Proskauer

California Employment Law Notes

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Time Spent By Employees In Exit Searches Is Compensable

Frlekin v. Apple Inc., 2020 WL 727813 (Cal. S. Ct. 2020)

In this opinion, the California Supreme Court answered a question certified to it by the United States Court of Appeals for the Ninth Circuit: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of Wage Order 7?" The California Supreme Court answered the question "Yes." Putative class member employees estimated the searches took between five and 20 minutes regularly, and up to 45 minutes when stores were busy. The Supreme Court determined that time spent during bag or security checks was time that was subject to the employer's control because: (1) Apple made employees find and flag down a security guard to conduct the search and confined employees to the premises during the search; and (2) although the bag search was not "required" because employees could choose not to bring a bag, the search was required as a practical matter because employees routinely bring personal belongings to work, including (of course) their iPhones. The Court referenced Apple's CEO Tim Cook who, in other circumstances, called the iPhone "so integrated and integral to our lives." The Court also noted that Apple's employees were subject to discipline if they did not comply with the bag-checking requirement and, therefore, the waiting time is compensable.

Prior Pay Is Not A Defense To An Equal Pay Act Claim

Rizo v. Yovino, 2020 WL 946053 (9th Cir. 2020) (*en banc*)

Aileen Rizo, a female math teacher, brought a claim under the Equal Pay Act ("EPA") against the Fresno County Superintendent of Schools for paying her substantially less than her male counterparts. The school district did not dispute that she was paid less and asserted that it determined her salary based on her past salary. Thus, the school district argued its actions fell under one of the EPA's affirmative defenses – that the pay disparity was due to "any other factor other than sex." After remand from the United States Supreme Court involving the judicial composition of the panel from the Ninth Circuit that had previously decided the appeal (one of the judges had died in the interim), the Ninth Circuit determined (once again) that the affirmative defense of "any other factor other than sex" was limited to job-related factors only. The Court held that an employee's prior pay is not job-related, and not a factor other than sex for EPA purposes. It held that because prior pay may carry with it the effects of sex-based pay discrimination, an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay determination.

Constructive Termination And Joint Employer Claims Were Properly Dismissed

St. Myers v. Dignity Health, 44 Cal. App. 5th 301 (2019)

Carla St. Myers worked as a nurse practitioner at a rural clinic that was part of a medical center owned and operated by Dignity Health. During her three years of employment, St. Myers submitted over 50 complaints about working conditions at the facility and also was the subject of several investigations based upon anonymous complaints. Although the investigations concluded that the complaints against St. Myers were unsubstantiated, she found another job and resigned but then alleged in a lawsuit that her resignation was a constructive termination of her employment due to "intolerable working conditions." St. Myers sued both Dignity Health and Optum360 Services (which provided revenue cycle services to Dignity Health). Dignity Health successfully moved for summary judgment in response to St. Myers's claims on the ground that St. Myers could not establish an adverse employment action because she was never subject to a disciplinary write-up, suspended, demoted or terminated. Optum360 Services successfully moved for summary judgment on the ground that it was not a joint employer of St. Myers because it did not pay her salary or benefits, it did not own the equipment St. Myers used to perform her duties at the clinic and it did not have the authority to hire, transfer, demote, discipline or discharge St. Myers. The Court of Appeal affirmed summary judgment in favor of each defendant.

Gay CHP Officer May Have Been Constructively Terminated

Brome v. California Highway Patrol, 44 Cal. App. 5th 786 (2020)

Jay Brome sued the California Highway Patrol ("CHP") after resigning as a law enforcement officer, claiming he had been subjected to harassment and discrimination because of his sexual orientation in violation of the California Fair Employment and Housing Act. Brome provided evidence that his fellow officers engaged in "locker room talk" and used words like "gay" or "fag" and would use the word "gay" with a negative connotation as in, "I hated that movie – it was so gay." Brome also offered evidence that he was frequently refused backup assistance during enforcement stops, which led him to fear for his life. Brome began to suffer from anxiety and stress on the job and became suicidal before beginning a medical leave of absence and filing a workers' compensation claim based upon work-related stress. After his workers' compensation claim was resolved in his favor, Brome took industrial disability retirement and ended his employment with the CHP. The trial court granted summary judgment against Brome, but the Court of Appeal reversed, holding that the filing of his workers' compensation claim could equitably toll the one-year deadline for filing his discrimination claim with the Department of Fair Employment and Housing to the extent the workers' compensation claim put the CHP on notice of the potential discrimination claim. Further, the Court held that "[v]iewed as a whole, the record could support a conclusion that Brome's working conditions became objectively intolerable over time and would have forced a reasonable employee to resign."

