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California Employment Law Notes

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Supreme Court Recognizes Discrimination Protection For Gay/Transgender Employees Under Title VII

Bostock v. Clayton County, 590 U.S. ___, 140 S. Ct. 1731 (2020)

The question for the United States Supreme Court in this (and two companion cases) was whether Title VII of the Civil Rights Act of 1964 is violated by an employer that terminates an employee merely for being gay or transgendered. In a 6-3 opinion written by President Trump's first appointee to the Court (Justice Neil Gorsuch), the Court determined that Title VII does prohibit such discrimination in that it is "because of… sex." The Court came to this conclusion over spirited dissenting opinions from Justices Thomas, Alito and Kavanaugh, who focused on Congress' intent in 1964, which everyone concedes did not include such protections. The majority noted, however, that "…the limits of the drafters' imagination supply no reason to ignore the law's demands." As a result of this opinion, all employers subject to Title VII (including those doing business in the states and municipalities that provided no protection against gay and transgender discrimination in the workplace) now must abide by the requirements of federal law with respect to such employees. Notwithstanding his dissent, Justice Kavanaugh noted that it was "appropriate to acknowledge the important victory achieved today by gay and lesbian Americans… [who] can take pride in today's result."

Dark Day For Hollywood – Law Prohibiting Online Publication Of Actors' Ages Is Struck Down

IMDb.com Inc. v. Becerra, 962 F.3d 1111 (9th Cir. 2020)

The Ninth Circuit has affirmed the district court's grant of summary judgment in favor of IMDb.com, a website that lists, among other things, the actual ages of actors and actresses. At issue was whether a 2016 California law (Assembly Bill 1687), which prohibits commercial online services from publishing actors' ages without their consent, is constitutional. The law was undoubtedly the best thing to happen to Hollywood since the invention of BOTOX. The statute required database sites like IMDb to remove an actor's age if requested, with the stated goal of preventing age discrimination in casting. In the lawsuit, IMDb argued successfully that the law violated the First Amendment by "chill[ing] free speech and undermin[ing] public access to factual information" without actually addressing age discrimination.

Airline Employees Whose Base of Work Is In California Must Receive Legally Compliant Wage Statements

Ward v. United Airlines, Inc., 2020 WL 3495310 (Cal. S. Ct. 2020)

Plaintiffs are pilots and flight attendants for United Airlines, which is based outside California. Although they reside in California, they perform most of their work in airspace outside of California's jurisdiction. The employees are not paid according to California wage law, but pursuant to the terms of a collective bargaining agreement entered into under federal labor law. The question posed in this case to the California Supreme Court by the Ninth Circuit is whether the airline must provide such employees with California-compliant wage statements pursuant to Cal. Lab. Code § 226(a). The California Supreme Court answered the Ninth Circuit's questions as follows: (1) The Railway Labor Act exemption in Wage Order No. 9 does not bar a wage statement claim brought under Section 226 by an employee who is covered by a collective bargaining agreement; and (2) Section 226 applies to wage statements provided by an employer if the employee's principal place of work is in California. This test is satisfied if the employee works a majority of the time in California or, for interstate transportation workers whose work is not primarily performed in any single state, if the worker has his or her base of work operations in California. *See also Oman v. Delta Air Lines, Inc.*, 2020 WL 3527091 (Cal. S. Ct. 2020) (same rules apply to timing of wage payments pursuant to Cal. Lab. Code § 204).

IATSE Signatory Was Employer Responsible For Payment Of Unpaid Wages

Mattei v. Corporate Mgmt. Solutions, Inc., 2020 WL 3970367 (Cal. Ct. App. 2020)

Alyosha Mattei and three other lighting technicians, all members of Local 728 of the IATSE trade union, worked on the production of a television commercial that was produced under the 2016 Commercial Production Agreement (CPA) – to which IATSE and the Association of Independent Commercial Producers, Inc. are signatories. MullenLowe hired Diktator US, LLC, to produce the commercial. Because Diktator is not a signatory to the CPA, it paid Corporate Management Solutions, Inc. (CMS), which is a signatory to the CPA, $2,000 to "borrow" CMS's signatory status so that Diktator would be able to hire IATSE crewmembers for the production. When MullenLowe failed to pay Diktator for the costs of production, Diktator failed to pay CMS, which in turn failed to timely pay the employees through a third-party payroll service. The trial court granted summary judgment in favor of CMS on the ground that it was not the employer within the meaning of IWC Wage Order No. 12-2001 (motion picture industry). The Court of Appeal reversed, holding that the CPA does not permit signatories like CMS who "lend" their signatory status to non-signatory production companies like Diktator to avoid responsibility for wage and hour violations suffered by IATSE member employees. According to the Court, "CMS appeared not to have this control [over the employees] because it chose to shut its eyes during productions, thus fostering the perception it was not an employer."

