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California Employment Law Notes

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Court Reverses $13 Million Gender Discrimination Verdict Entered Against UCLA

Pinter-Brown v. The Regents of the Univ. of Cal., 2020 WL 1950808 (Cal. Ct. App. 2020)

The California Court of Appeal reversed a $13 million judgment that was entered against UCLA in favor of one of its former professors of medicine, Dr. Lauren Pinter-Brown, who sued for alleged gender discrimination and age discrimination and harassment (the jury returned a verdict in UCLA's favor on the age claims). The appellate court determined that the trial judge committed a "series of grave errors" that were "cumulative and highly prejudicial" to UCLA and that evidenced "the trial court's inability to remain impartial."

Among other things, the trial judge told the prospective jurors assembled in his courtroom that "the arc of the moral universe is long," quoting Dr. Martin Luther King, and that "if you are selected as a juror, your job will be to help bend that arc toward justice." The judge then proceeded to give what can only be described as a multimedia civics lesson about invidious discrimination through the years in which he showed the jurors a video and made solemn reference to civil rights leaders who had marched from Selma to Montgomery, Alabama in the 1960s as well as Rosa Parks, Cesar Chavez, Harvey Milk, Atticus Finch, the internment of Japanese Americans during World War II, the passage of the 19th Amendment giving women the right to vote and the advent of gay marriage. As the judge concluded his remarks, he exhorted the prospective jurors: "[Y]ou as jurors in this case are going to become Dr. King. It's going to be your job to help bend that arc toward justice by rendering a verdict based on the law and the evidence that you are going to be hearing in this case."

Not surprisingly, counsel for UCLA immediately moved for a mistrial based upon the judge's remarks and requested that a new panel of jurors be assembled. The judge denied the motion, assuring UCLA that he gives the same presentation before all trials in his courtroom. After almost three weeks of trial, the jury rendered a verdict of more than $13 million in favor of Dr. Pinter-Brown on the disability discrimination claim, consisting of approximately $3 million in past and future lost wages and $10 million in past and future emotional distress damages. The appellate court reversed the judgment based not only on the trial judge's prejudicial remarks at the outset of the trial (which the court characterized as a "stirring call to action which stacked the deck against UCLA") but also because he allowed inappropriate and inapplicable "Me-Too" evidence into the case, which is "never appropriate to prove the employer's propensity to discriminate." The Court further held that the trial court committed "inexplicable error" when it allowed the plaintiff to "resurrect" a retaliation claim in the middle of the trial after having summarily adjudicated it against the plaintiff before the trial began.

Court Affirms $2.9 Million Verdict Against Employer That Failed To Obtain Green Card For Employee

Reynaud v. Technicolor Creative Servs. USA, Inc., 46 Cal. App. 5th 1007 (2020)

Plaintiffs Michael and Fiona Reynaud (both British citizens) sued Michael's former employer, Technicolor, for negligence based upon its failure to timely obtain a green card for Michael, which would have permitted him to remain in the United States. Although Technicolor had agreed to sponsor Michael's green card, as a result of a number of delays on the part of Technicolor and its outside counsel, he did not obtain a green card before his temporary work visa expired. Consequently, the Reynauds and their children (including one who was born in the United States) were required to leave the country. Although Technicolor originally indicated that Michael could continue working for the company after he returned to the United Kingdom, it ultimately decided not to continue to employ him past the expiration of his temporary work visa. The Reynauds sued Technicolor for negligence, and a jury awarded them $804,000 in economic damages and $2.08 million in emotional distress damages. The Court of Appeal affirmed the judgment, holding that substantial evidence supported the verdict and that workers' compensation did not provide the exclusive remedy for the Reynauds' emotional distress damages because their injuries did not arise out of Michael's job-related duties or responsibilities. *See another post-verdict decision: Colucci v. T-Mobile USA, Inc*., 2020 WL 2059849 (Cal. Ct. App. 2020) (court reduces punitive damages award to 1.5 times the amount of compensatory damages in case involving alleged retaliation in violation of the Fair Employment and Housing Act).

