Top Employment Law Cases of 2019

By Andrew H. Friedman, Ramit Mizrahi, and Anthony Oncidi



Andrew H. Friedman is a partner with Helmer Friedman LLP in Culver City, where he primarily represents employees in all areas of employment law. Mr. Friedman is the author of a leading employment law practice guide—*Litigating Employment Discrimination Cases* (James Publishing, 2007). Ramit Mizrahi is the founder of Mizrahi Law, APC in Pasadena, where she represents employees exclusively. She is Chair of the Pasadena Bar Association Labor and Employment Law Section and Immediate Past Chair of the CLA Labor and Employment Law Section. She can be reached at ramit@mizrahilaw.com. Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is (310) 284-5690 and his email address is aoncidi@proskauer.com.

In what has become the new normal, 2019 saw a continued deluge of employment decisions, an average of more than one new opinion each day! The courts also issued multiple important decisions that, while not in employment law cases, directly affect employment attorneys and their clients.

Federal and State Courts Continue to Churn out Arbitration Decisions

In a trio of cases—*Henry Schein, Inc. v. Archer & White Sales, Inc.*,[1] *Lamps Plus, Inc. v. Varela*,[2] and *New Prime Inc. v. Oliveira*,[3]—the U.S. Supreme Court addressed the scope of arbitration provisions and who (the court or an arbitrator) determines whether a matter is arbitrable in the first instance.

In *Henry Schein*, a non-employment law case, in a unanimous opinion by Justice Kavanagh, the Court held that where an arbitration agreement contains a delegation clause, the threshold issue of arbitrability must be decided by the arbitrator; rejecting the "wholly groundless" exception which many courts had adopted that allowed the trial court to decide that gateway issue.

In *New Prime*, a unanimous 8-0 decision (Justice Kavanaugh recused), the Court ruled that independent contractor drivers engaged by a transportation company cannot be forced to arbitrate their wage and hour claims under the Federal Arbitration Act's Section 1 exclusion for transportation workers engaged in foreign or interstate commerce, because that exclusion covers independent contractors as well as employees. The Court also held that a district court must make an "antecedent determination" of whether the Section 1 exemption applies to a contract *before* compelling arbitration, even if the parties' arbitration agreement contains a clause delegating such threshold determinations to the arbitrator.

Finally, in *Lamps Plus*, a 5-4 decision, the Court held, in an opinion written by Chief Justice Roberts, that, under the FAA, class-wide arbitration cannot be ordered if the arbitration agreement is ambiguous as to whether the parties agreed to it. In doing so, the Court emphasized that a "foundational FAA principle"—indeed, "the first principle that underscores all of our arbitration decisions"—is that "[a]rbitration is strictly a matter of consent."[4] Justice Ginsburg, joined by Justices Breyer and Sotomayor, wrote to "emphasize once again how treacherously the Court has strayed from the principle that 'arbitration is a matter of consent, not coercion.'"[5] She explained that Congress enacted the FAA "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes." Yet, the Court "has routinely deployed the law to deny to employees and consumers 'effective relief against powerful economic entities.'"[6]

In two other important cases—*OTO, LLC v. Kho*,[7] and *Subcontracting Concepts (CT), LLC v. De Melo*[8]—the California courts invalidated arbitration provisions as unconscionable.

In *OTO*, the California Supreme Court granted review to consider whether an arbitration agreement that required the waiver of statutory rights to a *Berman* hearing offered an accessible and affordable process

for resolving those disputes, consistent with *Sonic-Calabasas A., Inc. v. Moreno*.[9] However, the California Supreme Court never actually reached that issue. Instead, it concluded that the arbitration agreement in question involved such an unusually high degree of procedural unconscionability coupled with substantive unconscionability sufficient to render the entire agreement unenforceable. An important question for employers emerges in the wake of *OTO*, which is whether it is worth it to jeopardize the arbitration of more serious discrimination and harassment claims in order to secure arbitration of low-risk Labor Commissioner claims. In fact, why any employer would insist upon arbitration of a Labor Commissioner claim, where potential liability is rather limited, remains a bit of a mystery.

