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California Employment Law Notes

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Court Upholds Whistleblower Verdicts In Favor Of Fired Parking Ticket Hearing Examiners

Hawkins v. City of Los Angeles, 40 Cal. App. 5th 384 (2019)

Todd Hawkins and Hyung Kim were terminated from their jobs as hearing examiners at the Los Angeles Department of Transportation. Hawkins and Kim alleged they had been fired for whistleblowing on the City's practice of pressuring parking ticket hearing examiners to change decisions from "not liable" to "liable," meaning that drivers who had challenged their tickets were not getting refunds to which hearing examiners had found they were entitled. The jury respectively awarded Hawkins $238,531 and Kim $188,631 in damages, and the trial court assessed a $20,000 penalty under the Private Attorneys General Act ("PAGA") and awarded plaintiffs $1,054,286.88 in attorney's fees. The Court of Appeal affirmed the judgment, holding that the City's proffered reasons for firing plaintiffs were pretextual because, among other things, the employees were not terminated for the alleged performance deficiencies until after they had complained. Further, there was "overwhelming evidence" that supervisors had instructed hearing officers to change decisions: "Liable. Liable. Liable. Everything had to be liable."

College Professor Was Retaliated Against For Complaining About Hostile Environment

Gupta v. Trustees of the Cal. State Univ., 40 Cal. App. 5th 510 (2019)

Rashmi Gupta was denied a promotion to associate professor and lifetime tenure at San Francisco State University and was terminated after she and several other women of color in the University's School of Social Work complained about alleged "abuse of power and authority, excessive micromanagement, bullying, and the creation of a hostile environment." Gupta sued the University for discrimination and retaliation, and the jury awarded her $378,421 on the retaliation claim but found no liability on the discrimination claim. The trial court awarded Gupta an additional $587,161 in attorney's fees and costs, but denied her request for immediate reinstatement based upon there being no available position for her at the University. The Court of Appeal affirmed the judgment, holding that Gupta was not required to show she was "clearly superior" to a "comparator professor" who was granted tenure (but who had not complained). *See also Godecke ex rel. United States v. Kinetic Concepts*, 937 F.3d 1201 (9th Cir. 2019) (billing company employee sufficiently alleged a fraudulent scheme to submit false claims to Medicare in violation of the federal False Claims Act).

Discriminatory Failure-To-Hire Claim Must Be Brought Under The FEHA

*Williams v. Sacramento River Cats Baseball Club, LL*C, 40 Cal. App. 5th 280 (2019)

Wilfert Williams sued the Sacramento River Cats Baseball Club under a common law tort action for allegedly failing to hire him as an assistant visitor clubhouse manager because of his race. The trial court sustained the employer's demurrer to the complaint on the ground that California law does not recognize a common law cause of action for failure to hire in violation of public policy. The Court of Appeal affirmed dismissal of the claim on the ground that only an employee (as distinguished from an applicant) may bring a common law claim for discrimination against an employer. The Court noted, however, "plaintiff is not without recourse" because Williams could have sued under the California Fair Employment and Housing Act ("FEHA"). *Cf. Rojas v. Federal Aviation Admin.*, 2019 WL 5382055 (9th Cir. 2019) (rejected air traffic control applicant is entitled to some information regarding application process under the Freedom of Information Act).

Employee Failed To Present Sufficient Evidence At Trial To Support Retaliation Claim

Nejadian v. County of Los Angeles, 40 Cal. App. 5th 703 (2019)

Patrick Nejadian sued his former employer, the County of Los Angeles, for age discrimination and retaliation and was awarded $300,000 on the retaliation claims (arising under the FEHA and the Labor Code); the jury found no liability on the age discrimination claim. The Court of Appeal reversed the judgment on the ground that Nejadian had failed to present sufficient evidence to support his claims. The Court held that under Cal. Lab. Code § 1102.5(c), an employee is required to show that the activity in question *actually would* result in a violation or noncompliance with a statute, rule, or regulation, which is "a quintessentially legal question" for the trial court. Once it is determined by the court that the activity would result in a violation or noncompliance with a statute, rule, or regulation, the jury must then determine whether the plaintiff refused to participate in that activity and, if so, whether that refusal was a contributing factor in the defendant's decision to impose an adverse employment action on the plaintiff. (The Court of Appeal acknowledged that the "Directions for Use" of CACI No. 4603 should include an explanation about this procedure.) In reviewing the evidence presented, the Court determined that "Nejadian mostly referred to the activities in generalities" and failed to present sufficient evidence to show that the activities in question would result in a violation of any specific state, federal, or local statute, rule, or regulation. Similarly, the alleged retaliation under the FEHA did not constitute protected activity because the conversation in which he told a coworker that he felt discriminated against based upon his age "was part of an informal discussion between coworkers, and [the coworker] did not report Nejadian's statement to management."

