Proskauer

California Employment Law Notes

September 2021

Ninth Circuit Rejects "Paramour Preference" Liability Arising From Supervisor's Affair With Another Employee

Maner v. Dignity Health, ___ F.4th ___, 2021 WL 3699780 (9th Cir. 2021)

William "Bo" Maner worked as a biomedical design engineer in the obstetric and gynecological laboratory of Dr. Robert Garfield for several decades. Shortly after he joined the lab, Maner learned that Garfield and another researcher (Dr. Leili Shi) were engaged in a long-term romantic relationship. After Maner's position was eliminated based upon his poor performance and the lab's lack of funding, he filed a complaint alleging Title VII sex discrimination in which he asserted that Dignity Health had protected Shi (a female) from the impact of reduced lab funding by terminating Maner (a male); Maner also alleged unlawful retaliation for protesting Garfield's "favoritism" toward Shi at the expense of other employees. The district court granted Dignity Health's motion for summary judgment, and the Ninth Circuit affirmed dismissal, holding that an employer who singles out a supervisor's paramour for preferential treatment does not discriminate against other employees "because of [their] sex." The Court reasoned that "the motive behind the adverse employment action is the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees" though the Court noted that such activity is "certainly unfair to similarly situated workers and more than likely harms morale." The Court affirmed dismissal of the retaliation claim on the ground that Maner had failed to establish a causal connection between his alleged complaint and the elimination of his job.

$3.5 Million Emotional Distress Award Was "Shockingly Disproportionate" To Evidence Of Harm

Briley v. City of W. Covina, 66 Cal. App. 5th 119 (2021)

Jason Briley worked for the City of West Covina as a deputy fire marshal. During his employment, Briley complained that various city officials, including his former supervisor, had ignored his reports of safety issues and engaged in misconduct. The city investigated Briley's complaints and concluded they were unfounded, but while that investigation was still pending, the city commissioned a second investigation of allegations that Briley had repeatedly engaged in misconduct and unprofessional behavior. At the conclusion of the second investigation, Briley's employment was terminated. In this lawsuit, Briley alleged whistleblower retaliation under Cal. Lab. Code § 1102.5. At trial, the jury awarded Briley over $500,000 in lost wages, $2 million in past emotional distress damages and $1.5 million in future emotional distress damages – though Briley's attorney had asked the jury to award only $1.5 million in past and $1.5 million in future emotional distress damages.

In this opinion, the Court of Appeal held that "the jury's total award of $3.5 million in noneconomic damages is shockingly disproportionate to the evidence of Briley's harm and cannot stand." Although Briley testified that the termination was "pretty devastating" and that he had had some "sleep-related issues," there was no evidence that any of the problems Briley described was particularly severe. The Court held that $1,700 per day for past emotional distress damages was excessive and determined that Briley's demeanor on the witness stand (he cried) may have resulted in passion rather than measured judgment on the part of the jury. Further, the Court held that the $1.5 million award of future noneconomic damages "stands on even shakier ground" because the $500,000 in economic damages the jury awarded should have eliminated any remaining financial concerns tied to his termination and "also vindicated Briley and counteracted any false or unfair allegations against him." The Court also determined that Briley's counsel's "personal attack" on the city's counsel (calling him a liar) shortly before the jury began its deliberations may have prejudiced the jury against the city. The Court vacated the damages award and remanded the case for a new trial unless Briley accepted a reduction of the awards to $1 million in past emotional distress damages and $100,000 in future emotional distress damages (*i.e.*, a total reduction of $2.4 million).

Employee Nonsolicitation Clause Does Not Violate Antitrust Law And Is "Pro-Competitive"

Aya Healthcare Servs. v. AMN Healthcare, Inc., 2021 WL 3671384 (9th Cir. 2021)

AMN Healthcare contracted with Aya Healthcare for Aya to staff temporary "spillover assignments" of travel nurses to hospitals at which AMN was the managed service provider. In AMN's agreement with Aya, Aya agreed not to solicit AMN's employees; eventually, Aya became AMN's biggest associate vendor. After Aya began to actively solicit AMN's travel nurse recruiters, the parties' business relationship "soured." In this lawsuit, Aya challenged AMN's nonsolicitation provision under the Sherman Antitrust Act and California law. The district court granted AMN's summary judgment motion on the ground that Aya failed to raise a genuine issue of material fact regarding AMN's "market power."

The Ninth Circuit affirmed dismissal on summary judgment, holding that although the nonsolicitation agreement is a "horizontal restraint," it is "reasonably necessary to the parties' pro-competitive collaboration." More specifically, the Court noted that "[t]he non-solicitation agreement, therefore, promotes 'competitiveness in the healthcare staffing industry' – more hospitals receive more traveling nurses because the non-solicitation agreement allows AMN to give spillover assignments to Aya without endangering its 'established network of recruiters, travel nurses, AVs, and of course, hospital customers'" (quoting the district court's opinion).

