Proskauer

California Employment Law Notes

January 2022

Manicurist Can Proceed With Hostile Work Environment Claim

Fried v. Wynn Las Vegas, 18 F.4th 643 (9th Cir. 2021)

Vincent Fried, a manicurist at a salon in the Wynn Hotel in Las Vegas, was sexually propositioned by a customer. Fried immediately went to his manager to report the customer, at which point the manager allegedly told him to "just go [finish the pedicure] and get it over with" despite the lewd comments. Fried continued with the pedicure, but after the customer left, he approached his manager to discuss the incident but she said she had a lot of "emails to review" and asked to discuss the matter at another time.

The district court granted Wynn's summary judgment motion, dismissing Fried's claim for hostile work environment under Title VII. However, the Ninth Circuit reversed, holding that the manager's lack of response to the harassment may have created a hostile work environment. The Ninth Circuit analyzed evidence of the separate incidents upon which Fried relied to establish a hostile work environment:

- A comment by Fried's manager that he should consider finding another job (such as cooking) in which the clientele is not mostly female. In addition, on two different occasions, Fried's female coworkers commented that Fried and another male coworker should wear wigs if they wanted to get more clients or make more money at the salon; the Court held that these statements were insufficiently severe or pervasive to create a hostile work environment.

- The manager's inaction in response to Fried's complaint about the customer, however, was sufficient to create a hostile work environment because of the manager's failure to take immediate corrective action against harassment by a third party (the customer).

The Ninth Circuit concluded that "reasonable jurors could decide that Fried's manager condoned the customer's conduct and conveyed that sexual harassment would be tolerated in the salon because she took no action to stop it – such as requiring the customer to leave the premises immediately." On remand, the Ninth Circuit directed the district court to reconsider the cumulative effect of the manager's inaction along with "related comments" by Fried's coworkers that he should take the customer's sexual proposition as a "compliment" and that he welcomed it.

"Volunteers for Nonprofits Are Not Employees" – Court Affirms Order In Favor Of The American Film Institute

Woods v. American Film Institute, 2021 WL 5978072 (Cal. Ct. App. 2021)

Laurie Woods worked for four days as a volunteer at the AFI Film Festival in Los Angeles. She alleges that she worked between 12 and 14 hours each of those days and that she and the other volunteers she purported to represent in this putative class action were unpaid. Woods further alleged that AFI is not a charitable organization that is permitted to use volunteers under California law. AFI opposed Woods' motion to certify a class action and argued that common questions would not predominate over individual issues for the claims that Woods sought to certify for class treatment. AFI also argued that as a tax-exempt, nonprofit organization dedicated to the film industry, AFI is permitted to use volunteers who have no expectation of getting paid as employees. The trial court denied Woods' motion to certify the class on the ground that workers are not employees unless they expect compensation for their services, and determining whether particular class members were actually employees (based upon such expectations) would create individual issues that would dominate the trial. The Court of Appeal affirmed the trial court's order, holding that the putative "class might include persons with a variety of intentions, including those who freely volunteered; those who were promised compensation; and those who believed they would receive some compensation." The Court further held that "volunteers for nonprofit entities are not employees."

Nurse's Discrimination Claims Against Hospital Were Properly Dismissed

Wilkin v. Community Hosp. of the Monterey Peninsula, 71 Cal. App. 5th 806 (2021)

Kimberly Wilkin worked as a registered nurse for the Community Hospital of the Monterey Peninsula before the hospital terminated her employment following its discovery she had violated the hospital's policies governing the handling and documentation of patient medications. After her termination, Wilkin sued the hospital for wrongful termination and discrimination based upon an alleged disability and retaliation in violation of the California Family Rights Act and the FMLA. Based on undisputed evidence of Wilkin's history of poor attendance and discrepancies in the medication documentation (including for controlled substances) she had prepared for patients, the trial court granted the hospital's motion for summary judgment. The Court of Appeal affirmed, holding that the hospital presented evidence of nondiscriminatory reasons for terminating Wilkin's employment that Wilkin failed to establish were mere pretext for discrimination.