Security Guard Did Not Sexually Harass Court Personnel

Schmidt v. Superior Court, 44 Cal. App. 5th 570 (2020)

Tamika Schmidt and Danielle Penny, two employees at the Hall of Justice for Ventura Superior Court, claimed they were sexually harassed by a security guard named David Jacques. Schmidt and Penny claimed that Jacques had sexually harassed them with a metal detecting wand during the courthouse entry screening process. All security screening occurred in public and was captured on video. The trial court determined that none of the video supported the allegations. After a lengthy bench trial, the trial court ruled that plaintiffs had not proved their allegations. In this appeal, the employees claimed the trial court erroneously failed to credit testimony favorable to them and that the judge was biased against them. The Court of Appeal affirmed the judgment in favor of the Superior Court, holding that the judgment was supported by substantial evidence and that there was no hostile environment sexual harassment at the courthouse. Finally, plaintiffs did not protest the trial judge's alleged bias against them until they received the adverse results at the end of the trial.

Employer Was Not Liable For The Death Of A Pedestrian Caused By Employee

Bingener v. City of Los Angeles, 44 Cal. App. 5th 134 (2019)

Kim Rushton, an employee of the City of Los Angeles, struck and killed a pedestrian (Ralph Bingener) while Rushton was driving to work at the Hyperion Treatment Plant. Bingener's survivors sued the city on the theory that Rushton was a danger to others based upon a risk arising from or relating to work (Rushton had a job-related back injury for which he was taking medication that allegedly rendered him unfit to drive). Plaintiffs contended that the city was obligated to review Rushton's workers' compensation file and reach a decision whether he could safely drive a vehicle. The trial court disagreed and granted summary judgment to the city based upon the "going and coming" rule; the Court of Appeal affirmed, holding that "the undisputed fact [is] that it was a physician, and not the city, who approved Rushton to return to work and did so without limitation on his driving." *Cf. Alaniz v. Sun Pac. Shippers, L.P.*, 2020 WL 562381 (Cal. Ct. App. 2020) (hirer of independent contractor was not liable for injuries to contractor's employee absent evidence of hirer's negligent exercise of retained control over safety conditions).

Agreement Not To Compete With Employer While Still Employed Is Enforceable

Techno Lite, Inc. v. Emcod, LLC, 44 Cal. App. 5th 462 (2020)

Techno Lite employees Scott Drucker and Arik Nirenberg entered into an agreement with Techno Lite not to compete with Techno Lite while they were still employed with that company. Later, Techno Lite sued Drucker and Nirenberg for "siphoning off accounts of Techno Lite's and diverting the business of [Techno Lite] to their own company, Emcod" and alleged causes of action against the employees for breach of fiduciary duty, interference with contractual relationships, intentional and negligent interference with economic advantage, conversion, fraud and unfair competition. The trial court found in favor of Techno Lite on the interference, fraud and unfair competition claims. The Court of Appeal affirmed, holding that a promise not to compete with an employer while employed is not void under Cal. Bus. & Prof. Code § 16600 (California's anti-noncompete statute) and, therefore, the employees were properly found liable for fraud based upon a false promise.

Louisiana Wage Law Applies To Non-California Residents Working On Vessel Off The Coast Of California

Gulf Offshore Logistics, LLC v. Superior Court, 2020 WL 772610 (Cal. Ct. App. 2020)

Non-California resident crew members of the "Adele Elise" (a vessel that provides services to oil platforms located off the coast of California) filed this putative class action alleging multiple violations of California wage and hour law. The owner/operators of the vessel (all of whom are based in Louisiana) petitioned the Court of Appeal to issue a writ of mandate directing the superior court to vacate its order denying their motion for summary judgment. The owner/operators contended that Louisiana law applied to the claims, while the crew members claimed California law governed. The Court of Appeal agreed with the owner/operators and held that Louisiana law applies because the crew members are not residents of California and they perform work both within and outside the boundaries of California on a "boat at sea": "The employment relationships here were formed in Louisiana, between Louisiana-based employers and non-resident employees who traveled to that state to apply for, and accept employment."

