Proskauer

California Employment Law Notes

March 2023

No Claim By Employee Who Was Friends With Alleged Harasser

Atalla v. Rite Aid Corp., 2023 WL 2521909 (Cal. Ct. App. 2023)

Hanin Atalla and Erik Lund had a social relationship and became "close friends" before Atalla began working at Rite Aid where Lund worked as a district manager/district leader. Atalla and her husband socialized with Lund and his wife, and Atalla and Lund exchanged hundreds of texts; joked with one another in those texts; texted about personal matters; and sent multimedia messages to one another. They also frequently met for lunch and went out for coffee together. Late one Friday night after meeting with his "wine group," Lund sent Atalla a "Live Photo" of himself masturbating, followed shortly thereafter by a photo of his penis. Lund texted that he was "so drunk right now" and that he had "meant to send to wifey." Lund texted an apology to Atalla the next day to which she did not respond. Within a few days, Atalla's counsel sent a letter to Rite Aid asserting a claim of sexual harassment; following an investigation, Lund's employment was terminated. Although Rite Aid assured Atalla that she was welcome to return to work (and notified her of Lund's termination), she refused to come back. The trial court granted summary judgment to Rite Aid, and the Court of Appeal affirmed, holding that the evidence did not support an inference that "the text exchange culminating in the inappropriate photos was work-related in that Lund was acting in his capacity as a supervisor, and the conduct was in turn properly imputable to Rite Aid." The Court also held there was no constructive termination of Atalla's employment because "Rite Aid immediately took action, terminated Lund, and invited plaintiff back to work" (quoting the trial court's order).

Pregnancy Discrimination Lawsuit Was Properly Dismissed

Lopez v. La Casa de Las Madres, 2023 WL 2534998 (Cal. Ct. App. 2023)

Gabriela Lopez worked as shelter manager for a non-profit organization that provides services to women and children who are victims of domestic violence. In September 2016, Lopez gave birth to a child; by December 17, 2016, Lopez had received the full four months of pregnancy-disability leave required by statute, including the concurrently running 12 weeks of baby-bonding leave. Lopez then submitted a work-status report from Kaiser which stated that Lopez should not return to work before January 14, 2017. Lopez later submitted another form signed by a "social worker at Kaiser specializing in mental health" stating that Lopez was suffering from a disability that necessitated two modifications to her work duties for an "unknown" period: (1) time off to allow Lopez to continue mental health treatment (group and individual therapy); and (2) flexible/shortened workdays if Lopez "finds the nature of the work or stress of the work overwhelming and triggering of severe anxiety/depressive symptoms." La Casa notified Lopez that it was unable to accommodate the limitations proposed by her social worker and instead offered to briefly extend her leave and upon her return to work to temporarily assign her to a data entry specialist position. After Lopez failed to timely submit further information about her alleged disability, La Casa sent her a letter stating that La Casa considered Lopez to have "elected to discontinue her employment."

Following a bench trial, the trial court found that Lopez failed to carry her burden of proving that she had a condition related to pregnancy; could perform the essential functions of the job; and was denied a reasonable accommodation. The trial court also determined that Lopez had failed to prove La Casa had discriminated against her based on a disability because she did not prove that she was otherwise qualified to perform the shelter manager job, given her need to avoid stressful duties. The Court of Appeal affirmed judgment in favor of La Casa.

Employer That Failed To Layoff Employee Before She Became Disabled May Have Discriminated

Lin v. Kaiser Found. Hosps., 2023 WL 2202544 (Cal. Ct. App. 2023)

Suchin Lin received favorable performance evaluations as an IT Engineer at Kaiser before the decision was made to eliminate her position. Before Lin was informed of the elimination of her position, she fell in the workplace and suffered an injury to her shoulder, which resulted in her doctor placing her on modified duty. Thereafter, Lin's supervisor judged her performance more harshly in comparison to that of her teammates at Kaiser. After her employment was terminated, Lin filed this lawsuit against Kaiser, alleging disability discrimination and related claims. The trial court granted summary judgment in favor of Kaiser, but the Court of Appeal reversed, holding that although Kaiser had tentatively placed Lin on the termination list before becoming aware of her disability, it did not terminate her employment until after it was aware of her disability. The Court concluded that a reasonable jury could find that the negative evaluations Lin had received and her ultimate termination were substantially motivated by her disability.

