Top Employment Cases of 2016

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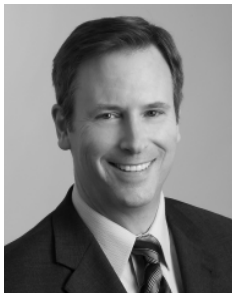

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When compared to 2015, it may seem that 2016 was a slow year for new employment law cases. But we saw a number of new and important developments with respect to arbitration, disability, retaliation, attorneys' fees and costs, and wage and hour laws, among others.

Arbitration

In 2016, the California Supreme Court spoke definitively on arbitration, and the message was clear: the bar for unconscionability in arbitration agreements is higher than some other California courts have held in the recent past. In *Baltazar v. Forever 21, Inc.*,[1] the court rejected a panoply of arguments challenging arbitration agreements. The court held that: (1) the failure to attach the arbitration provider's rules to the agreement does not in and of itself create procedural unconscionability unless the employee is challenging some element of the rules themselves that she was unaware of when signing the agreement; (2) it is not unconscionable to allow the parties to seek temporary restraining orders or preliminary injunctive relief in court, even if the employer is more likely to seek such relief; (3) listing employee claims as examples of claims subject to the agreement does not create a one-sided arbitration agreement; and (4) a confidentiality provision is not unconscionable if it is based on a need to protect trade secrets, does not limit use of the information in arbitration, and does not prevent the determination that any specific information was or was not a trade secret or otherwise qualified as confidential.

In *Sandquist v. Lebo Auto., Inc.*,[2] the California Supreme Court addressed the question of who decides whether an arbitration agreement permits or prohibits classwide arbitration. The court held that "no universal rule allocates this decision in all cases to either arbitrators or courts."[3] Instead, who decides is based on the parties' agreement, subject to interpretation under state contract law. Because the arbitration agreement at issue applied to all claims related to employment, its silence on who should decide the issue meant that the presumption in favor of arbitration resulted in the arbitrator deciding the question.

In *Morris v. Ernst & Young, LLP*,[4] the plaintiff challenged a "concerted action waiver" arguing that it violated the National Labor Relations Act (NLRA) by interfering with the right of employees to pursue work-related legal claims together. Dismissing contrary holdings by the Second, Fifth, and Eighth Circuits, as well as the California Supreme Court, the Ninth Circuit joined the Seventh Circuit and held that the "concerted action waiver" violated the NLRA, thus adopting the view of the currently constituted NLRB. (On September 8, 2016, Ernst & Young filed a petition for certiorari with the United States Supreme Court; calendared for consideration on January 7, 2017.)

Disability

Several California Court of Appeal opinions emphasized the expansive protections for California workers in the disability context. *Castro-Ramirez v. Dependable Hwy. Express, Inc.*[5] is the most notable, as it addressed potential accommodation obligations for those *associated* with people with disabilities.

For years, Castro-Ramirez had been accommodated in his work schedule so that he could be home in time each night to operate a dialysis machine for his disabled son. Then, his new supervisor rejected the scheduling agreement and allegedly fired him for refusing to work a shift that would have delayed him getting home in time for his son's dialysis. Castro-Ramirez sued for associational

disability discrimination and failure to accommodate in violation of the Fair Employment and Housing Act (FEHA), among other things. He later abandoned the failure to accommodate claim. The defendant moved for summary judgment, which the trial court granted.

The court of appeal reversed, finding a triable issue of fact with respect to the disability discrimination claim based on the express language of FEHA, specifically, Cal. Government Code § 12926(o): "'physical disability' . . . includes a perception . . . that the person is associated with a person who has, or is perceived to have" a physical disability. The original published opinion also held that FEHA creates a duty for employers to provide reasonable accommodations to applicants and employees who are associated with persons with disabilities. After a rehearing, however, the court retreated from its position, determining that because the plaintiff had abandoned his failure to accommodate cause of action, it would not decide that point. It stated in dicta, however, that

> "when section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical . . . disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person."[6]

Because the cause of action was abandoned,

> "[w]e only observe that the accommodation issue is not settled and that it appears significantly intertwined with the statutory prohibition against disability discrimination. . . ."[7]

Thus, whether employers have an obligation to accommodate workers who are "associated with" disabled individuals (including family members) remains undecided for now.