Employer May Have FEHA Liability If It Exercised Direction/Control Over Temp Worker

Jimenez v. U.S. Continental Mktg., Inc., 2019 WL 5257938 (Cal. Ct. App. 2019)

Elvia Velasco Jimenez asserted claims under the FEHA against her "contracting employer," a manufacturing company named U.S. Continental Marketing Inc. ("USCM") for which she performed services, and a "temporary-staffing agency" named Ameritemps. At trial, the jury agreed with USCM that it was not Jimenez's employer, and the trial court entered judgment in its favor. The Court of Appeal reversed the judgment in part, holding that Jimenez was entitled to a new trial on her discrimination and wrongful termination claims at which the jury should be instructed that USCM was Jimenez's employer. The Court held that "where a FEHA claimant presents substantial evidence of an employment relationship that is rebutted only by direction and control evidence outside the bounds of the contractual context (such as in a temporary-staffing situation where hiring, payment, benefits and time-tracking are handled by a temporary-staffing agency), the claimant has demonstrated an employment relationship for FEHA purposes."

McDonald's Corp Was Not The Joint Employer Of Its Franchisees' Employees

Salazar v. McDonald's Corp., 939 F.3d 1051 (9th Cir. 2019)

McDonald's Corporation ("McDonald's") was named as a defendant in a putative class action filed by the employees of the Haynes Family Limited Partnership, which operated eight McDonald's franchises in the Bay Area. The putative class members alleged they were denied overtime premiums, meal and rest breaks and other violations of the California Labor Code; they further alleged that McDonald's and its franchises were their joint employers for purposes of wage and hour liability. The district court granted summary judgment in favor of McDonald's, and the Ninth Circuit affirmed, holding that any control McDonald's asserted over its franchisees' workers was geared toward quality control and not over the "day-to-day aspects" of the work at the franchises. Similarly, the Court held that McDonald's did not "suffer or permit" the franchisees' employees to work for it nor were those workers employed by McDonald's under a common law theory of employment. *See also Henderson v. Equilon Enter., LLC*, 2019 WL 4942458 (Cal. Ct. App. 2019) (same).

Statute Of Limitations Runs From The Date Of Each Allegedly Discriminatory Payment

Carroll v. City & County of San Francisco, 2019 WL 5617019 (Cal. Ct. App. 2019)

Joyce Carroll retired from her job working for the City of San Francisco in 2000 due to rheumatoid arthritis; since that time, Carroll received monthly disability retirement benefit payments. Plaintiff alleged that she became aware in 2017 (17 years after she had retired) that the City provided employees such as herself who were over the age of 40 when they were hired "reduced retirement benefits" by using a standard policy that has a disparate impact on older employees. Carroll filed her complaint with the Department of Fair Employment and Housing ("DFEH") in 2017. In response to the putative class action lawsuit Carroll filed, the City filed a demurrer, claiming Carroll had failed to timely file an administrative charge with the DFEH. The trial court sustained the demurrer with leave to amend to allow the substitution of a new named representative to properly represent the putative class. In this opinion, the Court of Appeal reversed the trial court and determined that allegedly discriminatory payments made within the limitations period (i.e., in and after 2016) are actionable wrongs under the FEHA.

Live-In Nanny Is Entitled To Unpaid Wages, But Less Than $403,000

Liday v. Sim, 40 Cal. App. 5th 359 (2019)

Lea Liday sued her former employers for unpaid wages incurred from April 2010 until April 2014. Liday worked as the family's live-in caretaker for their children and was paid a fixed salary of $3,000 per month. The trial court determined that Liday was a "personal attendant" under Wage Order No. 15 and that her salary did not compensate her at the statutory minimum wage for all the hours she had worked. (Before 2014, live-in domestic workers classified as "personal attendants" were exempt from California overtime requirements but were still entitled to be paid at least the minimum wage for all hours worked; since 2014, personal attendants are also entitled to overtime pay for all hours worked in excess of nine hours per day/45 hours per week.) In order to calculate the regular rate Liday was paid, the trial court divided Liday's average weekly salary by 45 hours ($15.38) and concluded she was owed minimum wages at that rate for the hours she worked in excess of 45. The employers, on the other hand, argued that the trial court should have divided Liday's salary by the $8 per hour statutory minimum wage to determine how many hours Liday's salary had covered and then ordered the employers to pay Liday for any uncompensated hours at the rate of $8 per hour, resulting in a reduction of the amount owed from $265,720 to $74,000. The trial court awarded Liday $403,256, including prejudgment interest. The Court of Appeal agreed with the employers and determined that Liday is entitled to an award of only $74,080 in combined restitution and unpaid wages for the relevant period.

