Top Employment Cases of 2018

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During this past year, the United States Supreme Court, the California judiciary and the Ninth Circuit continued to take increasingly divergent paths regarding employment law issues. The United States Supreme Court has taken a narrow view of employee and union rights, while the California Supreme Court, California Courts of Appeal, and the Ninth Circuit have interpreted these rights more broadly. As a result, pre-dispute arbitration agreements and class-action waivers remain enforceable (barring action at the federal level), PAGA is still a powerful tool for employees in wage and hour matters, and many workers previously designated as independent contractors now fall under the protection of California's wage orders. As the #MeToo and #TimesUp movements have influenced more employees to step forward with harassment claims, several opinions involving hostile work environment issues reflect the evolving legal recourse available to victims.

U.S. Supreme Court Narrows Employee Rights with Respect to Arbitration, Labor Unions, and Whistleblowers

In *Epic Systems Corp. v. Lewis*,[1] the Supreme Court held that arbitration agreements between employers and employees waiving employees' rights to lead or participate in collective or class actions are enforceable under the Federal Arbitration Act (FAA) and do not violate section 7 of the National Labor Relations Act (NLRA). This means that an employer may lawfully require its employees to agree, as a condition of employment, to resolve all employment-related disputes in arbitration on an individual basis, and to waive their right to participate in a class or collective action. Notably, this case does not address whether representative action waivers (*i.e.*, a waiver of the right to bring a PAGA claim) are enforceable.

In *Janus v. American Fed'n of State, City, & Mun. Employees, Council 31*,[2] the Supreme Court struck down as unconstitutional provisions of the Illinois Public Labor Relations Act (IPLRA) allowing for non-union members to be charged a percentage of union dues to pay for collective bargaining and other "core" union activities. The law was challenged by a non-union member, Mark Janus, who was represented by a union in collective bargaining but disagreed with many of the union's public policy positions, including those regarding the pay and working conditions of public employees. Janus argued that requiring him to pay a percentage of union dues to support activities with which he disagreed violated his First Amendment right to freedom of speech. The Supreme Court agreed, overruling earlier precedent in *Abood v. Detroit Bd. of Educ.*[3] which had allowed the mandatory collection of union dues from non-members to support non-political activities including collective bargaining, but disallowed the mandatory collection of such fees for political activities such as supporting candidates for office. The Court found that the distinction drawn between political and apolitical activities of unions in *Abood* was incorrect, as virtually all of the activities of a union can be characterized as political in the ways urged by Janus. Relying on its previous decisions stating that individuals cannot be compelled to subsidize speech with which they disagree under the First Amendment, the Court struck down parts of the IPLRA and set a precedent that may soon be interpreted to render the entire country a "right to work" state for public employees, *i.e.*, make it unlawful throughout the nation to compel the payment of union dues from nonmembers.

In *Digital Realty Trust, Inc. v. Somers*,[4] the Supreme Court held that that the anti-retaliation provision

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in the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank") only applies to individuals who have reported violations of securities laws to the Securities and Exchange Commission (SEC). In doing so, it reversed the Ninth Circuit's holding that a person is protected by Dodd–Frank if they make internal disclosures, even if they did not also make a report to the SEC. In interpreting Dodd–Frank's protections this narrowly, the Supreme Court rejected the SEC's regulation on the topic and the position advocated by the Solicitor General.

California Supreme Court Interprets Employee Rights Broadly With Respect to Misclassification, Wage and Hour Laws, and Background Checks

In *Dynamex Operations W. v. Superior Court*,[5] the California Supreme Court decided what standard applies in determining whether workers should be classified as employees or independent contractors for purposes of the California wage orders. The court held that the "suffer or permit to work" definition of "employ" contained in the pertinent wage order may be relied upon in evaluating whether a worker is an employee or an independent contractor for purposes of the obligations imposed by the wage order. The court determined that in this context the "ABC" test should be applied to determine whether a worker is properly considered an independent contractor:

> [W]e conclude that unless the hiring entity establishes (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business, the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders. The hiring entity's failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order.[6]

Note that in *Garcia v. Border Transp. Group*, the court of appeal held that there is "no reason to apply the ABC test categorically to every working relationship" and that it was logical to apply it only to claims arising under the California wage orders and not to determining employee status for purposes of workers' compensation, wrongful termination, waiting time penalties, overtime, unfair competition, and indemnity claims under the Labor Code.[7]

In *Troester v. Starbucks Corporation*,[8] the California Supreme Court answered the following legal question from the Ninth Circuit: "Does the federal Fair Labor Standards Act's de minimis doctrine . . . apply to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197?"[9] Federal courts have applied the doctrine in some circumstances to excuse the non-payment of wages for small amounts of otherwise compensable time upon a showing that the time was administratively difficult to record.

