Proskauer

California Employment Law Notes

November 2020

Court Affirms $4.26 Million Jury Award For "Self-Published Defamation"

Tilkey v. Allstate Ins. Co., 2020 WL 6268474 (Cal. Ct. App. 2020)

Allstate terminated Michael Tilkey, a 30-year employee who sold life insurance, after Tilkey's arrest in Arizona following a domestic dispute with his girlfriend; he was arrested for "criminal damage deface, possession or use of drug paraphernalia and disorderly conduct, disruptive behavior." Domestic violence charges were attached to the criminal damage and disorderly conduct charges. Following an investigation, Allstate terminated Tilkey's employment for "engaging in threatening behavior and/or acts of physical harm or violence to any person, regardless of whether he/she is employed by Allstate." Tilkey sued Allstate for wrongful termination, violation of Cal. Lab. Code § 432.7 (which prohibits an employer from considering as a factor in employment decisions "any record of arrest… that did not result in a conviction") and compelled, self-published defamation.

The jury awarded Tilkey $2.7 million in compensatory and $16 million in punitive damages. The Court of Appeal reversed in part, holding that Allstate had not violated Section 432.7 because Tilkey had appeared before a court in Arizona and entered a guilty plea, which constituted a "conviction" within the meaning of the statute. The Court affirmed the jury's verdict on the defamation claim, holding that Tilkey was compelled to "self-publish" a statement about himself that was not substantially true after Allstate provided a written explanation for the termination on a Form U-5 to FINRA. Finally, the Court reduced the punitive damages award to $2.55 million (1.5 times the $1.7 million compensatory damages award for defamation). *See also Garcia-Brower v. Premier Auto. Imports of Cal., LLC*, 55 Cal. App. 5th 961 (2020) (employer may have violated Section 432.7 for terminating employee who did not disclose a dismissed conviction for misdemeanor grand theft).

Court Affirms Dismissal Of Trade Secrets Claim Brought Against Apple

Hooked Media Group, Inc. v. Apple Inc., 55 Cal. App. 5th 323 (2020)

Hooked Media, a startup company that Apple expressed interest in acquiring, sued Apple after Apple passed on the deal but three of Hooked's most important employees (including two engineers and the Chief Technical Officer) left to work for Apple. Hooked sued for fraud, misappropriation of trade secrets, interference with contract and related claims. The trial court granted summary judgment to Apple, and the Court of Appeal affirmed, holding that the fraud claim failed because the alleged misrepresentations by Apple all involved future events, not past or existing facts. As for the trade secrets claim, the Court held that evidence that the former employees may have had protected information in their possession is not sufficient to establish that Apple improperly acquired or used it. Further, just because there was evidence suggesting that the former engineers "drew on knowledge and skills they gained from Hooked to develop a product for [Apple]" does not mean there was a misappropriation of trade secrets, citing California's rejection of the "inevitable disclosure" doctrine. Nor did Apple's production of Hooked's trade secret information in response to discovery requests show that Apple acquired trade secrets by improper means. Finally, the Court held that "California's emphasis on employee mobility and freedom to compete counsels against a finding that the CTO's self-serving efforts to land a position with Apple were a breach of fiduciary duty." *See also Brown v. TGS Mgmt. Co.*, 2020 WL 6634990 (Cal. Ct. App. 2020) (arbitrator exceeded his power in issuing an award enforcing provisions of an employment agreement that illegally restricted a former employee's right to work in violation of Cal. Bus. & Prof. Code § 16600).

Employer Gets No Relief From $1.6 Million Default Judgment

Kramer v. Traditional Escrow, Inc., 56 Cal. App. 5th 13 (2020)

Michelle Kramer filed this wage and hour lawsuit against her employer and its alleged alter ego. A few months after defendants answered the initial complaint, their counsel withdrew, and defendants subsequently chose not to participate in the case. In violation of the California Rules of Court, defendants changed their mailing address without giving notice to plaintiff or the trial court. Despite the fact that the only specific sum of money identified in the initial complaint was an unpaid commission amount of $20,000, a default judgment was eventually entered against defendants in the amount of $1.6 million. The trial court set aside the default based upon "extrinsic fraud or mistake," but the Court of Appeal reversed, holding that defendants' lack of diligence precludes the application of equitable relief in the form of a set aside of the default judgment.

