Top Employment Cases of 2017

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Although there were fewer than usual employment law decisions in 2017, we did see important new developments with respect to discovery in PAGA cases, the reach of workers' compensation exclusivity/claim preclusion, retaliation, and the California Family Rights Act.

Workers' Compensation

2017 saw three interesting workers' compensation cases—two with potentially far-reaching ramifications: *Ly v. County of Fresno,*[1] which holds that a decision from the Workers' Compensation Appeals Board can preclude a subsequent claim under the Fair Employment and Housing Act (FEHA); *Light v. Department of Parks & Recreation*,[2] which addresses the scope of workers' compensation exclusivity; and *M.F. v. Pacific Pearl Hotel Mgmt., LLC*,[3] which holds that workers' compensation exclusivity does not preclude a sexual harassment claim against an employer based upon the conduct of a nonemployee trespasser.

In *Ly*, the court of appeal gave preclusive effect in a FEHA discrimination lawsuit to prior workers' compensation rulings against the plaintiff employees and granted summary judgment to the employer. Three Laotian correctional officers sued their employer, the County of Fresno, for discrimination, harassment, and retaliation. They contemporaneously filed workers' compensation claims for psychiatric injuries arising from the same alleged acts. The WCAB administrative law judges denied the employees' claims. Then, in the employees' FEHA action, the employer moved for summary judgment, arguing that the WCAB rulings were binding.

The trial court granted summary judgment, finding that the workers' compensation proceedings were judicial in nature and that the doctrine of collateral estoppel barred the FEHA claims because: (1) each plaintiff was afforded the opportunity to present evidence and call witnesses; (2) the issues litigated were identical; and (3) each administrative law judge found that the County's actions "were non-discriminatory, in 'good faith,' and based upon 'business necessity.'" The officers appealed. The court of appeal affirmed, holding that "[w]hile workers' compensation was not plaintiffs' exclusive remedy, once they elected to pursue that remedy to a final, adverse judgment instead of insisting on the primacy of their rights under the FEHA, the WCAB became the exclusive *forum* to recover for their injuries."[4]

Although the workers' compensation cases happened to be resolved in favor of the employer, one can easily imagine the opposite result in which the employer *lost* before the WCAB and that result might then became collateral estoppel/res judicata *against* the employer in a pending civil action arising under FEHA.

In *Light*, the court of appeal held that claims of intentional infliction of emotional distress based on discrimination and retaliation in violation of FEHA are not subject to workers' compensation exclusivity. Melony Light worked for the California Department of Parks and Recreation. She alleged a claim for intentional infliction of emotional distress against both the Department and her supervisor. The trial court granted summary judgment in favor of the defendants, holding that Light's claim was subject to workers' compensation exclusivity. The court of appeal reversed in part, holding that workers' compensation did not provide the exclusive remedy for alleged emotional distress arising from discrimination and

retaliation, because such conduct exceeds the risks inherent in the employment relationship.

In *M.F.*, a housekeeping employee sued her employer, the Pacific Pearl Hotel, for sexual harassment and for failure to prevent sexual harassment in violation of FEHA after a non-employee/trespasser sexually assaulted and raped her. Pacific Pearl demurred to the complaint, arguing that M.F. had not pleaded sufficient facts to show Pacific Pearl knew or should have known about any conduct by the trespasser requiring action by Pacific Pearl or putting Pacific Pearl on notice a sexual assault might occur. Consequently, Pacific Pearl argued the complaint did not state viable claims under FEHA and the claims were barred by the workers' compensation exclusivity doctrine. The superior court agreed, sustaining Pacific's demurrer without leave to amend and dismissing M.F.'s complaint with prejudice. The court of appeal reversed, holding that the facts alleged were sufficient to state claims under FEHA for sexual harassment by a nonemployee[5] and for failure to prevent such harassment (California Government Code § 12940(k)).

California Family Rights Act

Bareno v. San Diego Cmty. Coll. Dist.[6] is a terrific California Family Rights Act (CFRA) case for employees. Leticia Bareno was employed as an Administrative Assistant at San Diego Miramar College (the College). She required medical treatment and leave, and she requested it from her supervisor and provided supporting medical documentation. After the initial leave time ended, Bareno continued to miss work. She attempted to e-mail her supervisor a recertification of her need for additional medical leave, but the College claimed that her supervisor did not receive it. As a result, after she was out for an additional five days, the College took the position that she had "voluntarily resigned." After she received news of the decision, Bareno attempted to provide the College with information regarding the medical necessity of the leave that she had taken. The College refused to reconsider its position. Bareno sued, alleging that in effectively terminating her employment, the College retaliated against her for taking medical leave, in violation of CFRA, California Government Code § 12945.2. The College moved for summary judgment, which the trial court granted.