Employer Must Prove Employee Knew Or Should Have Known Of Discriminatory Failure To Hire For Statute Of Limitations Bar To Apply

Pollock v. Tri-Modal Distrib. Servs., Inc., 11 Cal. 5th 918 (2021)

Pamela Pollock, a customer service representative for Tri-Modal, alleged she was passed over for several promotions because she refused to have sex with Michael Kelso, Tri-Modal's executive vice-president. Kelso initiated a dating relationship with Pollock in 2014, but the relationship ended in 2016 when Pollock refused to have sex with Kelso. In March 2017, Leticia Gonzalez received and accepted an offer of promotion, which took effect on May 1, 2017. Pollock claimed that she was the most qualified candidate for the promotion and that her refusal to have sex with Kelso was a substantial factor in her not receiving the promotion. There is no evidence in the record that Pollock knew or should have known that Gonzalez was offered and accepted the promotion in March 2017. Pollock filed her administrative complaint under the Fair Employment and Housing Act in April 2018. The trial court and the Court of Appeal determined that Pollock's claim was time-barred because it was not filed within one year of the offer to and acceptance by Gonzalez of the promotion (even though Pollock may have been unaware of the promotion at the time). The California Supreme Court reversed the dismissal and remanded the case for a determination by the lower courts as to whether the defendant had proved that Pollock knew or should have known of Gonzalez's promotion in or before April 2017 (one year before the filing of her administrative complaint). The Supreme Court further held that a prevailing-party employer may only recover costs on appeal if the action was "frivolous, unreasonable, or groundless when brought."

Retired Judges May Proceed With Age Discrimination Lawsuit

Mahler v. Judicial Council of Cal., 67 Cal. App. 5th 82 (2021)

Plaintiffs are retired superior court judges who have participated in the Temporary Assigned Judges Program (TAJP). As a result of recent changes, there is a limit on the duration of service in the program, which plaintiffs claim has a disparate age impact on "older" retired judges. Defendants successfully demurred on various grounds, including that plaintiffs failed to state a viable disparate impact age discrimination claim. The Court of Appeal reversed dismissal of those claims and held that on remand, plaintiffs should be granted leave to amend their complaint. Among other things, plaintiffs failed to allege the total number of participants in the TAJP; the number of participants allegedly adversely impacted by the challenged changes to the program; the age group allegedly adversely impacted; "basic allegations" of statistical methods and comparison; or "even any anecdotal information of a significant age-based disparity." The Court further held that a disparate impact age discrimination claim under the Fair Employment and Housing Act is not foreclosed solely because it is predicated on alleged discriminatory impact on a sub-group within the protected age class as was alleged here.

Dutch Executive "Publicly Presented" Himself As An Executive Of California Company

Swenberg v. Dmarcian, Inc., 2021 WL 3856599 (Cal. Ct. App. 2021)

Charles Swenberg sued Martijn Groeneweg (among others), alleging various claims related to his ownership interest in and employment with dmarcian, Inc. Groeneweg (a Dutch citizen) filed a motion to quash service for lack of personal jurisdiction over him in the State of California. The trial court granted Groeneweg's motion, but the Court of Appeal reversed, noting that Groeneweg "publicly presented himself as one of the leaders of dmarcian, with no hint there was a distinction between dmarcian and any other entity Groeneweg was associated with." Among other things, the Court observed that dmarcian and dmarcian EU shared a website, and on the dmarcian website, Groeneweg appears immediately below the CEO of the California-based entity. The Court also took note of Groeneweg's LinkedIn profile, which describes him as "General Manager Europe at dmarcian" without reference to dmarcian EU or any other entity. Further, Swenberg stated in his declaration that he had participated in conference calls with Groeneweg "about the business of dmarcian, including the sales process and other day-to-day business matters." The Court concluded, "Groeneweg chose to make the Internet presence of dmarcian EU, and its ability to obtain customers from online contacts, depend upon the services of a California-based company. We see no unfairness in requiring him to subject himself to the jurisdiction of California courts in litigation involving his relationship with that California company and its employees."