The California Supreme Court held that California's wage and hour statutes and regulations have not incorporated the de minimis doctrine applicable to some FLSA claims. Indeed, the Labor Code *is* concerned with "small things"—such as 10-minute breaks. Although the de minimis rule has operated in other contexts in state law and may be incorporated by implication, it did not apply in this context, where the employer required employees to work "off the clock" for several minutes each shift.

The court further explained that two additional considerations serve as a basis to reject the doctrine. "First, the modern availability of class action lawsuits undermines to some extent the rationale behind a de minimis rule with respect to wage and hour actions. The very premise of such suits is that small individual recoveries worthy of neither the plaintiff's nor the court's time can be aggregated to vindicate an important public policy."[10] Further, the $102.67 that Starbucks characterizes as de minimis is "enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares" and "is not de minimis at all to many ordinary people who work for hourly wages."[11]

Second, many of the difficulties in recording time 70 years ago have been resolved by the ease with which employees can log their time via computers, smartphones, tablets, and other devices. The court declined to decide whether there are circumstances "where compensative time is so minute or irregular that it is unreasonable to expect the time to be recorded,"[12] and cited examples from FLSA litigation where the amount in question was minuscule (a minute or less per day), irregular/rare, or incidental to noncompensable time.

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In *Connor v. First Student, Inc.*,[13] a school bus driver filed a class action lawsuit against her employer First Student, alleging that it violated the California Investigative Consumer Reporting Agencies Act (ICRAA)[14] because it failed to provide the appropriate statutory notice and did not obtain written authorization before it conducted employee background checks. First Student asserted that ICRAA is unconstitutionally vague because the statute overlaps with the California Consumer Credit Reporting Agencies Act,[15] relating exclusively to credit checks. The California Supreme Court held that any partial overlap between the two statutes does not render one superfluous or unconstitutionally vague. Therefore, because First Student conducted a background check that reported on Connor's "character, general reputation, personal characteristics, or mode of living,"[16] it was an investigative consumer report subject to the stricter notice and authorization requirements of ICRAA.

Important Hostile Work Environment Opinions

In *Meeks v. Autozone, Inc.*[17] the plaintiff alleged that a coworker had made repeated sexual comments and advances towards her, sent her pornographic and sexual text messages and repeatedly attempted, one time successfully, to forcibly kiss her. When she reported this conduct, her superior threatened to fire her and her husband, who also worked for the employer, if they persisted in their complaints. Meeks filed a sexual harassment and retaliation lawsuit. The trial court granted summary adjudication against Meeks on her retaliation claim, Meeks dismissed the sexual battery claim, and the jury returned defense verdicts on the remaining claims.

The court of appeal affirmed dismissal of the retaliation claim but reversed the judgment on the remaining claims based on the trial court's exclusion of certain evidence. It held that the trial court erred in excluding plaintiff's proposed testimony regarding the contents of sexual and pornographic text messages sent by her coworker. Although plaintiff had lost or deleted the messages, the trial court found that she had not committed spoliation. The trial court nonetheless excluded the testimony, finding its inclusion would have been unfair because plaintiff could not remember the exact wording of the text messages. The appeals court held that the testimony should have been admitted under Evidence Code § 1523, which allows oral testimony to prove the contents of a writing when the writing is lost or destroyed with no fraudulent intent on the part of the proponent.

The appellate court also found that the trial court had improperly excluded "me too" evidence from other female employees who had been harassed by the same coworker who harassed plaintiff. Where other female employees had reported that they experienced the same types of harassment and the defendant put their testimony at issue by claiming that he had not treated female employees differently than male employees, the other female employees should have been allowed to testify as to his misconduct.

Finally, the court found that evidence of plaintiff's sexually tinged banter with the harasser was relevant to his theory that she consented to his comments. However, his claims that she had discussed her lower back tattoo with him in a sexually suggestive manner did not justify publishing a photo of the tattoo to the jury when it was not shown that she sent the photo to the harasser. The trial court's multiple mistaken evidentiary rulings resulted in prejudice to plaintiff necessitating a new trial. The trial court's grant of summary judgment on plaintiff's retaliation claim was affirmed on the basis that a threat to fire an employee which is never carried out does not constitute an adverse employment action.

In *Caldera v. Department of Corr. & Rehab.*,[18] the plaintiff worked as a correctional officer at a state prison. Caldera, who stutters when he speaks, was mocked or mimicked at least a dozen times over a period of about two years. A supervisor, Sergeant James Grove, participated in the mocking and mimicking, always in a mean-spirited manner and in front of others. On one occasion, Grove even mimicked Caldera's stuttering over the prison's radio system, which could be heard by about 50 employees. The harassing conduct was part of the culture at the prison. Caldera filed an internal EEO complaint against Grove, only to have Grove reassigned to the same area where Caldera had been working (they had separate chains of command). Grove continued to mock Caldera, including cursing at and about him with a mocking stutter.