The court of appeal reversed. It held that "the question '[w]hether notice is sufficient under CFRA is a question of fact.'"[7] The court found the following three disputed issues of material fact: (1) whether Bareno's supervisor had timely received the e-mail providing the supervisor with notification of Bareno's need for additional medical leave; (2) whether the College did not fulfill its obligations under CFRA, which places an obligation on employers to inquire of an employee if it requires additional information from that employee regarding the employee's request for leave;[8] and (3) whether the College decided to interpret Bareno's absences as a "voluntary resignation," despite evidence to the contrary, in retaliation for taking medical leave.

The court emphasized that "[m]any employment cases present issues of intent, . . . motive, and hostile working environment, issues not determinable on paper. Such cases . . . are rarely appropriate for disposition on summary judgment, however liberalized [summary judgment standards may] be."[9]

Retaliation

Three important retaliation cases were decided in 2017—one from the Ninth Circuit (*Arias v. Raimondo*[10]) and two from the California Court of Appeal (*Dinslage v. City & Cty. of San Francisco*[11] and *Husman v. Toyota Motor Credit Corp.*[12]).

In *Arias*, the Ninth Circuit expansively interpreted the anti-retaliation provision of the Fair Labor Standards Act (FLSA) to hold that a defendant's outside counsel could be liable for retaliation. José Arnulfo Arias worked as a milker for Angelo Dairy. The dairy did not complete a Form I-9 when it hired Arias. According to the appellate court, "[i]nstead of complying with federal law, the Angelos wielded it as a weapon to confine Arias in their employ" by threatening to report Arias to immigration authorities when, for example, he considered accepting employment elsewhere.

In 2006, Arias filed a lawsuit against the dairy on behalf of himself and other employees, alleging violations of wage and hour laws. Ten weeks before the trial was scheduled to begin, the employer's attorney, Anthony Raimondo, enlisted the services of Immigration and Customs Enforcement (ICE) in an effort to have Arias deported. There was evidence of "Raimondo's pattern and practice of similar conduct in other cases." In this lawsuit against Raimondo personally, Arias alleged that Raimondo violated the anti-retaliation provision of the FLSA. Raimondo's sole legal defense was that because he was never Arias's employer, he was immune from liability under the FLSA. The district court dismissed Arias's complaint. However, the Ninth Circuit reversed, holding that the FLSA's anti-retaliation provision applies to "any person," including a "legal representative" such as Raimondo.[13]

In sharp contrast to the expansive holding in *Arias*, *Dinslage* and *Husman* should serve as reminders that not all oppositional conduct will qualify as protected activity.

In *Dinslage*, plaintiff David Dinslage was a 38-year employee of the San Francisco Recreation and Parks Department. After he was laid off as part of a large reduction-in-force, he sued the city for age

discrimination, retaliation, and harassment in violation of FEHA. He claimed that he was harassed and retaliated against because of his age and because he opposed actions that he believed discriminated against disabled members of the general public. Dinslage had vocally supported the rights of the disabled community served by the Department. The City moved for summary judgment, which the trial court granted. Dinslage appealed and the court of appeal affirmed. In the published portion of the opinion, the court of appeal held that Dinslage had not engaged in protected activity because he had not opposed any unlawful *employment* practices, and therefore he could not have reasonably believed that the practices were prohibited by FEHA even if there may have been "discrimination" in some form.

In *Husman*, plaintiff Joseph Husman sued his former employer for retaliation in violation of FEHA and for wrongful discharge. He alleged that he had been fired from his executive-level management position because of criticisms he made concerning his employer's commitment to diversity—i.e., retaliation in violation of FEHA. Toyota's motion for summary judgment on Husman's retaliation claim was granted and he appealed. The court of appeal affirmed. Generalized comments about there being a need for more work toward creating LBGT diversity were insufficient to constitute "criticism or opposition salient to an act reasonably believed to be prohibited by FEHA."[14]

Notably, the case limits the so-called hirer-firer or same-actor inference as a summary judgment argument. The court of appeal noted that while the same-actor inference was "once commonly relied on by courts affirming summary judgment against a plaintiff alleging discriminatory action, the same-actor inference has lost some of its persuasive appeal in recent years." The court of appeal then went on to explain that "[p]sychological science on moral licensing reveals that, when a person makes both an initial positive employment decision and a subsequent negative employment decision against a member of a protected group, the second negative decision is *more likely* to have resulted from bias, *not less*."[15]

Sexual Harassment

2017 was a year in which sexual harassment became newsworthy in a way we haven't seen since the media frenzy surrounding the allegations of sexual harassment made by Professor Anita Hill against Clarence Thomas in 1991. Despite the media attention, there was only one sexual harassment decision of note in 2017—*Zetwick v. County of Yolo*.[16] Victoria Zetwick was a correctional officer for Yolo County. She sued the County and County Sheriff Edward Prieto, alleging that he created a sexually hostile work environment in violation of Title VII and FEHA. Over the course of 12 years, he greeted her with unwelcome chest-to-chest hugs more than 100 times and kissed her once, aiming for her lips. He hugged and kissed other female officers, but no male officers.