Hirer Of Independent Contractor Is Not Liable For Injuries To Workers

Gonzalez v. Mathis, 2021 WL 3671594 (Cal. S. Ct. 2021)

John R. Mathis (aka Johnny Mathis) lives in a one-story house with a flat, sand-and-gravel roof. The roof contains a large skylight covering an indoor pool. Luis Gonzalez is a professional window washer who regularly cleaned Mathis's skylight. At the direction of Mathis's housekeeper, Gonzalez went up on the roof to tell his employees to use less water while cleaning the skylight because water was leaking into the house. Gonzalez, who did not have workers' compensation insurance, slipped and fell to the ground, sustaining serious injuries. In this action, Gonzalez sued Mathis, claiming the accident was caused by "dangerous conditions" on Mathis's roof. The trial court granted Mathis's motion for summary judgment, finding that Mathis owed no duty to Gonzalez based on the *Privette* doctrine, which insulates the hirer of an independent contractor from liability under most circumstances. The Court of Appeal reversed, holding that a landowner may be liable to an independent contractor or its workers for injuries resulting from known hazards. In this opinion, the California Supreme Court reversed the Court of Appeal and ordered that the trial court's dismissal on summary judgment be affirmed: "Under *Privette*, a landowner presumptively delegates to an independent contractor all responsibility for workplace safety, including the responsibility to ensure that the work can be performed safely despite a known hazard on the worksite."

Meal/Rest Break Premiums Must Include All Forms of Remuneration

Ferra v. Loews Hollywood Hotel, LLC, 11 Cal. 5th 848 (2021)

Like the federal Fair Labor Standards Act (FLSA), Cal. Lab. Code § 510 requires that employers pay non-exempt employees overtime at their "regular rate[s] of pay." Under a different section of the Labor Code and the Industrial Welfare Commission's Wage Orders, employers also must provide non-exempt employees with unpaid meal and paid rest breaks at set intervals, depending on how many hours the employees work. Under Cal. Lab. Code § 226.7(c), if an employer fails to provide an employee with a compliant meal or rest break, the employer must "pay the employee one additional hour of pay at the employee's regular rate of compensation." Since the language in Section 226.7 is different from that in Section 510 ("regular rate of compensation" versus "regular rate of pay"), employers had long understood that the meal-and-rest break premiums were to be paid at non-exempt employees' base hourly rates (*i.e.*, the premiums did not have to include other forms of compensation above and beyond the base hourly rate).

In this new opinion from the California Supreme Court, however, the rules have changed. Former hotel bartender Jessica Ferra alleged that Loews violated California law by failing to include her nondiscretionary bonuses when calculating meal and rest break premiums. Both the trial court and the Court of Appeal held in favor of Loews, concluding that the "regular rate of pay" as used in Section 510 was not synonymous with the "regular rate of compensation" as used in Section 226.7. The California Supreme Court saw things differently, however. In an opinion authored by Associate Justice Goodwin Liu, the Court held that "regular rate of compensation" as used in Section 226.7 means the same thing as "regular rate of pay" in this context. Finally, the Court rejected Loews's argument that this opinion should apply only prospectively and determined the opinion applies *retroactively*.

Family Member In-Home Supportive Services Worker Is Ineligible For Unemployment Benefits

***Skidgel v. CUIAB*, 2021 WL 3671434 (Cal. S. Ct. 2021)**

Tamara Skidgel was an in-home supportive services (IHSS) provider who was being paid under the state's IHSS program to care for her own daughter. In this lawsuit, Skidgel alleged that she had been an IHSS provider for her daughter since May 2013 and expected to be eligible for unemployment benefits when her employment caring for her child ended. Skidgel relied upon a non-precedential decision of the California Unemployment Insurance Appeals Board (CUIAB) that a woman who was providing care to her son and receiving direct payments from a public entity for performing those services qualified for unemployment benefits. The trial court rejected that interpretation of the applicable statutes and held that Skidgel was ineligible for unemployment benefits. The Court of Appeal and, in this opinion, the California Supreme Court agreed, holding that Cal. Unemp. Ins. Code § 631 excludes IHSS providers who serve close-family-member recipients.

Employee Who Signed Promissory Note To Pay For Losses May Proceed With Class Action Lawsuit

***Gallano v. Burlington Coat Factory of Cal., LLC*, 2021 WL 3616152 (Cal. Ct. App. 2021)**

Krizel Gallano, a former employee of Burlington Coat Factory, filed this putative class action in which she alleged that Burlington forces its employees to pay for business losses incurred for common on-the-job mistakes by "misusing" California's shoplifting statute (Cal. Pen. Code § 490.5) and intimidating employees into signing promissory notes that result in their shouldering the debt for the company's financial losses. Among other things, Gallano alleged that Burlington had violated Cal. Lab. Code § 2802, which requires employers to indemnify employees for "expenditures or losses" that were incurred in direct consequence of the discharge of their duties for the employer. In response, Burlington filed an anti-SLAPP motion to dismiss the 2802 claim (arguing that Gallano's claims arose out of protected activity because the challenged conduct was undertaken in anticipation of litigation), but the trial court denied it. In this opinion, the Court of Appeal affirmed the trial court's denial of Burlington's anti-SLAPP motion, holding that when Gallano executed the promissory note at the direction and for the benefit of Burlington, she incurred an economic loss sufficient to trigger the protections of Section 2802. The Court rejected Burlington's additional argument based upon its "post-motion conduct in disclaiming any interest in enforcing the promissory note or the civil demand letters [because it] appears designed to preempt this lawsuit from proceeding as a class action."