Expense Reimbursement Claims Are Covered By Employment Practices Insurance

Southern Cal. Pizza Co. v. Certain Underwriters at Lloyd's, London, 40 Cal. App. 5th 140 (2019)

Lloyds of London provided the employer in this case with an employment practices liability insurance ("EPLI") policy, which contained an exclusion relating to "wage and hour or overtime law(s)." In this insurance coverage dispute, the employer alleged the policy exclusion is narrower in scope than Lloyd's contended. The trial court sustained the insurer's demurrer to the complaint, but the Court of Appeal reversed, holding that "we conclude many of the disputed underlying lawsuit claims are potentially subject to coverage." Specifically, the Court held that claims in the underlying lawsuit involving failure to reimburse delivery drivers for mileage expenses (Cal. Lab. Code §§ 2800 and 2802) fall outside the EPLI policy's wage-and-hour exclusion, as do the derivative claims for violation of Cal. Bus. & Prof. Code § 17200 and the PAGA.

Employer Must Have Written Meal Period Agreement, Which Includes A Revocation Clause

Naranjo v. Spectrum Sec. Servs., Inc., 40 Cal. App. 5th 444 (2019)

Spectrum contracts with federal agencies to take temporary custody of federal prisoners and ICE detainees who must travel offsite for medical treatment and other appointments; Spectrum's officers provide continuous supervision until the individuals are returned to their custodial locations. Spectrum had a policy that required on-duty meal periods for which officers were paid at their regular rate, but it did not have a written agreement with its employees that included an advisement that employees could revoke, in writing, the on-duty meal break policy agreement at any time. The Court of Appeal held that the employees were entitled to premium wages since the employer did not have a written agreement that included an on-duty meal period revocation clause; unpaid premium wages for meal break violations accrue prejudgment interest at the rate of seven percent; unpaid premium wages for meal break violations do not entitle employees to additional remedies for inaccurate wage statements if the statements include the wages earned for on-duty meal breaks but not the unpaid premium wages; absent a violation of Cal. Lab. Code § 226 (wage statements), attorney's fees under Section 226(e) may not be awarded; and the trial court erred in denying class certification of a rest break class. *See also Ferra v. Loews Hollywood Hotel, LLC*, 2019 WL 5061494 (Cal. Ct. App. 2019) (meal and rest premiums are to be paid at employees' hourly base rate of compensation; employer's neutral rounding policy did not systematically undercompensate employees).

Employer's "Service Charge" May Be A Gratuity Owed To Employees

O'Grady v. Merchant Exchange Prods., Inc., 2019 WL 5617001 (Cal. Ct. App. 2019)

In this putative class action, banquet server and bartender Lauren O'Grady alleged that her employer's practice of automatically imposing a 21 percent "service charge" to every food and beverage banquet bill constituted a gratuity that had to be fully paid to nonmanagerial service staff employees pursuant to Cal. Lab. Code § 351. The trial court sustained the employer's demurrer to the complaint on the ground that a service charge can never be a gratuity. The Court of Appeal reversed, observing that the terms "tip," "gratuity," and "service charge" are not "interchangeable synonyms" and that "service charge" is a "protean term of no fixed meaning." Accordingly, the Court held that plaintiffs might be correct that the custom in the hospitality industry is to treat sums designated as "service charges" as gratuities for employees within the mean of Section 351.

Determination Of Class Certification Motion Should Be Based On *Dynamex's* "ABC Test"

Gonzales v. San Gabriel Transit, Inc., 2019 WL 4942213 (Cal. Ct. App. 2019)

Francisco Gonzales filed this putative class action against his former employer, San Gabriel Transit ("SGT"), alleging that he and 550 other drivers were misclassified as independent contractors rather than employees. The trial court denied class certification on the ground that Gonzales had failed to demonstrate the requisite community of interest or typicality among SGT drivers. While Gonzales' appeal was pending, the California Supreme Court decided *Dynamex Ops. W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) in which it adopted the "ABC Test" for determining employee/independent contractor status. In this opinion, the Court of Appeal reversed the denial of the class certification motion and ordered the trial court to apply the ABC Test to those claims involving enforcement of wage order requirements and the test from *S.G. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341 (1989) to those claims not involving enforcement of wage order requirements. *Cf. Modaraei v. Action Prop. Mgmt., Inc.*, 40 Cal. App. 5th 632 (2019) (trial court properly denied class certification based upon commonality and class superiority criteria); *Supershuttle Int'l, Inc. v. Labor & Workforce Dev. Agency*, 2019 WL 4926864 (Cal. Ct. App. 2019) (employer's declaratory relief action filed against the Labor Commissioner is not subject to dismissal under the anti-SLAPP statute).

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