Defendants moved for summary judgment, asserting that the sheriff's conduct was not severe or pervasive, but was instead innocuous and socially acceptable. The trial court granted the motion, and Zetwick appealed. The Ninth Circuit reversed, holding that there were genuine issues of material fact as to whether Sheriff Prieto's conduct was sufficiently severe or pervasive so as to create an abusive environment. The Ninth Circuit also held that the district court had applied the incorrect legal standard because it found that the conduct was not "severe *and* pervasive" (as opposed to the disjunctive form) and concluded that this may have influenced the decision to grant summary judgment.

The court rejected the notion that there could be a "mathematically precise test" based on the frequency of the hugs. In reaching its conclusion, the Ninth Circuit concluded that the district court had failed to consider the totality of the circumstances, including the impact of harassment from a supervisor, the effect the behavior had on Zetwick, and the evidence that Prieto hugged and kissed other women.

Disability

In *Featherstone v. Southern Cal. Permanente Med. Grp.*[17] the court of appeal held that an employee who suffered from an alleged "altered mental state" need not be allowed to rescind her resignation. Ruth Featherstone alleged that her former employer (SCPMG) discriminated against her based on a "temporary disability" during which time she resigned from her job in a telephone conversation with her supervisor so that she could "do God's work" and then, a few days later, confirmed her resignation in writing.

When Featherstone emerged from the altered mental state (which caused her to take off all of her clothes and walk around naked in front of others, swear at family members, and take showers for no reason), she sought to rescind her resignation, which SCPMG declined to permit her to do. She alleged that SCPMG acted with discriminatory animus by refusing to allow her to rescind her resignation. The trial court granted summary judgment in favor of SCPMG, and the court of appeal affirmed, holding that the refusal to allow a former at-will employee to rescind a resignation is not an adverse employment action under FEHA.

PAGA

In *Williams v. Superior Court,*[18] the California Supreme Court confirmed that broad discovery is available in claims brought under California's Private Attorneys General Act (PAGA). Michael Williams brought a putative class action against his employer under PAGA for failure to: provide employees with meal and rest breaks or premium pay in lieu thereof; provide accurate wage statements; reimburse employees for necessary business-related expenses; and pay all earned wages during employment. During discovery, Williams sought contact information for all other California employees. When Marshalls resisted, Williams filed a motion to compel. The trial court granted the motion to compel as to the Costa Mesa store where Williams worked, but denied it as to every other California store, conditioning any renewed motion for discovery on Williams' sitting for a deposition and showing some merit to the underlying action. Williams petitioned the court of appeal to compel the trial court to vacate its discovery order. The court of appeal denied the writ.

The California Supreme Court granted review and concluded that in the absence of privilege, the right to discovery in California is a broad one, to be construed liberally so that parties may ascertain the strength of their case and at trial the truth may be determined. The supreme court explained that in prior non-PAGA class action opinions decided by the supreme court and the court of appeal, the contact information of those a plaintiff purports to represent is routinely discoverable as an essential prerequisite to effectively seeking group relief, without any requirement that the plaintiff first show good cause. The court went on to hold that nothing in the characteristics of a PAGA suit, essentially a qui tam action filed on behalf of the state to assist it with labor law enforcement, affords a basis for restricting discovery more narrowly than would be available in the class action context.

Wage and Hour

In response to three questions asked of it by the United States Court of Appeals for the Ninth Circuit,[19] the California Supreme Court opined, in *Mendoza v. Nordstrom, Inc*,[20] as follows regarding Labor Code §§ 551, 552 and 556:

1. A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited.
2. The exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If on any one day an employee works more than six hours, a day of rest must be provided during that workweek, subject to whatever other exceptions might apply.
3. An employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest.

With these principles in mind, the Ninth Circuit held that the two employees in this case who sought to lead the PAGA action did not work more than six consecutive days in any one workweek, so their individual claims under Labor Code §§ 551 and 552 were properly dismissed. In response, the two plaintiffs (or, more accurately, their lawyers) argued that the case should be remanded to the district court to permit a new PAGA representative who did suffer violations under the statute to "step forward." The Ninth Circuit disagreed and affirmed dismissal.

In *Augustus v. ABM Sec. Servs., Inc.*,[21] the California Supreme Court delivered early holiday gifts to thousands of security guards employed by ABM Security Services, Inc. Jennifer Augustus filed a putative class action on behalf of those security guards, arguing that its policy requiring guards to keep their pagers and radio phones on—even during rest periods—and to respond to calls as needed violated their right to the rest periods required by state law. The plaintiffs moved for summary judgment, which the trial court granted, finding ABM liable and awarding approximately $90 million. ABM appealed and the court of appeal reversed.