PAGA Plaintiff's Expert Statistician Should Have Been Permitted To Testify

Zuniga v. Alexandria Care Ctr., LLC, 2021 WL 3560665 (Cal. Ct. App. 2021)

Rosalinda Zuniga was employed by Alexandria Care as a housekeeper who filed a PAGA claim, alleging her former employer failed to provide required meal and rest breaks, to indemnify employees for expenditures and to maintain required records. The trial court excluded the expert testimony of Zuniga's expert witnesses on the grounds that one of them (Dean Van Dyke) was not qualified as an expert to testify about computer data processing and the other (Richard Drogin, Ph.D.) sought to offer opinions that had not been disclosed during his deposition, and his analysis was undertaken after his deposition and trial testimony. Without the expert testimony, the trial court ruled in favor of the employer. In this opinion, the Court of Appeal reversed the trial court's judgment and remanded the case for a new trial.

The Court held that Zuniga was an "aggrieved person" under PAGA even though she already had settled her individual claims after they had been ordered to arbitration. The Court further held that the trial court had abused its discretion by excluding Dr. Drogin's expert testimony because it was based upon spreadsheets created by Van Dyke's company (iBridge LLC), which the trial court had found to be inadmissible, citing Cal. Evid. Code § 801(b) which states that the basis for the expert opinion must be reliable, "whether or not admissible." However, the Court held the trial court did not abuse its discretion by excluding the iBridge spreadsheets, which had not been properly authenticated. *See also Johnson v. Maxim Healthcare Servs., Inc.*, 66 Cal. App. 5th 924 (2021) (employee of healthcare staffing company could proceed with PAGA claim arising from employer's requirement that employees sign a Non-Solicitation, Non-Disclosure and Non-Competition Agreement in violation of Cal. Lab. Code § 432.5; claim not barred by statute of limitations because employee was an "aggrieved employee" with standing to pursue claim); *Mauia v. Petrochem Insulation, Inc.*, 5 F.4th 1068 (9th Cir. 2021) (California state law regarding meal and rest periods does not apply to employees working on oil platforms on the Outer Continental Shelf).

Section 998 Settlement Offer Violated Labor Code

Wasito v. Kazali, 2021 WL 3878379 (Cal. Ct. App. 2021)

Subiono Wasito and Enny Soenjoto (plaintiffs) were employed as resident managers of a motel owned by the Kazali family. When the Kazalis closed the motel for renovations, plaintiffs were told their employment was being terminated. After plaintiffs demanded their unpaid wages, the Kazalis paid the unpaid salaries, but not the annual bonuses, despite conceding they were owed. Before trial, the Kazalis made a Cal. Code Civ. Proc. § 998 offer to pay plaintiffs $300,000 in settlement. After the Section 998 offer expired after 30 days, the Kazalis sent plaintiffs checks in the amount of $75,876.90 for the unpaid bonuses, including interest and penalties. The case proceeded to trial, and the jury awarded plaintiffs less than $2,200 (after the trial court adjusted the jury award). Both sides sought to recover their costs, and plaintiffs sought and recovered $66,700 in attorney's fees because they were the "prevailing parties." The trial court denied the Kazalis' motion to recover their costs on the ground the Section 998 offer violated Labor Code §§ 206 and 206.5 because the Kazalis withheld undisputed compensation while attempting to settle all claims. The Court of Appeal affirmed the judgment. *See also Reddish v. Westamerica Bank*, 2021 WL 3827308 (Cal. Ct. App. 2021) (trial court's order that the parties share the costs of depositions is not appealable under the collateral order doctrine).

Farm Labor Employers Did Not Fail To Pay Minimum Wage To Discharged Employees

Jaime Zepeda Labor Contracting, Inc. v. Department of Indus. Relations, 2021 WL 3560937 (Cal. Ct. App. 2021)

The California Division of Labor Standards Enforcement (DLSE) issued minimum wage citations to farm labor employers pursuant to Cal. Lab. Code § 1197.1 despite the fact that it was undisputed that the employers paid all of the employees at least the minimum wage by payday. The DLSE contended that the failure to pay wages on the dates the employees were discharged or within 72 hours of when they quit subjected the employers to waiting time penalties and constituted independent minimum wage violations that justified the issuance of the citations. The trial court granted a peremptory writ directing the DLSE to dismiss the citations with prejudice. The Court of Appeal affirmed, holding that to conclude otherwise would subject an employer to a double penalty for a single violation.

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