Court Compels Individual But Not Representative Claims To Arbitration

Piplack v. In-N-Out Burgers, 2023 WL 2384502 (Cal. Ct. App. 2023)

In-N-Out Burgers appealed from the trial court's denial of its motion to compel arbitration. The trial court denied the motion because In-N-Out's arbitration agreement contained an unenforceable PAGA waiver. After the trial court's ruling, the United States Supreme Court held in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) that PAGA waivers are enforceable. Consistent with this decision, In-N-Out argued that the plaintiffs' individual PAGA claims must be arbitrated and the remaining representative claims dismissed for lack of standing. The Court of Appeal agreed with In-N-Out on the individual claims and reversed the trial court. But despite recognizing *Viking River*'s express holding that the representative claims lack standing and must be dismissed, the Court of Appeal stated that it "simply c[ould] not reconcile" *Viking River* and the California Supreme Court's decision in *Kim v. Reins Int'l Cal., Inc.*, 9 Cal. 5th 73 (2020). Accordingly, following *Kim*, the Court of Appeal held that the plaintiffs retain standing to pursue the representative claims.

Good Faith Is Defense To Labor Code's "Knowing And Intentional" Standard

Naranjo v. Spectrum Sec. Servs., Inc., 2023 WL 2261253 (Cal. Ct. App. 2023)

After holding that premium payments from meal and rest period violations under Labor Code section 226.7 constituted "wages," the California Supreme Court remanded to the Court of Appeal to resolve two questions: First, whether in failing to timely pay employees premium pay, the trial court erred in finding the employer had not acted willfully (Section 203 only permits penalties for willful violations). Second, whether there was a "knowing and intentional" violation as required for recovery under section 226. The Court of Appeal affirmed the trial court on the first question because Spectrum's good faith basis for non-compliance satisfied the willful standard. Specifically, Spectrum's defenses were not made unreasonably, unsupported by the evidence, or made in bad faith. On the second question, the Court of Appeal held that the good faith basis finding also satisfied the "knowing and intentional" standard.

Absent Exemption, Highly Compensated Daily-Rate Workers Are Entitled To Overtime

***Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. ___, 143 S. Ct. 677 (2023)**

Oil rig worker Michael Hewitt earned over $200,000 per year but did not receive overtime compensation. Hewitt was paid on a "daily-rate" basis, *i.e.*, Hewitt's biweekly paycheck was calculated based on a daily rate which was multiplied by the number of days he worked during the pay period. Helix asserted that Hewitt was "a bona fide executive" and thus exempt from overtime. To meet this exemption, Helix had to show that Hewitt received a predetermined and fixed salary that does not vary based on the amount of time worked; however, Hewitt's salary varied depending on the number of days worked. Further, although there is an exception for daily-rate highly compensated employees, this exception was not satisfied because Helix did not "guarantee" a weekly payment that bears a reasonable relationship to what Hewitt usually earns. In dissent, Justice Kavanaugh, joined by Justice Alito, argued that Helix's daily guarantee of $963 per day to Hewitt satisfied the FLSA's requirement of guaranteeing at least $455 per week.