Religious Schools Were Permitted To Terminate Employment Of Teachers Despite Claims Of Discrimination

Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___, 2020 WL 3808420 (2020)

Agnes Morrissey-Berru and Kristen Biel worked as elementary school teachers at, respectively, Our Lady of Guadalupe School and St. James School. Following the termination of her employment, Morrissey-Berru sued her school for age discrimination under the ADEA; following the termination of her employment, Biel alleged her school had discriminated against her because she had requested a leave of absence to obtain breast cancer treatment. The district court dismissed each teacher's case based upon the "ministerial exception," which holds that the First Amendment bars a court from entertaining an employment discrimination claim brought by certain employees of a religious entity against the institution, but the Ninth Circuit reversed. In this 7-2 opinion, the Supreme Court reversed the Ninth Circuit: "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. ___, 2020 WL 3808424 (2020) (federal government had the authority under the Affordable Care Act to promulgate religious and moral exemptions from mandatory contraceptive coverage by employers with sincerely held religious objections).

Summary Judgment Was Properly Granted In Favor Of Hospital In Meal/Rest Break Case

David v. Queen of the Valley Med. Ctr., 2020 WL 3529683 (Cal. Ct. App. 2020)

Registered nurse Joana David sued her former employer, Queen of the Valley Medical Center, for allegedly failing to pay her for meal breaks and rest periods and for failure to pay minimum wage. David also alleged she was not paid for all wages that were owed because of the hospital's time-rounding policy. The trial court granted summary judgment in favor of the hospital, and the Court of Appeal affirmed. Summary judgment was properly granted as to the meal and rest break claims because there was no evidence that the hospital had actual or constructive knowledge that David's meal and rest breaks were being interrupted with work-related discussions: A supervisor's "walking into the break room and looking at the clock, without more," did not constitute "a direction to prematurely terminate a break." Further, an "instruction to avoid overtime, without more, cannot reasonably be understood as an affirmative direction to perform work off-the-clock" (quoting the trial court's order). Finally, the trial court properly held that the hospital's rounding policy was neutral insofar as it was established by the hospital's expert (and unrebutted by plaintiff's expert) that 47 percent of plaintiff's rounded time entries favored plaintiff or had no impact, and 53 percent favored the hospital. *See also Betancourt v. OS Restaurant Servs., LLC*, 49 Cal. App. 5th 240 (2020) (prevailing plaintiff who successfully sued for employer's failure to provide meal and rest breaks (but no wage payment violations) is not entitled to recover attorney's fees).

Class Action Was Improperly Removed To Federal Court Under CAFA

Adams v. West Marine Prods., Inc., 958 F.3d 1216 (9th Cir. 2020)

Adrianne Adams filed a putative wage and hour class action in state court, which her former employer (West Marine) removed to federal court under the federal Class Action Fairness Act "CAFA". Invoking the discretionary home state controversy exception to CAFA jurisdiction, the district court declined to exercise jurisdiction and ordered the case remanded to state court. On appeal, West Marine argued that the district court erred because Adams did not meet her burden of showing that greater than one-third of the putative class members were California citizens at the time of removal; West Marine also argued that the district court erred when it *sua sponte* invoked the discretionary home state exception to CAFA jurisdiction without giving West Marine the opportunity to brief or argue the issue. The Ninth Circuit affirmed the district court's order remanding the action to state court, holding that the district court was permitted to infer that more than one-third of the putative class members were California citizens because the last known addresses of over 90% of the putative class members are in California. The Court also rejected West Marine's argument that it was not afforded the opportunity to fully brief the issue before the district court. *See also Canela v. Costco Wholesale Corp.*, 2020 WL 3866577 (9th Cir. 2020) (suitable seating case brought under PAGA ordered remanded to state court because amount in controversy failed to meet $75,000 jurisdictional threshold and PAGA claims do not trigger CAFA jurisdiction).

Non-Severability Clause In Arbitration Agreement Invalidated Entire Agreement

Kec v. Superior Court, 2020 WL 3869721 (Cal. Ct. App. 2020)

Nichole Kec brought individual, class and Private Attorneys General Act (PAGA) claims against her employer, R.J. Reynolds Tobacco Co., et al. Kec had signed a predispute contractual waiver of class actions and any "other representative action," including a PAGA claim. The arbitration agreement further stated that it was "not modifiable nor severable" and that if the representative waiver is found to be invalid, "the Agreement becomes null and void as to the employee(s) who are parties to that particular dispute," which the court characterized as a "blow-up provision." The trial court granted the employer's motion to compel arbitration of Kec's individual claims except the PAGA claim. Kec petitioned the Court of Appeal to issue a writ of mandate overturning the trial court's order compelling arbitration of her individual claims. The Court of Appeal issued the writ, holding that the employer could not selectively enforce the arbitration agreement by asking the court to sever the unenforceable PAGA waiver. *See also Aixtron, Inc. v. Veeco Instruments Inc.*, 2020 WL 4013981 (Cal. Ct. App. 2020) (arbitrator did not have authority to issue pre-hearing discovery subpoenas under California Arbitration Act).