Summary Judgment Properly Entered In Favor of DOL in FLSA Case

Scalia v. Employer Solutions Staffing Group, 2020 WL 992564 (9th Cir. 2020)

Employer Solutions Staffing Group ("ESSG") contracts with other companies to recruit employees and place them at jobsites for which ESSG provides administrative tasks such as payroll processing. ESSG conceded that it qualifies as an "employer" of the recruited employees under the Fair Labor Standards Act ("FLSA"). One of ESSG's employees (Michaela Haluptzok) was responsible for processing payroll for a company whose employee called Haluptzok and told her without explaining why to pay all overtime hours as "regular hours." Haluptzok complied even though in order to follow the employee's instructions, Haluptzok had to ignore numerous error messages in ESSG's software concerning the applicability of overtime payments. By the time ESSG's relationship ended with the employer in question, more than 1,000 violations had occurred in which employees did not receive their earned overtime pay.

The Secretary of Labor sued ESSG and others over the FLSA violations, and the district court granted the Secretary's motion for summary judgment, holding that ESSG had willfully violated the FLSA and awarded the Secretary $78,500 in unpaid overtime plus an equal amount in liquidated damages for the willful violation. The Ninth Circuit affirmed the judgment, holding that an employer may be liable even for the actions of a low-level employee such as Haluptzok. The Court also held that the violation was willful and, therefore, a three-year statute of limitations applied – as did an award of liquidated damages. Finally, the Court found there to be no right to indemnification or contribution from the other employers involved in the case.

Employee Can Sue Employer That Was Not Released In Prior Class Action

Grande v. Eisenhower Med. Ctr., 44 Cal. App. 5th 1147 (2020)

Lynn Grande was assigned through a temporary staffing agency (FlexCare) to work as a nurse at Eisenhower Medical Center. Grande was a named plaintiff in a class action prosecuted against FlexCare in which she alleged she had not received her required meal and rest breaks, wages for certain periods she had worked and overtime wages. A year after FlexCare settled with the class (including Grande), Grande brought a second class action alleging the same violations against Eisenhower, which was not a party to the original class action. The trial court held a trial limited to the questions of whether Eisenhower was a released party as a result of the settlement agreement and/or whether Eisenhower and FlexCare were in privity such that Grande's claims against Eisenhower were barred by the prior action against FlexCare. The trial court ruled in Grande's favor, and the Court of Appeal affirmed, holding that because the release did not include words such as "clients, joint employers, joint obligors" of FlexCare or reference to "any client of FlexCare as to whom any class member may have provided services through FlexCare," Eisenhower was not among the "Released Parties." The Court further held that FlexCare and Eisenhower were not in privity with one another because joint employers are generally not liable for each other's Labor Code violations (following *Serrano v. Aerotek, Inc.*, 21 Cal. App. 5th 773 (2018) from the Fourth Appellate District and refusing to follow *Castillo v. Glenair, Inc.*, 23 Cal. App. 5th 262 (2018) from the Second Appellate District). (Note that the second holding drew a dissent from Presiding Justice Ramirez.)

Agreement To Divide $4.3 Million in Attorneys' Fees Was Unenforceable Absent Disclosure About Insurance

Hance v. Super Store Indus., 44 Cal. App. 5th 676 (2020)

The attorneys who represented the employees in a class action filed a motion with the trial court for approval of a settlement of the action and also for an award of attorneys' fees and a division of those fees among the lawyers in accordance with a fee division agreement that had been worked out among the lawyers. One of the lawyers challenged the fee division agreement on multiple grounds, including that one of the lawyers who was seeking enforcement of the agreement had failed to advise the clients that he lacked professional liability insurance as he was required to do by the California Rules of Professional Conduct. The trial court enforced the agreement, but the Court of Appeal reversed, holding that "[t]o allow [the attorney] to recover his agreed upon percentage of the attorney fee award, despite noncompliance with the requirements of the [insurance disclosure] rule, would effectively condone that violation, contrary to the purpose behind the rules." The Court remanded the case to the trial court to determine what amount of fees the attorney should recover on a quantum meruit (*i.e.*, equitable value) basis.

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