Caldera sued the California Department of Corrections and Rehabilitation (CDCR) for disability harassment, failure to prevent harassment, and related claims under the FEHA, and he sued Grove individually for harassment. Defendants file a motion for summary judgment, which was granted and subsequently reversed in an unpublished opinion. At trial, a jury found in Caldera's favor, awarding him $500,000 in emotional distress damages. The trial court found the damage award to be

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excessive and granted the defendants a new trial solely as to damages. The parties cross-appealed.

The court of appeal agreed with Caldera, reversing the new trial order as to the damage award, confirming that the conduct was sufficiently severe or pervasive. The court admonished Defendants for misstating the record and failing to mention critical evidence in support of the plaintiff. The court also affirmed the verdict on the claim for failure to prevent harassment. It held that even though CDCR conducted training, Grove's harassment persisted after the training, such that a jury could reasonably conclude that the steps it took to prevent harassment were not effective.

PAGA Is in Essence a "Qui Tam" Action That Allows an Employee Affected by at Least One Labor Code Violation to Sue on Behalf of Others

Huff v. Securitas Sec. Servs. USA, Inc.[19] tested the limits of the Labor Code Private Attorneys General Act of 2004 ("PAGA").[20] Forrest Huff filed a PAGA action against his former employer Securitas, seeking penalties not only for Labor Code violations that personally affected him, but also those that only affected other employees. The trial court held that, so long as he demonstrated that he was affected by at least one Labor Code violation, Huff could pursue PAGA penalties on behalf of other employees for additional violations. Securitas appealed.

The court of appeal affirmed. It held that an employee who is affected by at least one Labor Code violation may pursue PAGA penalties on behalf of the State for unrelated violations by the same employer. The court looked to PAGA's definition of "aggrieved employee" as contained in § 2699(c): "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." It noted that "we cannot readily derive any meaning other than that from the plain statutory language, and Securitas does not offer a reasonable alternative for what those provisions mean when read together."[21] In reaching its holding, the court of appeal rejected Securitas's reliance on and analysis of PAGA's legislative history, as the statutory language itself was "unambiguous" and "none of the purported expressions of intent relied on by Securitas made its way into the statute."[22] Indeed, the Legislature had clearly expressed that PAGA was meant to address the lack of state enforcement resources by allowing private citizens to pursue violators. The court emphasized that PAGA is in essence a *qui tam* action, and the government is the real party in interest in the action. "So in this context, not being injured by a particular statutory violation presents no bar to a plaintiff pursuing penalties for that violation."[23]

In *Atempa v. Pedrazzani,*[24] the court of appeal held that an individual (i.e., an owner, officer, director, or agent of a corporate employer) can be personally liable under PAGA for civil penalties and attorneys' fees resulting from the employer's failure to pay minimum wages and overtime.

Closing the Gender Pay Gap

In *Rizo v. Yovino,*[25] the final opinion authored by Judge Stephen Reinhardt, published posthumously, an *en banc* panel of the Ninth Circuit eloquently explained why prior salary cannot be used to justify a gender wage differential in an Equal Pay Act claim. Aileen Rizo worked for the Fresno County Office of Education. Her salary was determined in accordance with the County's Standard Operating Procedure (SOP), which had ten stepped salary levels, each level containing ten steps within it. Per the SOP, salary is calculated by taking the individual's prior salary, increasing it by 5 percent, and placing the new employee in the corresponding step of the salary schedule. Several years into the job, Rizo learned that her male colleagues had been placed at higher salary steps when hired. Rizo sued, alleging among other things a violation of the federal Equal Pay Act.

The Ninth Circuit held: "[P]rior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands." Allowing prior salary to be a permissible "factor other than sex" would "allow the County to defend a sex-based salary differential on the basis of the very sex-based salary differentials the Equal Pay Act was designed to cure."[26] Therefore, the County failed as a matter of law to set forth an affirmative defense and the district court properly denied its motion for summary judgment. The Ninth Circuit left it to the district court to decide whether Rizo was entitled to summary judgment on her equal pay claim even though she did not move for summary judgment.

Note that the California Legislature passed AB 2282, which among other things amended California's Equal Pay Act to confirm that prior salary shall not, by itself or in combination with other factors, justify any disparity in compensation.

