Proskauer

California Employment Law Notes

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Age/National Origin Case Was Properly Dismissed Despite "Direct Evidence" Of Discriminatory Animus

Opara v. Yellin, 57 F.4th 709 (9th Cir. 2023)

Joan Opara was terminated from her employment as an IRS revenue officer after the IRS determined she had committed several "UNAX offenses" (*i.e.*, incidents of unauthorized access of taxpayer data). Following her termination, Opara sued the Treasury Secretary, alleging she was terminated in violation of the Age Discrimination in Employment Act and Title VII for, respectively, age and national origin discrimination. The district court granted summary judgment to the Treasury Secretary, and the Ninth Circuit affirmed, concluding that Opara's direct evidence of age-related discriminatory animus (several age-related comments from a decision maker), while sufficient to support a prima facie case of age discrimination, was insufficient to raise a genuine issue as to pretext concerning the reasons offered by the Secretary for the termination. The reason the direct evidence was insufficient to defeat the summary judgment motion was because it consisted entirely of Opara's own uncorroborated and self-serving testimony and allegations (*citing Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002)). The Ninth Circuit also affirmed dismissal of Opara's age/national origin discrimination claims based on her failure to show pretext for the UNAX offenses.

Family Court May Order Employer To Provide Determination Of Arrearages Owed In Spousal Support Case

Brubaker v. Strum, 2023 WL 179541 (Cal. Ct. App. 2023)

The family court ordered the employed former husband in this case to pay his former wife monthly child and spousal support payments; the husband's employer was ordered to withhold the total amount of support payments from the husband's paychecks and to forward those amounts to the California Child Support Services Department. Later, the wife filed a request with the family court for an order to determine child and spousal support arrearages. The family court denied the wife's request on the ground that the wife should seek relief directly from the husband's employer with respect to all periods during which there was a valid income withholding order in place. The Court of Appeal reversed, holding that pursuant to Family Code § 5241, the wife was permitted to obtain an order from the family court compelling the husband to provide a determination of arrearages. The appellate court also reversed the $9,329.50 in sanctions the family court ordered the wife's attorney to pay to the husband.

Background Check Agency May Have Violated State Law By Disclosing Conviction

Kemp v. Superior Court, 86 Cal. App. 5th 981 (2022)

In 2020, the background reporting agency in this case disclosed to an employer a conviction of an individual from 2011 who had applied for a job. Following receipt of the report, the prospective employer withdrew its job offer. The individual then filed this lawsuit against the reporting agency on the ground that the conviction/parole was too old to have been the subject of such a report. Although it is legal under the federal Fair Credit Reporting Act (FCRA) for a regulated agency to report a person's prior conviction to a prospective employer no matter how long ago it occurred, under the California Investigative Consumer Reporting Agencies Act (ICRAA) and the California Consumer Credit Reporting Agencies Act, a reporting agency is prohibited from reporting a "conviction of a crime that, from the date of disposition, release, or parole, antedate the report by more than seven years." The reporting agency demurred to the complaint on the ground that the parole period ended fewer than seven years in the past, but the trial court overruled the demurrer, holding that the "plain meaning of 'from the date of…parole' refers to the start date of conditional release," which had occurred more than seven years before the report was issued. The Court of Appeal denied the reporting agency's writ petition (thus finding the demurrer was properly sustained in part) and ordered the trial court to further overrule the demurrer to the extent the trial court had held that the FCRA preempted the ICRAA claim.

Former Teacher's Defamation Suit Was Properly Dismissed Under Anti-SLAPP Statute

Bishop v. The Bishop's School, 86 Cal. App. 5th 893 (2022)

Chad Bishop was a teacher at The Bishop's School for 16 years. In March 2019, Bishop entered into a contract as an English teacher for the 2019-20 academic year. In September 2019, Bishop and Kendall Forte, a 19-year-old former student of the School who had graduated the previous June, exchanged "flirtatious" text messages with one another. Forte had posted an altered version of the texts on social media, and the School received communications from concerned parents about the incident. The School terminated Bishop's employment shortly thereafter for violating the School's policies and conduct expectations and related reasons. Bishop filed a lawsuit against the School for breach of contract and the Head of School (Ron Kim) for defamation. In response, defendants filed a motion to strike the first amended complaint under the anti-SLAPP statute as well as a demurrer. The trial court granted the anti-SLAPP motion as to the defamation claim, but denied it as to the contract claim.

The Court of Appeal affirmed dismissal of the defamation claim against Kim on the ground that Kim's statement to the school newspaper about the reasons for Bishop's termination constituted speech in connection with the issue of public interest of student safety and was entitled to anti-SLAPP protection. The Court further held that Bishop could not establish a probability that he could prevail on the defamation claim because he could present no evidence that Kim had made a false and defamatory statement about Bishop. The Court also held that neither the termination letter nor the termination itself was protected speech under the anti-SLAPP statute.

Judgment Against Employer Was Enforceable Where Appeal Was Invalid

Patel v. Chavez, 85 Cal. App. 5th 712 (2022)

Manuel Chavez was employed as an on-site hotel property manager by DTWO & E, Inc. and Stuart Union, LLC from 2002 to 2016. Chavez alleged he was paid less than the minimum wage and that the employers committed wage theft. In 2017, the Labor Commissioner issued two order, decision or awards (ODA's) finding in favor of Chavez and ordered Stuart Union to pay $235,000. Stuart Union brought a procedurally defective appeal pursuant to Labor Code Section 98.2 and PIIC (the insurance company) posted a bond under protest. The Court of Appeal affirmed several orders in favor of Chavez, including a dismissal in the entirety, finding that the appeal was invalid. After PIIC refused to release the bond to Chavez, Chavez filed a motion with the trial court, which entered judgment against the employer and PIIC as surety.