Service Technicians May Be Entitled To Compensation For Travel Time

Oliver v. Konica Minolta Bus. Solutions USA, Inc., 2020 WL 3446865 (Cal. Ct. App. 2020)

In this putative class action, plaintiffs Michael Oliver and Norris Cagonot sued their employer for compensation for the time they and other service technicians spent driving their own personal vehicles to the first customer site in the morning and from the last customer site in the evening. Service technicians did not report to an office for work, and they carried the employer's tools and parts with them in their vehicles. The trial court determined that plaintiffs' commute time was not compensable as hours worked. The Court of Appeal reversed, holding that there are triable issues of fact whether the technicians were subject to the employer's control during their commute time and also whether they were entitled to reimbursement for commute mileage. *See also Gutierrez v. Brand Energy Servs. of Cal., Inc.*, 2020 WL 3249043 (Cal. Ct. App. 2020) (Wage Order does not permit employer subject to a collective bargaining agreement not to pay at least minimum wage for compensable travel time).

Trial Court Should Have Scrutinized Declarations Submitted By Employer In Wage Hour Case

Barriga v. 99 Cents Only Stores LLC, 2020 WL 3481717 (Cal. Ct. App. 2020)

Sofia Wilton Barriga filed this lawsuit against her employer, 99 Cents Only, alleging that the "zero-tolerance" policy requiring its stores to lock their doors at closing time forced nonexempt employees such as herself and those similarly situated to wait for as long as 15 minutes for a manager with a key to let them out of the store. Plaintiff alleged that the zero-tolerance policy denies employees pay for the time they have to wait to be let out of the store, and it also denies some employees their full half-hour meal break. In opposition to plaintiff's motion to compel certification of two class actions, 99 Cents Only submitted 174 declarations from current and former nonexempt employees who declared that graveyard shift employees could leave the store immediately without waiting to be let out and that those employees who did have to wait were let out promptly and paid for the time they waited. Only 53 of the 174 declarants were members of the putative class. Plaintiff took the depositions of 12 of the declarants, and although most testified they understood what they were signing and did so freely and without coercion or promise of promotion or a pay raise, others testified they "had no idea what the lawsuit was about or even why they had been called upon to testify." Plaintiff moved to strike all 174 declarations on the ground that the process by which they were obtained was improper. The trial court concluded it lacked the "statutory authority" to strike the declarations and denied plaintiff's motion to strike and also the class certification motion.

The majority of the Court of Appeal panel reversed, holding that "California courts have recognized the trial court has both the duty and the authority to exercise control over precertification communications between the parties and putative class members to ensure fairness in class actions." The Court reversed the orders denying plaintiff's motion to strike the declarations and the class certification motion. In dissent, Justice Slough questioned why the Court had reversed the denial of the motion to strike the declarations, which plaintiff had *not challenged*, and further why the Court had not analyzed whether the denial of said motion prejudiced the outcome of the case: "This is a first. *Every* court that has found an abuse of discretion in an evidentiary ruling has gone on to determine whether the error was prejudicial to the trial court's certification decision" (emphasis in original).

Hirer Of Independent Contractor Was Not Liable For Death Of Latter's Employee

Horne v. Ahern Rentals, Inc., 50 Cal. App. 5th 192 (2020)

The surviving heirs of Ruben Dickerson sued Ahern Rentals, a company that leases forklifts and other heavy-duty construction vehicles to its customers. Dickerson's employer, 24-Hour Tire Service, provided tire repair and replacement services for Ahern's equipment. Dickerson was killed on Ahern's premises while he was replacing the tires on one of its forklifts. Dickerson's heirs received workers' compensation benefits from 24-Hour's workers' compensation insurer. In this case, the heirs sued Ahern for wrongful death based upon Ahern's alleged negligence in failing to provide a stable and level surface for the tire change that resulted in Dickerson's death. The trial court granted summary judgment to Ahern, and the Court of Appeal affirmed, holding that there is no evidence that Ahern affirmatively contributed to Dickerson's death because a "hirer like [Ahern] may be liable for injury to an employee of a contractor only if the hirer actively directs the contractor or contractor's employee to do the work in a particular way or fails to undertake a particular safety measure the hirer promised to do. There is no such evidence in this case." *Cf. Savaikie v. Kaiser Found. Hosps.*, 2020 WL 4013134 (Cal. Ct. App. 2020) (assisted living facility is not liable for death caused by volunteer who struck and killed a pedestrian while driving his vehicle home).

Class Action Claims Were Moot After Class Representative Settled His Individual Claims

Brady v. AutoZone Stores, 960 F.3d 1172 (9th Cir. 2020)

Michael Brady sued AutoZone Stores for alleged violations of Washington State's meal break laws. After several years of litigation, the district court denied Brady's motion for class certification; Brady then settled his individual claims with AutoZone. Although the settlement agreement stated that it was "not intended to settle or resolve Brady's Class Claims," it did not provide that Brady would be entitled to any financial reward if the unresolved class claims were ultimately successful. The Ninth Circuit dismissed as moot Brady's appeal from the district court's denial of class certification: "A class representative must … retain a financial stake in the outcome of the class claims. Absent such a stake, a class representative's voluntary settlement of individual claims renders class claims moot." *See also Williams v. U.S. Bancorp Investments, Inc.*, 50 Cal. App. 5th 111 (2020) (collateral estoppel doctrine does not bar an absent class member in a putative class that was initially certified, but later decertified, from subsequently pursuing an identical class action)

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