Moore v. Regents of the Univ. of California[8] contains a lengthy, thoughtful discussion of perceived disability claims under FEHA as well as claims under the California Family Rights Act (CFRA). In this case, plaintiff Moore was a Director of Marketing for UC San Diego. She was diagnosed with idiopathic cardiomyopathy, and for a period of time wore a device called a "LifeVest" to monitor her condition. Plaintiff claimed that even though her condition did not impair her in the performance of her job duties, her supervisor treated her as if it did, taking away responsibilities and giving work assignments to others. The court of appeal held that the determination that an employee did not have a disability was not a proper basis to reject claims for failure to accommodate and failure to engage in the interactive process under FEHA. The court quoted the rationale laid out in *Gelfo v. Lockheed Martin Corp.*:

> "An employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions."[9]

The court also rejected the trial court's conclusion that Moore was not denied an accommodation because she was terminated prior to any denial of her request for time off for surgery.

With respect to the CFRA-based causes of action, the court rejected the argument that, because the plaintiff testified that she had not intended to use a protected leave for her surgery, she had not exercised her right to take CFRA leave. The court held that "the relevant question is not whether a plaintiff expressly requested CFRA leave, but rather whether she exercised her right to take leave and whether the purpose for the leave sought was a qualifying CFRA purpose."[10] The court also stated that "summary adjudication of an interference claim under CFRA may not be appropriate where, as here, the record fails to establish—as a matter of law—that the employer satisfied a threshold requirement of its obligations to an employee under CFRA"[11] — including the giving of notice of leave rights.

In *Wallace v. County of Stanislaus*,[12] the court reversed judgment in favor of the defendant in a disability discrimination case. The plaintiff had been removed from his job and placed on an unpaid medical leave of absence based on the employer's erroneous assessment that he could not safely perform his job duties. He sued for disability discrimination, among other causes of action. The trial court inserted into the jury instructions (CACI 2540) and verdict form a requirement that the plaintiff establish that the defendant regarded or treated him "as having a disability in order to discriminate." The jury found for the plaintiff on each of the elements of disability discrimination except for the one added by the court. The court of appeal concluded that the jury instruction and special verdict form in the first trial was erroneous. In its opinion, the court explored the role that "animus" plays in a disability discrimination case. It held that:

> California law does not require an employee with an actual or perceived disability

> to prove that the employer's adverse employment action was motivated by animosity or ill will against the employee. Instead, California's statutory scheme protects employees from an employer's erroneous or mistaken beliefs about the employee's physical condition. In short, the Legislature decided that the financial consequences of an employer's mistaken belief that an employee is unable to safely perform a job's essential functions should be borne by the employer, even if the employer's mistake was reasonable and made in good faith.[13]

Interestingly (or strangely, depending on one's perspective), the court seemed to suggest that, because disability claims are "fundamentally different" from other forms of claimed discrimination, a showing of ill will or conscious hostility *is* a necessary prerequisite to prove other (non-disability related) forms of discrimination. This suggestion appears at odds with both federal and state law.[14] Indeed, neither the California Supreme Court in its most recent pronouncement about discrimination—*Harris v. City of Santa Monica*[15]—nor the CACI jury instruction for employment discrimination (No. 2500), makes animus a requirement for proof of employment discrimination.

Ultimately, because the jury found for the plaintiff on all of the necessary elements of disability discrimination, the retrial was limited to determining the amount of damages resulting from the employer's decision to place the plaintiff on an unpaid leave of absence.

Retaliation

A trio of retaliation cases confirms that retaliation claims remain among the most favored employment claims in federal court. *Heffernan v. City of Paterson, N.J.*[16] held that the First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity—even if those taking action were mistaken about the employee's involvement in the political activities:

> [T]he government's reason for demoting [the plaintiff] is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.[17]

The Court reasoned that the constitutional harm consists in large part of discouraging other employees, as "the discharge of one tells the others that they engage in protected activity at their peril."[18]

In *Stilwell v. City of Williams*,[19] a city employee sued his employer, asserting a 42 U.S.C. § 1983 claim for violation of the First Amendment and a claim for retaliation in violation of the Age Discrimination in Employment Act (ADEA). He alleged that he was fired for planning to testify in a lawsuit relating to age discrimination. The Ninth Circuit held that the employee's sworn statement and imminent testimony were protected under the First Amendment and that the district court had erred in holding that the ADEA precluded his § 1983 retaliation claim.