In this appeal, the employer claimed the trial court lacked jurisdiction to release the bond or enter judgment. The Court of Appeal rejected the argument that the proceedings should have been stayed pending the appeal because “[t]he pendency of an appeal does not stay enforcement of a money judgment absent an undertaking.” An undertaking is a separate bond that must be posted that ranges between 1.5 to 2 times the amount of the judgment; however, in this case, the employer only posted a bond in the amount of the judgment itself. The Court, rejecting the employer’s second argument that the trial court lacked jurisdiction because the section 98.2 appeal was invalid, held that while the posting of a bond is a jurisdictional prerequisite to a section 98.2 appeal, the reverse *(i.e.* , a valid section 98.2 appeal is a jurisdictional prerequisite for a court to issue orders regarding such a bond) is “not necessarily true.” *See also* Adanna *Car Wash Corp. v. Gomez*, 2023 WL ___ (Cal. Ct. App. 2023)(employer’s posting of licensing bond does not satisfy appeal bond requirement under section 98.2).

Real Estate Agents Are Independent Contractors As A Matter Of Law If Requirements Met

Whitlach v. Premier Valley, Inc., 86 Cal. App. 5th 673 (2022)

James Whitlach, a real estate agent, brought a PAGA suit against Premier Valley, Inc. dba Century 21 MM and Century 21 Real Estate, LLC (collectively, “Century 21”). Whitlach alleged that Century 21’s real estate agents were misclassified as independent contractors. The Court of Appeal affirmed the trial court’s holding that Section 650 of the Cal. Unemp. Ins. Code, rather than the ABC test or *Borello*, was the proper test for classification of real estate agents because of AB-5’s exemption for real estate licensees. Accordingly, real estate licensees are independent contractors if: (1) “substantially all” of their remuneration comes from sales; and (2) the written contract provides that the licensee is an independent contractor. Examining legislative history, the Court of Appeal explained this meant that Century 21’s real estate licensees “as a matter of law” were independent contractors and not employees. The Court of Appeal rejected Whitlach’s arguments that the statute was unconstitutional and that the contract was unconscionable. As to the first point, real estate agent contracts are unique and thus the legislature could have rationally decided that their unique nature warranted an exemption. The contract was also not unconscionable because the statute expressly permitted the designation of real estate agents as independent contractors. Because PAGA claims can only be brought by “aggrieved employee[s],” the claim was properly dismissed.

Employer Need Not Count Overtime Twice In Bonus Calculation

***Lemm v. Ecolab Inc.*, 2023 WL 21795 (Cal. Ct. App. 2023)**

Stephen Lemm, a route sales manager, brought a PAGA action against his employer, Ecolab, Inc., alleging that Ecolab improperly calculated nondiscretionary bonuses. Pursuant to Ecolab's incentive plan, an employee could receive a higher monthly bonus based on performance as a percent of gross wages. For the purpose of calculating the bonus, gross wages included straight time, overtime, and double time wages. Ecolab relied on a federal regulation that specifically applies to percentage bonuses and permitted Ecolab's calculation method. Lemm argued that the DLSE manual requires that a nondiscretionary bonus be incorporated into the calculation of the regular rate of pay, which would in turn affect overtime calculations. Further, Lemm argued, because California law favors an interpretation that is more protective of workers, Ecolab could not rely on a less protective federal regulation. The trial court granted summary judgment for Ecolab and the Court of Appeal affirmed, holding that because Ecolab's calculation was already based on overtime, requiring Ecolab to again calculate based on overtime would require them to pay "overtime on overtime."

Outside Salesperson Exemption Does Not Apply To Workers Whose Employer Controls Their Hours And Working Conditions

Espinoza v. Warehouse Demo Servs., Inc., 86 Cal. App. 5th 1184 (2022)

Georgina Espinoza, an employee of Warehouse Demo Services (“Warehouse”), worked in a Costco and performed demonstrations of products. Warehouse did not lease the space, but instead collects floor space on behalf of the companies whose products are demonstrated and then remits payment on their behalf to Costco. Espinoza brought a class action complaint alleging numerous Labor Code violations. Warehouse, however, argued that Espinoza fell within the outside salesperson exemption, which exempts workers from statutory overtime, minimum wage, and meal and rest break requirements, because she was engaged in selling outside of Warehouse’s place of business. The trial court held that the Espinoza was covered by the exemption because Warehouse did not own or lease the site at which Espinoza worked. However, the Court of Appeal reversed, holding that the correct inquiry is the extent to which the employer maintains control or supervision of the employee’s hours and working conditions. The Court of Appeal held that the exemption reflected the fact that such outside salespersons generally control their hours and are paid by commission. In “stark contrast,” Espinoza was assigned to work in a small, designated area at a fixed site; she was required to clock in and out for each shift; and she could not leave the area during her shift unless another employee relieved her, which does not comport with the purpose of the exemption.

Related Professionals

- **Anthony J. Oncidi**
  Partner