Proskauer

California Employment Law Notes

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Former UCLA Physician Can Proceed With Whistleblower Claims

Scheer v. The Regents of the Univ. of Cal., 76 Cal. App. 5th 904 (2022)

Arnold Scheer, M.D., M.P.H., sued the Regents of the University of California and others for alleged whistleblower retaliation. Dr. Scheer asserted claims under Cal. Lab. Code § 1102.5 ("Section 1102.5"), Cal. Gov't Code § 8547, *et seq.*, and Cal. Health & Safety Code § 1278.5. Among other things, Dr. Scheer alleged he was retaliated against for having been a whistleblower concerning "numerous issues, violations, and concerns related to patient safety, mismanagement, economic waste, fraudulent and/or illegal conduct," etc. Defendants successfully moved for summary judgment in the trial court, but the Court of Appeal reversed, holding that the trial court had applied the wrong standard in evaluating Dr. Scheer's claims, citing *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703 (2022). *Lawson*, a recent opinion from the California Supreme Court, requires the plaintiff to meet a less burdensome standard in prosecuting a whistleblower claim under Section 1102.5. In this opinion, the appellate court further held that the *Lawson* standard also applies to a claim under Cal. Gov't Code § 8547.10 (comparable to Section 1102.5 but as applied to employees of the University of California). As for the alleged Health & Safety Code claim, the Court found there to be a material fact as to whether defendants' stated reasons for termination were pretextual. *See also Ross v. Superior Court*, 2022 WL 1153146 (Cal. Ct. App. 2022) (whistleblower is entitled to obtain testimony showing that the employer attempted to suppress or alter a witness's testimony); *Khoiny v. Dignity Health*, 76 Cal. App. 5th 390 (2022) (predominant relationship between a medical resident and a hospital residency program is an employee-employer relationship subject to claims of discrimination and retaliation).

Former Employee Adequately Alleged Disability Under The ADA

Shields v. Credit One Bank, N.A., 2022 WL 1436839 (9th Cir. 2022)

Karen Shields worked as an HR Generalist for Credit One Bank before her position was eliminated, which occurred after she took a medical leave of absence as an accommodation under the ADA. The district court granted the Bank's motion to dismiss on the ground that Shields had failed to plead facts sufficient to establish she had an "impairment" or any "permanent or long-term effects for her impairment." The Ninth Circuit reversed the dismissal, noting that that both the ADA and the applicable EEOC regulations had been updated and broadened to encompass protection for the "effects of an impairment lasting or expected to last fewer than six months." 29 CFR § 1630.2(j)(1)(ix). The Court further held that Shields had adequately alleged a disability under the ADA. *See also Buchanan v. Watkins & Letofsky, LLP,* 30 F.4th 874 (9th Cir. 2022) (plaintiff established genuine issue of material fact whether employer's two offices were an integrated enterprise and, thus, together have at least 15 employees such that the employer is covered by the ADA).

California Resident May Rely Upon Labor Code § 925 To Challenge Non-Compete

LGCY Power, LLC v. Superior Court, 75 Cal. App. 5th 844 (2022)

California resident Michael Jed Sewell worked as a sales representative and sales manager for LGCY Power, which is headquartered in Salt Lake County, Utah. In 2015, Sewell signed a "Solar Representative Agreement," which included noncompetition, nonsolicitation and confidentiality provisions as well as Utah choice of law and forum provisions. In 2019, Sewell and several other executives and managers left LGCY to form a competing solar sales company. Shortly thereafter, LGCY sued Sewell and the other former employees in Salt Lake County for breach of their employment agreements, breach of fiduciary duty, misappropriation of trade secrets and related claims. Four of the defendants (not including Sewell) filed a joint cross-complaint against LGCY in the Utah court proceeding and then unsuccessfully sought dismissal of LGYC's action against them.