In *Rosenfield v. GlobalTranz Enters., Inc.*,[20] the Ninth Circuit reversed the summary judgment that had been entered in favor of the defendant, holding that a former HR manager could proceed with her Fair Labor Standards Act (FLSA) retaliation claim. The court held that she could state a retaliation claim regardless of her job duties, as long as her employer had "fair notice" that she was "making a complaint that could subject [it] to a later claim of retaliation."[21] The court held that this standard requires that the employer must be able to "understand [the complaint], in light of both content and context, as an assertion of rights protected by the statute and a call for their protection," and that the determination must be made on a case-by-case basis.[22] In this case, the HR manager's reports of wage violations had to be construed as protected, as it was her boss who "considered himself solely responsible for FLSA compliance," and he "did not understand, appreciate, or welcome [plaintiff's] bringing to his attention the FLSA violations."[23]

Attorneys' Fees and Costs

Perhaps the most significant attorneys' fees case for California employment lawyers was *Laffitte v. Robert Half Int'l Inc.*[24] *Laffitte* involved a wage and hour class action that settled before trial for $19 million. The settlement agreement provided that class counsel would receive no more than a third of that amount for attorneys' fees, awarded out of the common fund. Class counsel sought court approval for the maximum fee amount. The trial court approved the settlement and awarded the requested fee. On review, the California Supreme Court confirmed that "a trial court [may] calculate an attorney fee award from a class action common

fund as a percentage of the fund, while using the lodestar-multiplier method as a cross-check of the selected percentage."[25] Under the "lodestar cross-check" approach, if a comparison between the percentage and lodestar calculations produces an imputed multiplier far outside the normal range, indicating that the percentage fee would reward counsel for their services at an extraordinary rate, the trial court will have reason to reexamine its choice of a percentage.

In *DeSaulles v. Community Hosp. of Monterey Peninsula*,[26] the California Supreme Court addressed the question of whether a plaintiff who voluntarily dismisses an action after entering into a monetary settlement is a "prevailing party" under Civil Procedure Code § 1032(a)(4). The court held that "[w]hen a defendant pays money to a plaintiff in order to settle a case, then plaintiff obtains a 'net monetary recovery,' and a dismissal pursuant to such a settlement is not a dismissal 'in [the defendant's] favor.'"[27] The court explained that "just as a plaintiff cannot avoid a cost award by dismissing an action on the eve of trial, so a defendant cannot avoid a cost award merely by settling on the eve of trial."[28]

The U.S. Supreme Court also weighed in on attorneys' fees this year. In *CRST Van Expedited, Inc. v. E.E.O.C.*,[29] it held that a favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed under Title VII's attorneys' fees provision.

Wage and Hour

The U.S. Supreme Court took on a number of wage and hour cases in its last term. Of note, in *Tyson Foods, Inc. v. Bouaphakeo*,[30] the Court held that a representative or statistical sample may, depending on the degree to which it is reliable, be used to show predominance of common questions of law or fact for purposes of class certification.

In *Encino Motorcars, LLC v. Navarro*,[31] the Court held that *Chevron* deference would not be applied to a Department of Labor (DOL) regulation interpreting the term "salesman" to exclude service advisors in an FLSA provision exempting salesmen engaged in selling or servicing automobiles from overtime pay requirements. The 2011 regulation was issued without the reasoned explanation that was required in light of the DOL's change from its longstanding position that service advisors are exempt under § 213(b)(10)(A). In addition, the DOL did not analyze or explain why the statute should be interpreted to exempt dealership employees who sell vehicles, but not dealership employees who sell services. The lack of a reasoned explanation resulted in a rule that could not carry the force of law.

Although not an employment law case, *Campbell-Ewald Co. v. Gomez*,[32] has important ramifications in the employment class action context, as it answers a question left open in *Genesis Healthcare Corp. v. Symczyk*:[33] Is an unaccepted offer to satisfy the named plaintiff's individual claim sufficient to render a case moot, when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated? In *Campbell-Ewald Co.*, the Supreme Court held that an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case.

Other

Several other cases from 2016 are worth highlighting. Two cases involving teachers reached our state and federal high courts, and in both, future action is expected. In *Vergara v. State of California*,[34] public school students sued the State, alleging that statutes governing teacher tenure, dismissal, and layoffs violated the equal protection rights of poor and minority students under the California Constitution. The trial court determined that the students' rights were violated. The evidence showed that tenure decisions were required to be made before teachers could be properly assessed, teachers were difficult to terminate once tenured, and they were laid off based on seniority rather than competence. The court concluded that the practical effect of these statutes was that incompetent teachers were prevalent, hard to fire, and were frequently assigned to schools with low-income and minority students, violating the students' constitutional rights. The court of appeal reversed, holding that the facial challenge to the statutes failed, as they did not inevitably cause low-income and minority students to be disproportionately assigned to grossly ineffective teachers in violation of equal protection, and that other students assigned to grossly ineffective teachers were not a sufficiently identifiable group for purposes of equal protection. The California Supreme Court denied review, but Justices Liu and Cuellar each issued impassioned dissenting statements about the errors in the court of appeal's equal protection analysis.