Security Officer Can Proceed With Disability Discrimination And Wrongful Termination Claims, But Not Retaliation Claim

Zamora v. Security Indus. Specialists, Inc., 71 Cal. App. 5th 1 (2021)

David Zamora sued his former employer, Security Industry Specialists, Inc. ("SIS"), for disability discrimination, wrongful termination and retaliation. Eight days after he was hired, Zamora tripped over a curb at work and twisted his left knee. Zamora was later laid off as part of a wider reduction in force while he was temporarily disabled and was on a workers' compensation leave of absence related to the accident. The trial court granted SIS's summary judgment motion, but the Court of Appeal reversed in part, holding that although the retaliation claim was properly dismissed, the discrimination and wrongful termination claims should not have been. The Court reasoned that in the absence of direct evidence of discrimination by SIS, the *McDonnell Douglas* shifting burden analysis applied, and that in this case Zamora established that SIS failed to perform its "affirmative duty" to engage in the interactive process with him by not advising him of other suitable job opportunities. Had it done so, Zamora may have found another position doing modified work that would have resulted in his avoiding the lay-off. The Court also found that SIS's asserted legitimate, nondiscriminatory reasons for termination were refuted by Zamora's evidence of pretext. Finally, the Court affirmed dismissal of the retaliation claim on the ground that Zamora did not engage in any protected activity by requesting time off for his knee injury.

Employer Prevails On Breach Of Nondisclosure Agreement Claim Against Former Employee

Elation Sys., Inc. v. Fenn Bridge LLC, 71 Cal. App. 5th 958 (2021)

Elation Systems sued one of its former software developers, Tiebiao "Joe" Shi, for breach of a nondisclosure agreement and a settlement agreement after he quit his employment and formed a new business entity called Efen Bridge (which became Fenn Bridge). At trial, the jury concluded that Shi had breached the NDA and awarded $10,000 in damages to Elation on that claim and also that Shi had breached the settlement agreement, but awarded no damages to Elation on that claim. Shi and Fenn Bridge filed a JNOV motion, challenging the jury's findings of harm and damages on the NDA claim and the jury's finding of breach on the settlement agreement claim. The trial court granted the JNOV motion and awarded Shi and Fenn Bridge $719,000 in attorney's fees as the prevailing parties in defending against Elation's claims. The Court of Appeal reversed, holding that the trial court erred in granting the JNOV motion on the NDA claim and that Elation was entitled to nominal damages (though not $10,000) after the jury determined the NDA had been breached; however, the Court affirmed the grant of JNOV as to Elation's claim for breach of the settlement agreement.

Trial Court Failed To Properly Assess Fairness Of PAGA Settlement

Moniz v. Adecco USA, Inc., 72 Cal. App. 5th 56 (2021)

Rachel Moniz filed a PAGA notice with the Labor Workforce and Development Agency ("LWDA") and a subsequent lawsuit alleging that Adecco, her former employer, maintained and implemented unlawful limitations on the disclosure of information such as wages, working conditions and non-public information of commercial value. After two mediation sessions, the parties moved for approval of a settlement agreement, but the trial court declined to approve the settlement because the release was too broad. After the parties narrowed the release, the trial court approved the settlement, but the LWDA then moved to intervene, objecting to the settlement and seeking to vacate the judgment. The trial court then vacated the judgment because timely notice of the settlement had not been provided to the LWDA. The trial court ultimately approved the settlement, which was then challenged on appeal by another claimant (Paola Correa) who had filed a separate action. Although Correa raised multiple procedural and substantive objections to the settlement, the Court of Appeal rejected all of them with the exception of Correa's challenge to the fairness of the settlement itself, which included a disproportionate allocation of civil penalties among temporary and full-time employees, and on that basis the Court reversed the judgment.

Flight Attendants Are Entitled To Labor Code Compliant Wage Statements

Gunther v. Alaska Airlines, Inc., 72 Cal. App. 5th 334 (2021)

Julie Gunther is an Alaska Airlines flight attendant who lives in San Diego. In this PAGA claim, Gunther alleged that her wage statements are not compliant with Cal. Labor Code § 226 because they fail to state the total hours worked; the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; and the corresponding rate of pay for each. Following a bench trial, the trial court found the wage statements to be deficient and awarded over $25 million in PAGA penalties to the aggrieved employees and $944,860 in attorneys' fees. The Court of Appeal affirmed liability against Alaska Airlines, but determined that the heightened penalties under Labor Code § 226.3 apply only where the employer fails to provide wage statements or keep required records – neither of which Alaska Airlines did. Alaska Airlines argued, and the Court of Appeal agreed, that the default penalty amount set forth in Cal. Labor Code § 2699(f)(2) ($100 per aggrieved employee per pay period) should be applied by the trial court upon remand. In so holding, the Court of Appeal refused to follow *Raines v. Coastal Pac. Food Distributors*, 23 Cal. App. 5th 667 (2018), which held that the heightened penalties of Section 226.3 apply to "all violations of section 226." The Court affirmed the award of attorneys' fees. *See also Santos v. El Guapos Tacos, LLC*, 72 Cal. App. 5th 363 (2021) (former employees' LWDA notice provided facts and theories sufficient to put agency on notice of specified Labor Code violations).

Related Professionals

- **Anthony J. Oncidi**
  Partner