Prohibiting Overly Broad No-Rehire Provisions

Golden v. California Emergency Physicians Med. Grp.[27] examined the limits of no-rehire provisions commonly found in settlement

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agreements. Donald Golden, M.D., was an emergency room doctor affiliated with the California Emergency Physicians Medical Group (CEP), a large consortium of over 1,000 doctors that manages or staffs facilities throughout California. Dr. Golden sued CEP, including for race discrimination. The parties orally agreed to settle the case following a settlement conference. However, Dr. Golden refused to sign a written settlement agreement draft because of a no-rehire paragraph it contained. It stated that Golden would not be entitled to work or be reinstated (1) with CEP, (2) at any facility that CEP may own, manage, or contract with now or in the future, and (3) that CEP reserved the right to fire Golden if he was working at a facility it later acquired or to which it provided services.

The district court had ordered Golden to sign the agreement, and later ordered that it be enforced. Dr. Golden appealed, asserting that the no-rehire provision of the agreement violated Bus. & Prof. Code § 16600 as a contract restraining the lawful practice of a profession. In 2015, the Ninth Circuit reversed and remanded the case for the district court to determine whether the provision constituted a restraint of a substantial character to Dr. Golden's medical practice.[28] On remand, the district court ordered Dr. Golden to sign the agreement. Once again, Golden appealed.

The Ninth Circuit reversed and remanded. It held that the first provision, which pertained only to Dr. Golden's future employment at CEP was only a "minimal" impediment to his medical practice. However, the remainder of the paragraph, which affected not only Dr. Golden's employment at CEP but also current and future employment with third-parties "easily rises to the level of a substantial restraint, especially given the size of CEP's business in California."[29] The Ninth Circuit concluded by holding that because the paragraph was material to the settlement agreement, the entire agreement was void, and the district court abused its discretion in ordering Dr. Golden to sign it.

Arbitration Ethics

Honeycutt v. JP Morgan Chase Bank, N.A.[30] vacated an arbitration award based on inadequate arbitrator disclosures. Plaintiff Patrice Honeycutt sued JP Morgan Chase Bank (Chase) alleging employment law violations. The trial court compelled the dispute to arbitration. The arbitrator filled out a disclosure worksheet but left out one page, which asked whether the arbitrator intended to accept other employment offers from the parties. The arbitrator wrote a handwritten note on another page indicating that she would continue to consider employment offers from the parties. Following arbitration, the arbitrator found in favor of Chase. Plaintiff then demanded that the arbitrator provide the missing page of the disclosure worksheet and a list of other cases in which she had served as a neutral arbitrator for Chase. The arbitrator produced these documents, which showed that she had served as an arbitrator for Chase in eight disputes during the pendency of plaintiff's case, four of which had not been disclosed. Plaintiff sought the disqualification of the arbitrator and vacatur of the award, based on the arbitrator's failure to comply with Code of Civil Procedure section 1281.9, which requires arbitrators to make disclosures about themselves, their experience and potential conflicts of interest. Failure to timely make these disclosures can render the arbitrator subject to disqualification under § 1281.91.

The court found that the plaintiff waived her right to vacate the award based upon the arbitrator's incomplete disclosure worksheet by failing to timely object under Code of Civil Procedure § 1281.91(c). However, plaintiff was entitled to vacate the award on the basis of the arbitrator's failure to disclose the other offers and acceptances of employment from Chase during the pendency of the case. Because the arbitrator was actually aware of these offers and acceptances and did not timely notify plaintiff, the court vacated the arbitration award under Code of Civil Procedure § 1286.2(6).

ENDNOTES

1. 138 S. Ct. 1612 (2018).
2. 138 S. Ct. 2448 (2018).
3. 431 U.S. 209 (1977).
4. 138 S. Ct. 767 (2018).
5. 4 Cal. 5th 903 (2018), *reh'g denied* (June 20, 2018).
6. *Id.* at 956.
7. 28 Cal. App. 5th 558 (2018).
8. 5 Cal. 5th 829 (2018), *as modified on denial of reh'g* (Aug. 29, 2018).
9. *Id.* at 834.
10. *Id.* at 846.
11. *Id.* at 847.
12. *Id.* at 835.
13. 5 Cal. 5th 1026 (2018).
14. Cal. Civ. Code §§ 1786, *et seq.*
15. Cal. Civ. Code §§ 1785.1, *et seq.*
16. 5 Cal. 5th at 1038.
17. 24 Cal. App. 5th 855 (2018).
18. Cal. App. 5th 31 (2018).
19. 23 Cal. App. 5th 745 (2018).
20. Cal. Lab. Code §§ 2698, *et seq.*
21. 23 Cal. App. 5th at 754.
22. *Id.* at 755.
23. *Id.* at 757.
24. 27 Cal. App. 5th 809 (2018).
25. 887 F.3d 453 (9th Cir. 2018).
26. *Id.* at 456-57.
27. 896 F.3d 1018 (9th Cir. 2018).
28. *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1093 (9th Cir. 2015).
29. 896 F.3d at 1026.
30. 25 Cal. App. 5th 909 (2018).

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