After-Acquired Evidence Was Properly Used To Defeat ADA Claim

***Anthony v. TRAX Int'l Corp*., 955 F.3d 1123 (9th Cir. 2020)**

After Sunny Anthony filed suit, alleging she was terminated because of her disability, the employer (TRAX) learned that contrary to her representation on her employment application, she lacked the bachelor's degree that was required of all technical writers under the employer's government contract. The district court granted summary judgment in favor of TRAX in light of the after-acquired evidence that Anthony lacked the required bachelor's degree, reasoning that she was not a "qualified individual" within the meaning of the Americans with Disabilities Act. The Ninth Circuit affirmed, rejecting the EEOC's argument that the court should disregard the agency's own regulation and interpretive guidance, which calls for a determination of whether the plaintiff "satisfies the prerequisites of the job," including possessing the requisite skill, experience, education and other job-related requirements of the position. The Ninth Circuit also held that TRAX was not required to engage in the interactive process because Anthony was not "otherwise qualified" for the position.

Court Orders Higher Prevailing-Plaintiff Attorneys' Fees In Disability Discrimination Case

Caldera v. California Dep't of Corrs. & Rehab., 2020 WL 2109751 (Cal. Ct. App. 2020)

Augustine Caldera is a correctional officer at a state prison who stutters when he speaks. Caldera alleged that the prison's employees, including a supervisor, "mocked and mimicked" his stutter at least a dozen times over a period of two years. Caldera sued the CDCR for disability harassment, failure to prevent harassment and related claims, and a jury awarded Caldera $500,000 in emotional distress damages. The trial court found the damage award to be excessive and granted the employer's motion for a new trial solely as to that issue. Both parties appealed, and the Court of Appeal in a previous opinion reversed the trial court's new trial order but otherwise affirmed the $500,000 judgment in Caldera's favor on the ground that the harassment was sufficiently severe or pervasive to support the judgment. In this proceeding, the Court of Appeal held that the trial court should have allowed Caldera to recover prevailing-party attorneys' fees based upon the fees charged by his San Francisco-based attorneys (who charge $750 per hour) rather than the $550 rate that is standard for San Bernardino-based attorneys because Caldera had been unable to find a local attorney to prosecute his case.

Court Should Not Have Dismissed Self-Represented Employee's Claims

Nuño v. California State Univ., 47 Cal. App. 5th 799 (2020)

Anthony Nuño, an assistant college professor, represented himself in this lawsuit against California State University, Bakersfield, in which he alleged harassment, retaliation and discrimination based upon his race and sexual orientation. The trial court sustained defendants' demurrer and granted plaintiff additional time to file an amended complaint. After plaintiff failed to timely file an amended complaint, defendant filed an ex parte application for dismissal with prejudice, which was heard and granted by the trial court while plaintiff was out of the country attending a conference. The Court of Appeal reversed the dismissal, holding that the trial judge and the defense-prepared minute order were ambiguous as to exactly when plaintiff was required to file an amended complaint and "lulled plaintiff into a false sense of security about the deadline for filing the [amended] complaint." *Cf. Wood v. Superior Court*, 46 Cal. App. 5th 562 (2020) (plaintiff who alleged gender identity discrimination claim under the Unruh Civil Rights Act had no attorney-client relationship with the California Department of Fair Employment and Housing).

Employer Did Not Violate FCRA By Providing Disclosure Along With Other Materials

Luna v. Hansen & Adkins Auto Transport, Inc., 2020 WL 1969409 (9th Cir. 2020)

Leonard Luna filed this putative class action, alleging a violation of the Fair Credit Reporting Act ("FCRA") because his former employer had provided him a FCRA disclosure statement simultaneously with other employment materials and had failed to provide a standalone FCRA authorization. The district court granted summary judgment to the employer, and the Ninth Circuit affirmed, holding that the FCRA disclosure need not be provided at a point in time that is "distinct" from the time when other employment-related documents are provided to an applicant. The Court also held that the disclosure was "clear and conspicuous," and observed that "applicants, such as big-rig truckers, can be expected to notice a standalone document featuring a bolded, underlined, capital-lettered heading." Finally, the Court held that the FCRA authorization (as opposed to the disclosure) need not be a standalone document. *See also Walker v. Fred Meyer, Inc.*, 953 F.3d 1082 (9th Cir. 2020) (employer violated FCRA by including extraneous information in disclosure document, but employee is not entitled to "discuss" the results of a consumer report with the employer before adverse action is taken).