In *Subcontracting Concepts*,[10] the court of appeal analyzed an arbitration provision buried at the end of an "Owner/Operator Agreement" that was five pages long, in a small font. The arbitration clause provided that disputes within the jurisdictional maximum for small claims would be resolved there, and that all other disputes would be arbitrated in accordance with the FAA. The arbitration clause: (a) provided for arbitration before a three-arbitrator panel, with costs to be split; (b) contained a class action waiver; (c) prohibited PAGA actions; (d) limited each party to three depositions with a two-hour maximum each; and (e) limited the arbitrators to awarding actual monetary damages only, with no punitive or equitable relief, and no award of attorney fees or costs. De Melo was presented this agreement "on the spot" when he was hired. De Melo's native language is Portuguese, and he is not fluent enough to understand documents written in English. He was given the document in English, and no one explained it to him in any detail in Portuguese or English. He had no idea what arbitration was or the rights that he was giving up.

Several years later, De Melo filed a claim with the Labor Commissioner. SCI filed a petition to compel arbitration in court. The Labor Commissioner intervened and opposed the petition. The trial court denied the petition, concluding that the arbitration clause in the employment agreement was unconscionable. SCI appealed. The court of appeal affirmed, holding not only that *Armendariz*'s protections apply to both employees and independent contractors, but also that the agreement was unconscionable.

California Supreme Court Clarifies That Anti-SLAPP Statute Can Be Used to Screen Claims Alleging Discriminatory or Retaliatory Employment Actions

In *Wilson v. Cable News Network, Inc.*,[11] the California Supreme Court granted review to address a split over whether anti-SLAPP protections apply to otherwise protected conduct motivated by unlawful discrimination or retaliation. Stanley Wilson was fired from his position as a field producer with CNN, after 17 years with the network, allegedly for plagiarism. Wilson sued, alleging violations of the FEHA and CFRA, and that he was defamed when the network told prospective employers that he had committed plagiarism. CNN filed an anti-SLAPP motion under CCP § 425.16, arguing that the FEHA and CFRA causes of action were based largely on the firing, and that CNN's decision was "in furtherance of its right to determine who should speak on its behalf on matters of public interest." It argued that the defamation claim also arose from protected speech. The trial court granted the motion. The court of appeal reversed, holding that allegations of discrimination or harassment fall outside the scope of the anti-SLAPP statute.

The California Supreme Court granted review. It held that activity protected under the anti-SLAPP statute retains that protection even if the plaintiff alleges that the conduct was the result of unlawful motivations. "To conclude otherwise would effectively immunize claims of discrimination or retaliation from anti-SLAPP scrutiny, even though the statutory text establishes no such immunity." The court remanded for a determination of whether, CNN having met its burden on the first prong with respect to the termination, Wilson's FEHA and CFRA claims have the requisite minimal merit to proceed. With respect to the defamation claim, the court held that Wilson is not a figure so prominent that remarks about him would qualify as speech on a matter of public concern and the comments were not part of a larger public discourse about plagiarism.

Courts Expand Ability to Sue for Discrimination

In *Fort Bend County, Texas v. Davis*,[12] the Supreme Court held that the filing of an EEOC charge is not a "jurisdictional" requirement to initiating a Title VII lawsuit.

In *Galvan v. Dameron Hosp. Ass'n*,[13] the court of appeal reversed summary judgment in a discrimination/harassment case. Shirley Galvan alleged that her supervisor, Doreen Alvarez, harassed her and other Filipino employees based on their national origin and age. Alleging she was constructively fired, Galvan sued for a number of FEHA violations. Dameron moved for summary judgment and the trial court granted it.

The court of appeal reversed the judgment. With respect to the discrimination claim, the court of appeal held that Galvan had presented evidence that would allow a reasonable

trier of fact to find that Alvarez's conduct was based on national origin and age. Indeed, discrimination on the basis of an employee's foreign accent is a sufficient basis for finding national origin discrimination.

The court of appeal discussed the standards for constructive discharge and determined that they had been met. A reasonable factfinder could conclude that Alvarez, a supervisory employee, intentionally created working conditions that would have compelled a reasonable person to leave. In doing so, the court of appeal held that the trial court erred in requiring Galvan to show that Dameron Hospital knew of Alvarez's conduct prior to her resignation; Alvarez was a supervisor, and her conduct could bind Dameron.

In *Pearl v. City of Los Angeles*,[14] a harassment and retaliation case, the court of appeal affirmed a trial court's remittitur from $17,394,972 to $12,394,972 and denial of a new trial conditioned on the employee's acceptance of this sum. Pearl, who worked for the City's Bureau of Sanitation, filed a charge of race discrimination with the DFEH, naming several of his managers. After that, his supervisors began a campaign of retaliation against him, including his firing. Pearl appealed the termination and was reinstated. But, when he returned, the harassment and retaliation only escalated. Eventually, after Pearl experienced chest pains and fainted at work, his doctor placed him on medical leave.