Meanwhile, Sewell filed a complaint against LGCY in California Superior Court, asserting breach of contract, unjust enrichment, and California wage claims and sought declaratory relief; after LGCY was unsuccessful in having the California action dismissed, it filed this writ proceeding in the Court of Appeal. In this opinion, the Court of Appeal denied LGCY's writ petition, holding that Cal. Lab. Code § 925 (Section 925 generally prohibits non-California choice of law/forum provisions) is an exception to Cal. Code Civ. Proc. § 426.30(a), the compulsory cross-complaint rule that would otherwise have required Sewell to file his cross claims against LGCY in the Utah action. The Court held that Sewell had implicitly satisfied the requirement of Section 925 that he request the trial court to void the contract under the statute (Sewell could not void the contract without a judicial determination). Further the Court determined that the change in Sewell's work duties, title and compensation since Section 925 became effective was sufficient to bring the contract within the purview of the statute. Finally, the Court rejected LGCY's assertion that the full faith and credit clause of the United States Constitution required California to recognize Utah's compulsory cross-complaint statute because "different [i.e., less] credit is owed to [another state's] statutes versus judgments under full faith and credit precedent." *See also DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956 (9th Cir. 2022) (Section 925 voided non-California forum-selection clause, and "traditional factors" favored denial of transfer of action to New Jersey).

School District Is Not Liable For Teacher's Sexual Relationship With Student

Doe v. Anderson Union High School Dist., 2022 WL 1404140 (Cal. Ct. App. 2022)

A teacher at Anderson Union High School allegedly had a sexual relationship with one of his students, which included sexual activities in the classroom. The student sued the school district, the principal and superintendent for negligent hiring and supervision. The trial court granted the school district's motion for summary judgment, finding that there was no evidence that the district or any of the other defendants knew or should have known that the teacher posed a risk of harm to students. The Court of Appeal affirmed the dismissal on summary judgment. Further, the school district did not have a duty to review alarm data and video recordings to constantly monitor all teachers, students and campus visitors; to impose such a duty would be unreasonable. *Compare Perez v. City & County of San Francisco*, 75 Cal. App. 5th 826 (2022) (police officer's failure to secure his firearm was within the scope of his employment such that the city was potentially liable for death caused by firearm after it was stolen from officer's vehicle and used to kill plaintiff's son).

Employer May Have Violated Federal Law On Forced Labor By Abusing Visa Program

Martinez-Rodriguez v. Giles, 2022 WL 1132809 (9th Cir. 2022)

Plaintiffs are six citizens of Mexico (all licensed in Mexico as either animal scientists or veterinarians) who were recruited to work as "Animal Scientists" at Funk Diary in Idaho under the TN Visa program for professional employees, as established under the North American Free Trade Agreement ("NAFTA"). However, once they arrived at Funk Dairy to perform "professional services," they were required to work substantially as general laborers. In this lawsuit, plaintiffs argued that defendants' "bait-and-switch tactics" violated federal prohibitions against forced labor. The district court granted defendants' summary judgment motion, but the Ninth Circuit in this opinion reversed, holding that an issue of fact remained in the case from which a jury could conclude that Funk Dairy knowingly obtained plaintiffs' labor by abusing the TN Visa process in order to exert pressure on plaintiffs to provide labor that was substantially different from what had been represented to them and to federal consular officials.

Trial Court Should Not Have Dismissed PAGA Claims On Unmanageability Grounds

Estrada v. Royalty Carpet Mills, Inc., 76 Cal. App. 5th 685 (2022)

In this PAGA case, the trial court relied upon *Wesson v. Staples the Office Superstore, LLC* , 68 Cal. App. 5th 746 (2021) in which the Court of Appeal held that trial courts have inherent authority to strike unmanageable PAGA claims. The Court of Appeal in this case reversed the dismissal based upon unmanageability grounds, holding that "[a]llowing dismissal of unmanageable PAGA claims would effectively graft a class action requirement onto PAGA claims, undermining a core principle" established in at least two prior California Supreme Court cases. The Court further noted that

> …courts are not powerless when facing unwieldy PAGA claims. Courts may still, where appropriate and within reason, limit the amount of evidence PAGA plaintiffs may introduce at trial to prove alleged violations to other unrepresented employees. If plaintiffs are unable to show widespread violations in an efficient and reasonable manner, that will just reduce the amount of penalties awarded rather than lead to dismissal.