Ninth Circuit Strikes Down "*Request Arbitration, Go To Jail*" Law

***Chamber of Commerce v. Bonta*, 2023 WL 2013326 (9th Cir. 2023)**

A Ninth Circuit panel struck down California's AB 51 (aka the *Request Arbitration, Go to Jail Law*). The law imposed civil and criminal penalties on employers that required employees to sign arbitration agreements. The same panel previously held that the Federal Arbitration Act (FAA) preempted much of the law but declined to strike down AB 51's penalties for employers who had failed to get an employee to sign. In dissent, Judge Ikuta eviscerated the majority's "torturous ruling" which, she said, was analogous to a statute making it unlawful for a drug dealer to attempt to sell drugs, but lawful if the drug dealer had succeeded in the transaction. However, after *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), the panel voted to rehear the case and Judge Fletcher switched sides. Now writing for the majority, Judge Ikuta noted that AB 51 singled out arbitration agreements in violation of the FAA and that non-negotiable agreements (like arbitration agreements) are routine and lawful.

Issue Preclusion Barred PAGA Claims After Arbitration Loss

Rocha v. U-Haul Co. of Cal., 88 Cal. App. 5th 65 (2023)

Thomas and Jimmy Rocha alleged FEHA and Labor Code violations against their employer U-Haul. The brothers' individual PAGA claims were compelled to arbitration where they subsequently lost on all causes of action. The Rochas then moved to vacate the arbitrator's award, but the trial court confirmed the award and imposed sanctions. The Court of Appeal affirmed, holding that issue preclusion applied because the Rochas were not "aggrieved employees" as required for standing under PAGA. Therefore, the arbitrator's finding that the brothers did not suffer any Labor Code violations precluded them from acting as aggrieved employees. The opinion criticized *Gavriiloglou v. Prime Healthcare Mgmt., Inc.*, 83 Cal. App. 5th 595 (2022), which held that issue preclusion did not apply to the subsequent PAGA action because the plaintiff was not operating in the same capacity. The *Rocha* court noted that there is no "same capacity" requirement for issue preclusion.

No Arbitration Waiver Where Employer Answered Complaint And Engaged In Limited Discovery

Armstrong v. Michaels Stores, Inc., 59 F.4th 1011 (9th Cir. 2023)

Teresa Armstrong executed an arbitration agreement with her employer Michaels Stores. After filing her claims in state court, Michaels answered, asserting its right to arbitration as an affirmative defense and removing the action to federal district court. The parties then submitted a joint case management statement that referenced as an issue in dispute whether Armstrong had agreed to arbitrate. Michaels also served interrogatories and a request for document production. Following the Supreme Court's ruling in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), Armstrong's claims were compelled to arbitration where she lost. Armstrong appealed the arbitrator's award on the basis that Michaels waived its right to arbitration by waiting too long to move to compel arbitration. The district court confirmed the award and the Ninth Circuit affirmed. The Ninth Circuit explained that Michaels did not engage in "intentional acts inconsistent" with the right to arbitration. Thus, although Michaels did not immediately move to compel arbitration, Michaels repeatedly reserved the right to compel arbitration, did not ask the district court to weigh in on the merits, and did not engage in any meaningful discovery unrelated to the arbitration issue.

Labor Commissioner's Deposition Subpoena Power Ends Once Wage Citation Issued

Garcia-Brower v. Nor-Cal Venture Grp., Inc., 2023 WL 2421824 (Cal. Ct. App. 2023)

The Labor Commissioner investigated alleged Labor Code violations at Nor-Cal Venture Group, Inc. and issued a wage citation for $900,000. The employer challenged the citation in an informal hearing and the Commissioner issued a subpoena to depose Nor-Cal's person most knowledgeable. Nor-Cal refused to comply, arguing that the Commissioner's broad investigatory powers, including the right to issue a deposition subpoena, were ineffective once the investigation ended, *i.e.,* after the Commissioner issued the wage citation. The hearing was delayed to permit a trial court to consider the issue and the trial court ruled in the Commissioner's favor. The Court of Appeal reversed, holding that when the Commissioner issued the wage citation, the matter moved "from an investigatory phase to an adjudicatory one." Accordingly, because the deposition subpoena is a power existing solely in the investigatory phase, the Commissioner could not invoke it during the hearing stage.