The California Supreme Court granted review to address two related issues: whether employers are required to permit their employees to take off-duty rest periods under Labor Code § 226.7 and Industrial Welfare Commission (IWC) Wage Order No. 4-2001;[22] and whether employers may require their employees to remain "on call" during rest periods. The California Supreme Court reversed the court of appeal and reinstated the $90 million judgment, concluding that state law prohibits on-duty and on-call rest periods. During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time. On-call rest periods are "irreconcilable with employees' retention of freedom to use rest periods for their own purposes." As the court explained: "A rest period, in short, must be a period of rest." In a concurring and dissenting opinion, Justice Kruger expressed concern about the court's reinstatement of a $90 million judgment despite the fact that "the record contains no evidence that the rest period of any member of

the plaintiff class was ever actually interrupted by a call to return to duty."[23]

Other

A few other cases from 2017 are worth highlighting. *Minnick v. Auto. Creations, Inc.*[24] dealt with the legality of an employer's vacation policy that did not provide for the accrual of vacation pay until after an employee had been employed for one year, at which time the employee would be entitled to one week of vacation and two weeks after two years. The court of appeal rejected a challenge to that policy, holding that it did not violate Labor Code § 227.3.

In *Beck v. Stratton*,[25] the court of appeal upheld an attorneys' fees award of $31,000 in attorney's fees on a $303 unpaid wage claim, with an additional $5,757.46 in liquidated damages, interest and statutory penalties.

Sviridov v. City of San Diego[26] involved the interplay between a Civil Procedure Code § 998 offer to compromise and the California Supreme Court's decision in *Williams v. Chino Valley Indep. Fire Dist.*[27] Sviridov sued for violations of FEHA, the Public Safety Officers Procedural Bill of Rights (POBRA), and other claims. During three points in the litigation, the City served the former employee with § 998 offers, offering to waive costs in exchange for a dismissal. After judgment was entered for the City, it sought and was awarded $90,000 in costs as the prevailing party under Civil Procedure Code §§ 1032 and 998. Sviridov appealed, arguing that *Williams*, which held that costs should not be awarded to a defendant in a FEHA case "unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit,"[28] precluded an award of costs.

However, Sviridov did not respond substantively to the City's argument that *Williams* does not apply, because the court properly awarded costs under § 998, and therefore forfeited his argument.[29] The court of appeal reasoned that a blanket application of *Williams* to preclude § 998 costs unless the FEHA claim was objectively groundless would erode the public policy of encouraging settlement. In reaching its decision to uphold the costs award, the court failed to engage in any balancing between the two statutes.

ENDNOTES

1. 16 Cal. App. 5th 134 (2017).
2. 14 Cal. App. 5th 75 (2017).
3. *Id.*
4. *Ly*, 16 Cal. App. 5th at 144 (emphasis in original).
5. Cal. Gov't Code § 12940(j)(1).
6. 7 Cal. App. 5th 546 (2017).
7. *Id.* at 565, *quoting Avila v. Continental Airlines, Inc.*, 165 Cal. App. 4th 1237, 1255 (2008).
8. *See* Cal. Code Regs., tit. 2, § 11091(a)(1) ("The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave.").
9. *Bareno*, 7 Cal. App. 5th at 561, *quoting Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 286 (2009).
10. 860 F.3d 1185 (9th Cir. 2017).
11. 5 Cal. App. 5th 368 (2016).
12. 12 Cal. App. 5th 1168 (2017).
13. *See also* Cal. Labor Code §§ 1019–1019.1 and Cal. Bus. & Prof. Code § 6103.7 (recently enacted California restrictions on "unfair immigration-related practices").
14. 12 Cal. App. 5th at 1188-89 (some internal citations and quotations omitted).
15. *Id.* at 1189.
16. 850 F.3d 436 (9th Cir. 2017).
17. 10 Cal. App. 5th 1150 (2017).
18. 3 Cal. 5th 531 (2017).
19. 865 F.3d 1261 (9th Cir. 2017).
20. 2 Cal. 5th 1074 (2017).
21. 2 Cal. 5th 257 (2016).
22. Cal. Code Regs., tit. 8, § 11040.
23. *Augustus*, 2 Cal. 5th at 274.
24. 13 Cal. App. 5th 1000 (2017).
25. 9 Cal. App. 5th 483 (2017).
26. 14 Cal. App. 5th 514 (2017).
27. 61 Cal. 4th 97 (2015).
28. *Id.* at 99.
29. *Sviridov*, 14 Cal.App.5th at 521.