Unlimited Vacation Policy Failed To Properly Compensate Employees

McPherson v. EF Intercultural Fndn., Inc., 47 Cal. App. 5th 243 (2020)

In this case of first impression, the California Court of Appeal affirmed the trial court's judgment (except for the amount of damages and attorneys' fees awarded) and held that the unlimited vacation policy at issue in this case was not as described and that the employer (EF Intercultural Foundation) owed the plaintiffs for certain accrued but unpaid vacation benefits. Importantly, however, the court did not determine that an unlimited vacation policy (if correctly applied) would necessarily violate California law: "We by no means hold that all unlimited paid time off policies give rise to an obligation to pay 'unused' vacation when an employee leaves."

The defendant, EF Intercultural Foundation, is a nonprofit that runs organizational and cultural exchange programs between the U.S. and other countries. Three former employees — area managers who ran seasonal homestay programs for international students and who worked from home and in the field — brought an action against EF Intercultural, claiming that they were entitled to accrued vacation pay upon separation under its ostensibly unlimited vacation policy. While EF Intercultural included a vacation policy in its handbook, which provided a specified number of vacation days for certain salaried positions, the vacation policy that applied to these particular plaintiffs was untracked and unwritten. The employees did not accrue vacation days and were only required to notify a supervisor before taking time off. EF Intercultural argued that this was an unlimited vacation policy that did not result in any accrual of benefits or require any payment upon termination.

The court distinguished EF Intercultural's policy from a truly unlimited vacation policy and essentially sidestepped the question of whether a properly administered unlimited vacation policy would require payout of anything upon termination: "We need not decide whether vacation wages are earned under an unlimited policy — whether 'uncapped time off' equate[s] to 'vested vacation' — as that is not the policy here." The appellate court held that although EF Intercultural characterized its policy as unlimited, its actual practice was to give plaintiffs a fixed amount of vacation time with an implied limit of two to four weeks, which was really no different from the amount of PTO provided to other corporate employees under the policy set forth in the handbook.

Even though the court limited its holding to EF Intercultural's specific vacation policy and practice, noting the "particular, unusual facts of this case," it provided helpful guidance for employers that already have implemented or are considering adopting an unlimited vacation policy. The court determined that such a policy may relieve an employer from having to pay out any accrued vacation benefits upon separation if, in writing, it:

1. clearly provides that employees' ability to take paid time off is not a form of additional wages for services performed, but perhaps part of the employer's promise to provide a flexible work schedule — including employees' ability to decide when and how much time to take off;
2. spells out the rights and obligations of both employee and employer and the consequences of failing to schedule time off;

3. in practice allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off; and
4. is administered fairly so that it neither becomes a de facto 'use it or lose it policy' nor results in inequities, such as where one employee works many hours, taking minimal time off, and another works fewer hours and takes more time off.

Another problem with EF Intercultural's policy was its informal nature — it was not described in writing and was instead communicated informally by way of "side conversations" between employees and their supervisors. If an employer is going to maintain an enforceable unlimited vacation policy, it must be memorialized in writing and should fully describe the benefits to the affected employees as well as the potential that they will leave money on the table by working more hours for the same pay than those who scheduled more PTO.

Racial Discrimination/Sexual Harassment Case Was Properly Dismissed On Summary Judgment

Ducksworth v. Tri-Modal Distrib. Servs., 47 Cal. App. 5th 532 (2020)

Bonnie Ducksworth and Pamela Pollock are customer service representatives at Tri-Modal Distribution Services who alleged a failure to promote based upon racial discrimination by two staffing agencies used by Tri-Modal; Pollock also alleged sexual harassment. The trial court granted the staffing agencies' motion for summary judgment based upon the undisputed material fact that the agencies "did not provide any input, have any authority or make any decision regarding the promotion of any employees leased to Tri-Modal." The trial court also granted summary adjudication on the sexual harassment claim based on the statute of limitations, which commences running in a failure-to-promote case when the plaintiff is told she has been denied the promotion, not when the promoted employee assumes the position. The Court of Appeal affirmed.