Google Employees' PAGA Claims Are Not Preempted By The NLRA

Doe v. Google, Inc., 54 Cal. App. 5th 948 (2020)

Google requires its employees to comply with various confidentiality policies, including policies that allegedly prevent employees from using or disclosing the "skills, knowledge, and experience" they obtained at Google for purposes of competing with Google; policies that prevent employees from disclosing violations of state and federal law either within Google or outside Google to private attorneys or government officials; and policies that prevent employees from engaging in lawful conduct during non-work hours and that violate state statutes entitling employees to disclose wages, working conditions, and illegal conduct. Google filed a demurrer in response to the complaint in which plaintiffs asserted a violation of the Private Attorneys General Act ("PAGA") on the ground that the National Labor Relations Act (the "NLRA") preempted the employees' confidentiality claims. The trial court sustained the demurrer, but the Court of Appeal reversed, holding that the claims "fall within the local interest exception to *Garmon* preemption and may therefore go forward."

Non-California Forum Selection Clause Is Barred By Labor Code Section 925

Midwest Motor Supply Co. v. Superior Court, 2020 WL 6305492 (Cal. Ct. App. 2020)

Patrick Finch worked as a sale supervisor for Midwest Motor Supply and was employed in 2014 pursuant to an employment agreement that contained a choice-of-law and forum selection clause invoking Ohio law and venue in Franklin County, Ohio. Finch was promoted in 2016 and received a new compensation plan; he also received new compensation plans in 2017 and 2018. After Finch sued Midwest in California in 2019 for various Labor Code violations, Midwest filed a motion to dismiss or, alternatively, stay the action on the basis of the Ohio forum-selection clause. The trial court denied Midwest's motion on the ground that the modifications to the compensation plan in 2017 and 2018 occurred after January 1, 2017 (the operative date of Labor Code § 925, which generally renders out-of-state forum selection clauses voidable by a California employee). The Court of Appeal denied Midwest's petition for writ of mandate, holding that a modification to an employment agreement on or after January 1, 2017 triggers Section 925 even though the modification was to a provision other than the forum-selection clause.

Ninth Circuit Upholds FINRA Class Action Waiver Provision

Laver v. Credit Suisse Secs. (USA), LLC, 976 F.3d 841 (9th Cir. 2020)

Christopher Laver filed a putative class action against Credit Suisse, alleging breach of contract and other state law claims. Credit Suisse responded with a motion to dismiss in favor of arbitration premised upon FINRA's Employee Dispute Resolution Program, which among other things contains a class action wavier. The district court granted the motion, holding that the class action waiver provision rendered Laver unable to pursue a class action in any forum and, therefore, FINRA Rule 13204(a)(4), prohibiting compelled arbitration of putative class actions, does not apply to Laver's claims. The Ninth Circuit affirmed, aligning itself with the Second Circuit's decision in *Cohen v. UBS Fin. Servs., Inc.* , 799 F.3d 174 (2d Cir. 2015).

Employees Compensated Solely By Commission Are Not Paid A "Salary" And Are Non-Exempt

Semprini v. Wedbush Secs., Inc., 2020 WL 6557549 (Cal. Ct. App. 2020)

Joseph Semprini and another employee filed this putative class action against Wedbush for various wage and hour violations based upon an alleged misclassification of similarly situated financial advisors who were treated as exempt employees. Wedbush classified its California financial advisors as exempt from overtime pursuant to the administrative exemption. Since Wedbush pays its financial advisors on a commission-only basis, the question at issue in this case is whether the financial advisors are exempt since they were not paid a monthly salary equivalent to no less than two times the state minimum wage. Following a bench trial, the court ruled that Wedbush's compensation plan satisfied the salary basis test and that the administrative exemption provided a complete defense to all remaining causes of action, entering judgment in favor of Wedbush. The Court of Appeal reversed, holding that a compensation plan based solely on commissions, with a recoverable draw against future commissions, does not qualify as a "salary" for purposes of the administrative exemption. *See also Cruz v. Fusion Buffet, Inc.*, 2020 WL 6559229 (Cal. Ct. App. 2020) (affirming award of $47,000 in attorney's fees to prevailing employee in wage/hour lawsuit).

Related Professionals

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