In *Friedrichs v. California Teachers Ass'n*,[35] the U.S. District Court for the Central District of California, at the request of counsel for the plaintiff teachers, entered judgment on the pleadings in favor of the union defendants, holding under prior authority[36] that although public employees who do not join a union cannot be required to pay for the union's political activities, they can be charged an "agency" or "fair share" fee to pay for other costs that the union incurs (e.g., for collective bargaining). Employees who do not want to pay for the union's political

activities must affirmatively opt out. As they had in the district court, counsel for the plaintiffs invited the Ninth Circuit to affirm in favor of the defendants, in order to put the issue squarely before the U.S. Supreme Court, where they hoped to have the unfavorable precedents overturned. Then, the Supreme Court "affirmed by an equally divided court" (post-Scalia). The plaintiffs petitioned for a rehearing to take place "once a new Justice is seated." Although the Court denied the petition, with the probable appointment and confirmation of a new Supreme Court Justice imminent as a result of the November election, this issue is likely to be back before the Court in the immediate future.

Un Hui Nam v. Regents of the Univ. of California[37] rejected the "misguided reading of the anti-SLAPP law" by the Regents, which contended that the gravamen of a plaintiff's claims for sexual harassment and retaliation arose from the Regents' protected First Amendment activity:

> It has been suggested that '[t]he cure has become the disease—SLAPP motions are now just the latest form of abusive litigation.' [Citation omitted.] And the disease would become fatal for most harassment, discrimination, and retaliation actions against public employers if we were to accept the Regents of the University of California's (University) misguided reading of the anti-SLAPP law and reverse the trial court's denial of its motion to strike.[38]
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> . . .
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> It is hard to imagine that a resident's complaint alleging retaliatory conduct was designed to, or could, stifle the University from investigating and disciplining doctors who endanger public health and safety. The underlying lawsuit may or may not have merit that can be tested by summary judgment, but it is quite a stretch to consider it a SLAPP merely because a public university commences an investigation.[39]

Conclusion

There were quite notable developments in several areas of employment law this year. 2017 will likely be an even more interesting year in employment law, particularly given the likely changes in the composition of the United States Supreme Court.

ENDNOTES

1. 62 Cal. 4th 1237 (2016).
2. 1 Cal. 5th 233 (2016).
3. *Id.* at 241.
4. 834 F.3d 975 (9th Cir. 2016).
5. 2 Cal. App. 5th 1028 (2016).
6. *Id.* at 1038-39.
7. *Id.* at 1039.
8. 248 Cal. App. 4th 216 (2016).
9. *Id.* at 242 (quoting *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34, 59 (2006)).
10. 248 Cal. App. 4th at 248-49.
11. *Id.* at 252.
12. 245 Cal. App. 4th 109 (2016).
13. *Id.* at 115.
14. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617 (1987) (holding that, although "there was no suggestion . . . that the [defendant] held any racial animus against or denigrated blacks," defendant still could be held liable for racial discrimination 'regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities.'"); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1283–84 (11th Cir. 2000) ("plaintiff need not prove that a defendant harbored some special 'animus' or 'malice' towards the protected group to which she belongs").
15. 56 Cal. 4th 203 (2013).
16. 136 S. Ct. 1412 (2016).
17. *Id.* at 1418.
18. *Id.* at 1419.
19. 831 F.3d 1234 (9th Cir. 2016).
20. 811 F.3d 282 (9th Cir. 2015).
21. *Id.*at 286.
22. *Id.*
23. *Id.* at 288.
24. 1 Cal. 5th 480 (2016).
25. *Id.* at 488.
26. 62 Cal. 4th 1140 (2016).
27. *Id.* at 1144.
28. *Id.* at 1154.
29. 136 S. Ct. 1642 (2016).
30. 136 S. Ct. 1036 (2016).
31. 136 S. Ct. 2117 (2016).
32. 136 S. Ct. 663 (2016).
33. 133 S. Ct. 1523 (2013).
34. 246 Cal. App. 4th 619 (2016).
35. 136 S. Ct. 1083 (2016).
36. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S. Ct. 1782 (1977) and *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir. 1992).
37. 1 Cal. App. 5th 1176 (2016).
38. *Id.* at 1179.
39. *Id.* at 1193.