Proposition 22 Is Not Unconstitutional

Castellanos v. State of Cal., 2023 WL 2473326 (Cal. Ct. App. 2023)

Ride-share drivers and the Service Employees International Union sought to have Proposition 22 declared unconstitutional under the provisions governing workers' compensation, initiative power, and separation of powers. The trial court granted the petition. The Court of Appeal reversed holding that while certain provisions of the Proposition were unconstitutional, those provisions could be severed and the remainder of the Proposition was constitutional. First, the Proposition did not intrude on the legislature's workers' compensation authority because while the legislature has plenary power, this power was not exclusive as references to the legislature's power are interpreted to include the people's reserved right to use the initiative power. Second, the Proposition did not violate the single-subject rule simply when it embraced multiple purposes because Propositions may properly accomplish comprehensive, broad-based reform. Finally, the sections of the Proposition defining what constituted an amendment to the Proposition (and thus required a 7/8 majority in the legislature to amend the Proposition) intruded on the judiciary's power to define the meaning of amendment of a proposition as already set out in the Constitution. This portion also intruded on the legislature's authority to address a related area that the Proposition did not specifically authorize or prohibit. Accordingly, the provisions which defined Amendment were severed; however, the remainder of the Proposition, including the 7/8 requirement, remains valid.

Short-Term Military Leave May Have To Be Comparable To Non-Military Leave Benefits

Clarkson v. Alaska Airlines, Inc., 59 F.4th 424 (9th Cir. 2023)

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), employers are required to provide employees who take military leave with the same non-seniority rights and benefits as colleagues who take comparable non-military leaves. Casey Clarkson, a pilot for Alaska Airlines and a military reservist, alleged that the airline's failure to provide paid leave for short-term military leaves while providing pay for jury duty, bereavement, and sick leave violated the USERRA. The district court granted summary judgment to the Airline, but the Ninth Circuit reversed. The Ninth Circuit considered three comparability factors: (1) the duration of leave, (2) purpose of leave, and (3) employee choice of when to take the leave (*i.e.*, control). The Ninth Circuit concluded that the district court erred by comparing all military leave instead of just short-term military leave. For example, the district court compared the longest military leave (185 days) rather than the average length of short-term military leave (3.1 days). The district court also erred by finding that the purpose of short-term military leave was not to perform a civic duty and public service and that a reasonable jury could conclude that pilots do not have significantly more control over their short-term leave relative to other types of leave.

Employee's PAGA Action Was Not Limited By Sick Pay Statute

Wood v. Kaiser Found. Hosps., 88 Cal. App. 5th 742 (2023)

Ana Wood brought a PAGA action against her employer Kaiser for alleged failure to correctly pay for three paid sick days as required under California's Healthy Workplaces, Healthy Families Act (the "Act"). The Act provided for compensatory relief and civil penalties, but restricted relief to equitable, injunctive, or restitutionary relief when brought by "any person or entity enforcing this article on behalf of the public." Kaiser argued that this phrase encompassed PAGA actions in which a plaintiff acts on behalf of the public and thus civil penalties (as plaintiffs seek under PAGA) are barred. On the other hand, the plaintiff argued that the Legislature intended to only restrict the Unfair Competition Law (UCL). The trial court sustained Kaiser's demurrer. The Court of Appeal reversed, holding that the phrase only referred to the UCL and not to PAGA. Disagreeing with several federal district courts and despite recognizing that aggrieved employees bring an action "on behalf of the state," the Court of Appeal held that the Legislature intended PAGA plaintiffs to bring claims on behalf of the plaintiff and fellow aggrieved employees. *See* Cal. Lab. Code § 2699(a). This in contrast to the UCL which is expressly brought on behalf of the public. Thus, the Act's reference to "on behalf of the public" referred only to the UCL and plaintiff was not precluded from bringing a PAGA action under the Act.

Related Professionals

- **Anthony J. Oncidi**
  Partner