The case went to trial, and the jury awarded Pearl $17,394,972 including $10 million in past noneconomic losses. The City moved for JNOV and a new trial. The City argued that plaintiff's counsel's statement at closing that the jury's verdict could change the City's culture, improperly inflamed the jury. At the hearing, the trial court indicated a belief that the award of $10 million in past non-economic damages was meant to punish the City. It therefore granted the motion for a new trial conditionally unless the plaintiff agreed to a reduced award of $5 million for past noneconomic damages. Pearl accepted, and the City appealed. The court of appeal affirmed.

Courts Also Expand Ability to Sue for Retaliation

In *Siri v. Sutter Home Winery, Inc.*,[15] the court of appeal held that an accountant could proceed with a whistleblower lawsuit even though documents underlying her claims were privileged. Siri was a staff accountant for Sutter Home Winery, where she filed sales and use tax returns for them. She repeatedly complained to top management that the company was out of compliance with California sales and use tax laws and had failed to pay use taxes on certain purchases. After that, the company began to retaliate against her, including by scrutinizing her, taking away job duties, giving an office promised to her to someone else, ostracizing her, and ultimately terminating her. Siri filed suit, alleging violations of Labor Code § 1102.5 and wrongful termination in violation of public policy. The defense moved for summary judgment on the ground that she would need to rely on Sutter's confidential tax returns to prove her claim, and that those were not discoverable because of the taxpayer privilege. The trial court granted summary judgment, and Siri appealed. The court of appeal reversed. It held that Sutter failed to show that Siri could not prove her case without using the actual tax returns: "Prosecution of plaintiff's claim does not require the forced production of defendant's returns or of the content of its returns. Plaintiff's right to recover turns only on whether she was discharged for communicating her reasonable belief that defendant was not properly reporting its use tax obligation." Thus, "Plaintiff is entitled to attempt to prove her claim without disclosing any information that is subject to the privilege."

In *Hawkins v. City of Los Angeles*,[16] the court of appeal affirmed a verdict and fee award in a whistleblower retaliation case. Todd Hawkins and Hyung Kim were hearing examiners working for the City of Los Angeles Department of Transportation. They reviewed parking violations and made determinations as to whether the individuals contesting their violations were liable. Both men complained internally that their supervisor was pressuring them to change decisions from "not liable" to "liable"—in essence cheating individuals out of the refunds of the fines they had paid. Both men were then fired. They sued for whistleblower retaliation under Labor Code § 1102.5, and violations of the Bane Act. A jury found in the plaintiffs' favor, awarding Hawkins $238,531 and Kim $188,631 in damages. The trial court then assessed a $20,000 PAGA penalty, and subsequently awarded plaintiffs $1,054,286.88 in attorney fees. The City appealed.

The court of appeal affirmed as to the Labor Code § 1102.5 claim. It further affirmed the award of attorney fees, which were warranted under PAGA and under Code of Civil Procedure § 1021.5. As to the latter, the plaintiffs conferred a significant benefit on the public through the litigation, as the City had been denying the public of independent, impartial hearings and instead undermined the review process to generate revenue.

California Supreme Court and Ninth Circuit Shut Down Efforts to Expand Ability of Employees to Sue for Wage Theft

In *Voris v. Lampert*,[17] the California Supreme Court held that employees cannot sue employers for the tort of conversion. Justice Mariano-Florentino Cuéllar (joined

by Justice Goodwin H. Liu) issued a cogent dissent summarized by a single paragraph: "Unlike the majority, I wouldn't close the courthouse door when a worker invokes the conversion tort to recover earned but unpaid wages. In California, unpaid wages are the employee's property once they are earned and payable . . . Which is why an action for unpaid wages is not, as the majority suggests, merely an "action[ ] for a particular amount of money owed in exchange for contractual performance." The doctrinal basis for invoking conversion here is as solid as California's longstanding concern about wage theft. Indeed, nothing in the legislative scheme or public policy more generally justifies limiting the tort in the manner the majority proposes. So with respect, I dissent."

In Goonewardene v. ADP, LLC,[18] the California Supreme Court held that a payroll company could not be liable to an employee of one of its clients for negligence or breach of contract holding that: (1) ADP owed no common law duty of care to Altour's employees and thus could not be liable for alleged negligence; and (2) Altour's employees were not parties to, nor third-party beneficiaries of, the contract between Althour and ADP and thus could not be liable for breach of contract.