Threat To Terminate Employee May Constitute Extortion

Galeotti v. International Union of Operating Eng'rs Local No. 3, 2020 WL 2188995 (Cal. Ct. App. 2020)

John Galeotti, a former business agent for the union, alleged he was wrongfully terminated for refusing to contribute money toward the campaigns of various union officials who had run for election to union positions. Galeotti alleged his employment was terminated after he failed to contribute $1,000 to the union officials' campaign; among other things, he alleged extortion under Penal Code §§ 484 and 518. The trial court sustained the employer's demurrer and dismissed the claims, but the Court of Appeal reversed, holding that Galeotti properly alleged a "threat" to "injure his property" (*i.e.,* the termination of his employment) within the meaning of the extortion statute.

Lyft Was Not Liable For Accident Involving One Of Its Drivers

Marez v. Lyft, Inc., 2020 WL 2108643 (Cal. Ct. App. 2020)

While driving a car rented through Lyft's "Express Drive Program," Jonathan Guarano struck the plaintiffs and caused significant injuries. Plaintiffs sued Lyft under the doctrine of respondeat superior, but the trial court granted summary judgment to Lyft on the ground that at the time of the accident, Guarano was not acting within the course and scope of his employment. The Court of Appeal affirmed summary judgment for Lyft, holding that at the time of the accident, Guarano was returning home from working at a gaming conference in San Francisco, which was not within the course and scope of his employment for Lyft. *See also Alaniz v. Sun Pac. Shippers, L.P.*, 2020 WL 2029279 (Cal. Ct. App. 2020) (trial court erred by failing to instruct jury about the *Privette/Hooker* doctrine relating to a landowner's responsibility to employees of an independent contractor, despite defendants' failure to request same).

Employees Who Were Required To Call-In Prior To Shift Were Entitled To Reporting-Time Pay

Herrera v. Zumiez, Inc., 953 F.3d 1063 (9th Cir. 2020)

Alexa Herrera filed this putative class action against her employer, alleging that Zumiez failed to provide reporting-time pay to employees at its California retail stores for their "Call-In" shifts. Employees scheduled for a Call-In shift were required to make themselves available to work during the shift and then call their manager 30 to 60 minutes before the shift or, if they worked a shift immediately before the Call-In shift, contact their manager at the end of that shift. At the time of the contact, the manager would then tell the employee whether s/he was required to work during the Call-In shift. If the employee was not required to work, Zumiez would not pay the employee. The employer filed a motion for judgment on the pleadings, which the district court denied.

In this appeal, the Ninth Circuit affirmed the denial of the employer's motion based upon the California Court of Appeal's recent ruling in *Ward v. Tilly's, Inc.*, 31 Cal. App. 5th 1167 (2019), holding that an employee need not physically report to work in order to be eligible for reporting-time pay. The Ninth Circuit also affirmed denial of the employer's motion to dismiss the claim for "hours worked" associated with the time spent by employees (five to 15 minutes) calling in three to four times each week. The Court reversed the denial of the employer's motion to dismiss the claim for indemnification for the telephone expenses incurred in calling in, but ordered that the plaintiff be allowed to amend the complaint to include more specific allegations about that. *Cf. Cardinal Care Mgmt., LLC v. Afable*, 2020 WL 1909143 (Cal. Ct. App. 2020) (trial court provided an adequate hearing on residential care facility's financial ability to post an undertaking before it filed a de novo appeal from a $2.5 million award to employees, and also properly awarded attorneys' fees to prevailing-party employees).

Court Properly Dismissed Employer's Civil Rights Claim Against Employee

Patel v. Chavez, 2020 WL 2109599 (Cal. Ct. App. 2020)

Balubhai Patel and various entities sued Manuel Chavez, the former on-site property manager of the Stuart Hotel, which was owned and operated by Patel and the other plaintiffs. Plaintiffs alleged a federal civil rights violation (42 U.S.C. § 1983) against Chavez based upon his allegedly false testimony given during a labor commissioner hearing in which Chavez was awarded $235,000 in unpaid wages, penalties and interest against the plaintiffs; Patel, et al., also sued two Labor Commissioner officials and sought $10 million in damages. The trial court granted Chavez's anti-SLAPP motion and dismissed the complaint on the ground that it arose from the testimony Chavez gave before the Labor Commissioner and that such testimony was absolutely privileged pursuant to Cal. Civ. Code § 47(b) (the litigation privilege). The trial court also dismissed the claims against the two Labor Commissioner officials. The Court of Appeal affirmed the dismissal of the claims, holding that the anti-SLAPP procedure can be applied to a federal claim filed in state court.

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