The Court also held that certain releases in settlement agreements that the employer negotiated with individual class members prior to trial were valid; the trial court correctly applied a seven percent prejudgment interest rate to premium pay awarded under Lab. Code § 226.7 rather than a 10 percent rate; and the employer was entitled to judgment on certain derivative waiting time and wage statement claims. However, the trial court erred in failing to find that a meal period claim, which was added in an amended complaint, did not relate back to a prior complaint and in decertifying a subclass of claims. Finally, the Court held that a meal policy that required employees to remain at the facility during meal breaks violated governing law. *See also Shaw v. Superior Court*, 2022 WL 1400806 (Cal. Ct. App. 2022) (trial court properly applied the exclusive concurrent jurisdiction rule to later-filed PAGA action involving claims that overlapped with earlier-filed action).

Court Improperly Remanded Action To State Court Based On Amount In Controversy Under CAFA

Jauregui v. Roadrunner Transp. Servs., Inc., 28 F.4th 989 (9th Cir. 2022)

Griselda Jauregui filed this putative class action in California state court against Roadrunner Transportation Services on behalf of all current and former hourly workers in California. The complaint alleged numerous violations of California wage and hour law. Roadrunner removed the case to federal court, invoking the Class Action Fairness Act ("CAFA"). Plaintiff filed a motion to remand on the ground that Roadrunner had failed to establish the requisite $5 million jurisdictional minimum for the amount in controversy under CAFA. In support of its opposition to the motion to remand, Roadrunner relied primarily on the declaration of its senior payroll lead who concluded, based upon the company's payroll data and Jauregui's allegations, the amount in controversy exceeded $14.7 million. The district court granted the motion to remand after independently evaluating Roadrunner's calculations for each of the seven alleged violations. The district court found that Roadrunner had sufficiently demonstrated the claimed amount in controversy for only two of the seven claims and, as for the remaining five claims, the district court assigned a value of $0 for the amount in controversy where it disagreed with Roadrunner's calculations. The Ninth Circuit reversed, holding that the district court committed "two primary errors": (1) putting a thumb on the scale against removal; and (2) assigning a $0 amount to most of the claims simply because the lower court disagreed with one or more of the assumptions underlying Roadrunner's amount in controversy estimates.

Workers Do Not Need To Establish They Were Hired Before ABC Test Can Be Applied

Mejia v. Roussos Constr., Inc., 76 Cal. App. 5th 811 (2022)

Plaintiffs, unlicensed flooring installers, installed floors on behalf of Roussos Construction, a general contractor. There were three individuals working between plaintiffs and Roussos whom plaintiffs called "supervisors" and Roussos called "subcontractors." At trial, Roussos maintained that it used independent contractors (the three individuals) who were licensed to perform work not permitted by Roussos' contractor's license and that those subcontractors hired and paid plaintiffs and were responsible for complying with the applicable labor laws. The parties disagreed as to the appropriate jury instruction to be given, with Roussos contending the "ABC test" for determining employee vs. independent contractor status can only be applied if the workers first established they were actually hired by Roussos or its agent. Plaintiffs countered that there is no hiring test articulated in *Dynamex Ops. W. v. Superior Court*, 4 Cal. 5th 903 (2018), the California Supreme Court opinion that adopted the ABC Test in California. The trial court ultimately agreed with Roussos: "This jury does need to make the predicate finding of whether or not Roussos Construction was the hiring entity." After being so instructed, the jury returned a verdict in Roussos' favor on all counts. In this opinion, the Court of Appeal reversed the judgment on the four wage and hour counts involving the ABC Test, holding that a "threshold hiring entity test" was not intended by the *Dynamex* court.

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