In *Salazar v. McDonald's Corp.*,[19] the Ninth Circuit held that McDonald's Corp. was not the joint employer of its franchisees' employees. McDonald's Corporation was named as a defendant in a putative wage and hour class action filed by the employees of the Haynes Family Limited Partnership, which operated eight McDonald's franchises in the Bay Area. The putative class members alleged McDonald's and its franchises were their joint employers for purposes of wage and hour liability. The district court granted summary judgment in favor of McDonald's, and the Ninth Circuit affirmed, holding that any control McDonald's asserted over its franchisees' workers was geared toward quality control and not over the "day-to-day aspects" of the work at the franchises. Similarly, the court held that McDonald's did not "suffer or permit" the franchisees' employees to work for it, nor were those workers employed by McDonald's under a common law theory of employment.

Other Wage & Hour and PAGA Cases

In *ZB, N.A. v. Superior Court of San Diego County*,[20] the California Supreme Court held that only the Labor Commissioner can recover both civil penalties and unpaid wages as laid out in Labor Code § 558(a): "Section 558, in other words, authorizes only the Labor Commissioner to issue a citation that includes both a civil penalty and the same unpaid wages. Lawson can alternatively recover under section 1194 through a civil action or an administrative hearing. But section 2699, subdivision (a) does not authorize employees to collect section 558's unpaid wages through a PAGA action."

In *Ward v. Tilly's, Inc.*,[21] the court of appeal held that on-call employees who are required to call in should receive reporting-time pay. Skylar Ward challenged by way of this putative class action the on-call scheduling practices of her former employer, Tilly's, Inc., as violating the reporting time pay requirements of California law. Tilly's required on-call employees to contact Tilly's two hours before their on-call shifts. If they were told to come in, they were paid for the shifts they worked; if they were not told to come in, they received no compensation for having been "on call." Ward alleged that when the employees contacted Tilly's two hours before their on-call shifts, they were "reporting for work"; Tilly's asserted that employees "report for work" only by physically appearing at the work site at the start of a scheduled shift. The trial court sustained Tilly's' demurrer and dismissed the action. The court of appeal reversed, holding that "the call-in requirement is inconsistent with being off-duty, and thus triggers the reporting time pay requirement."

Important Procedural Issues Affecting Employment Litigators

In *Doe v. Superior Court of San Diego County*,[22] the court of appeal held that an employee's lawyer was improperly disqualified after contacting a "me-too" co-employee witness. Jane Doe, a student-employee, brought claims relating to sexual harassment against the Southwestern Community College District and three employees. Doe also alleged that two other employees were sexually harassed by one of the employees who had harassed her. Doe's lawyer, Manuel Corrales, Jr., contacted one of those employees ("Andrea P.") as a possible percipient witness. The trial court disqualified Corrales based upon Cal. Rule of Prof. Conduct 4.2, which prohibits a lawyer from communicating with a "person the lawyer knows to be represented by another lawyer in the matter." The court of appeal issued a writ of mandate directing the trial court to vacate its disqualification order relating to Corrales and to enter a new order denying the motion to disqualify, holding that (1) Andrea P. was not represented by counsel at the time Corrales contacted her; and (2) Andrea P. was not a current employee covered by Rule 4.2(b)(2) because she could not make statements that might be "binding upon or imputed to the organization": "We therefore hold that where a plaintiff-employee claiming harassment and/or a hostile work environment seeks to rely on evidence of similar misconduct provided by another alleged employee-victim, ex parte communication with that second employee does not concern 'an act or omission of such person

in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability'."[23]

In *Mesa RHF Partners, L.P. v. City of Los Angeles*,[24] the court of appeal explained that in order to ensure that a trial court is able to retain jurisdiction under CCP § 664.6, the parties must either: (1) file a stipulation and proposed order signed by counsel that attaches a copy of the settlement agreement signed by the parties with an express request for retention of jurisdiction, or (2) file a stipulation and proposed order signed by the parties noting the settlement and expressly requesting that the court retain jurisdiction to enforce the settlement.

In *Monster Energy Co. v. Schechter*,[25] the court of appeal held that the lawyers who approved a settlement agreement as to "form and content" may be bound by the agreement's confidentiality provisions.

California Courts of Appeal Issue Clarion Call for Civility and the Elimination of Bias in the Practice of Law

Lasalle v. Vogel[26], a non-employment case, is one of the most significant cases of 2019 because it addresses a dire emergency in the legal profession—loss of civility. *Lasalle* is ostensibly a legal malpractice action in which the plaintiff Angele Lasalle was suing her former attorney Joanna T. Vogel for alleged malpractice. Thirty-six days after Lasalle served Vogel with the summons and complaint, Lasalle's lawyer sent Vogel a letter and an email, informing Vogel that her default would be entered if no response was filed the very next day, a Friday. No response was filed. On Monday, Lasalle filed request for entry of default. A week later, Vogel filed a motion to set aside the default. The court denied Vogel's set-aside motion and a default judgment was entered against Vogel for $1 million. Vogel then appealed. The court of appeal determined that because "[d]ignity, courtesy, and integrity were conspicuously lacking" in the litigation, reversal was appropriate.

The most important part of the opinion is the court of appeal's lengthy lament about the declining state of the legal profession, excerpted here in part:

> Here is what Code of Civil Procedure section 583.130 says: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition." That is not complicated language. No jury instruction defining any of its terms would be necessary if we were submitting it to a panel of non-lawyers. The policy of the state is that the parties to a lawsuit "shall cooperate." Period. Full stop.
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> Yet the principle the section dictates has somehow become the Marie Celeste of California law—a ghost ship reported by a few hardy souls but doubted by most people familiar with the area in which it's been reported. The section's adjuration to civility and cooperation "is a custom, [m]ore honor'd in the breach than the observance." In this case, we deal here with more evidence that our profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130, and—in keeping with what has become an unfortunate tradition in California appellate law—we urge a return to the professionalism it represents.[27]

In *Martinez v. O'Hara*,[28] the court of appeal held that a gender biased statement made in court papers violates ethical rules and may be reported to the state bar by the court. Fernando Martinez appealed the trial court denial of his motion for attorney fees and costs following an $8,080 jury verdict on his sexual harassment claim. Instead of using the Judicial Council notice of appeal form, his counsel submitted his own notice of appeal which stated in, in pertinent part: "The ruling's succubustic adoption of the defense position, and resulting validation of the defendant's pseudohermaphroditic misconduct, prompt one to entertain reverse peristalsis unto its four corners."[29] Noting that Webster's Third New International Dictionary defined the term "succubus" as "1: a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus 2: demon, fiend 3: strumpet, whore," the court of appeal held that the "reference [in the notice of appeal] to the ruling of the female judicial officer, from which plaintiff appealed, as 'succubustic' constitutes a demonstration 'by words or conduct, bias, prejudice, or harassment based upon . . . gender' and thus qualifies as reportable misconduct." The court of appeal then commented: "We publish this portion of the opinion to make the point that gender bias by an attorney appearing before us will not be tolerated, period."

ENDNOTES

1. 139 S. Ct. 524 (2019).
2. 139 S. Ct. 1407 (2019).
3. 139 S. Ct. 532 (2019).
4. 139 S. Ct. 1407, 1415 (2019).

5. *Id*. at 1420 (Ginsburg, J. dissenting) *quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010).
6. *Id., quoting DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 476 (2015) (Ginsburg, J., dissenting).
7. 8 Cal. 5th 111 (2019).
8. 34 Cal. App. 5th 201 (2019).
9. 57 Cal. 4th 1109 (2013) ("*Sonic II*").
10. 34 Cal. App. 5th 201 (2019).
11. 7 Cal. 5th 871 (2019).
12. 139 S. Ct. 1843 (2019).
13. 37 Cal. App. 5th 549 (2019). *Galvan* had a companion case, *Ortiz v. Dameron Hosp. Ass'n*, 37 Cal. App. 5th 568 (2019), which also reversed summary judgment in a case arising out of similar conduct by the same alleged bad actor.
14. 36 Cal. App. 5th 475 (2019).
15. 31 Cal. App. 5th 598 (2019).
16. 40 Cal. App. 5th 384 (2019).
17. 7 Cal. 5th 1141 (2019).
18. 6 Cal.5th 817 (2019).
19. 939 F.3d 1051 (9th Cir. 2019).
20. 8 Cal. 5th 175 (2019).
21. 31 Cal. App. 5th 1167 (2019).
22. 36 Cal. App. 5th 199 (2019).
23. *Id*. at 209.
24. 33 Cal. App. 5th 913 (2019).
25. 7 Cal. 5th 781 (2019).
26. 36 Cal. App. 5th 127 (2019).
27. 36 Cal. App. 5th 127, 130 (2019) (footnotes and citations omitted).
28. 32 Cal. App. 5th 853 (2019).
29. 32 Cal. App. 5th 853, 857 (2019).