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MCLE SELF-STUDY:

THE TOP EMPLOYMENT CASES OF 2023

Much like the torrential flooding in the state last winter, 2023 brought about a deluge of employment decisions. Most were predictably favorable to employees as Governor Gavin Newsom and President Joe Biden's appointments and nominations to the bench made their marks, but there were some exceptions. Here, we cherry pick some of the more consequential and interesting decisions of the year.

ACCOMMODATION

In ***Groff v. DeJoy***,[1] Gerald Groff, an Evangelical Christian who did not work on Sundays, took a mail delivery job with the USPS at a time when postal service employees were not required to work on Sundays. However, when the USPS began Sunday deliveries for Amazon, he was called upon to work that day. That prompted his resignation after he had received progressive discipline for refusing to work the Sunday shifts. Groff sued the USPS for violating Title VII, alleging it

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could have accommodated him without undue hardship on conducting its business.

The district court and the Third Circuit ruled in favor of the USPS, holding that requiring an employer "to bear more than a de minimis cost to provide a religious accommodation is an undue hardship." The lower courts held that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." In this unanimous decision, the U.S. Supreme Court clarified earlier precedent, *Trans World Airlines, Inc. v. Hardison*,[2] by holding that an employer can show "undue hardship" only by demonstrating that the burden of granting a religious accommodation would result in *substantial* increased costs in conducting its particular business.

In ***Hodges v. Cedars-Sinai Medical Center***,[3] the court of appeal affirmed summary judgment in favor of an employer on an employee's disability discrimination and retaliation claims. The defendant hospital had required plaintiff Deanna Hodges, as a condition of continued employment, to get a flu vaccine unless she obtained a valid exemption. Her doctor wrote a note recommending an exemption for various reasons, including her history of cancer and general allergies. None of the reasons was a medically recognized contraindication to getting the flu vaccine. The hospital denied the exemption request. Hodges still refused to get the vaccine, and the hospital fired her. The court of appeal rejected the plaintiff's contention that an employer is bound to accept an employee's subjective belief that she is disabled. Instead, it found that Hodges failed to demonstrate either that she had a disability or that the hospital perceived her as having a disability.

ARBITRATION

In 2022, employers prematurely hailed *Viking River Cruises, Inc. v. Moriana*[4] as the magic bullet that would allow them to use arbitration agreements to finally and completely end, or at least limit, the bane of their existence: PAGA claims. In 2023, however, a unanimous California Supreme Court, in the highly anticipated decision, ***Adolph v. Uber Technologies, Inc.***,[5] shattered that dream. The California court seized on a passage in Justice Sonia Sotomayor's concurring opinion in *Viking River*: "Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."[6] And noting that it was "not bound by the high court's interpretation of California law," it held that "an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA."[7] Come the November 2024 election, employers will try, once again, to defang PAGA—this time, via a business-backed and trial lawyer-opposed voter initiative: the California Fair Pay and Employer Accountability Act of 2024.[8]

In addition to *Adolph v. Uber*, the California state and federal courts once again issued hundreds of arbitration decisions in 2023. Here is a very small sampling:

In ***Murrey v. Superior Court***,[9] the court of appeal rejected an employee's argument that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021[10] exempted from arbitration her sexual harassment and retaliation action—a case she had filed approximately one year before the legislation was enacted. The court accepted her argument that "the highly secretive and one-sided provisions of her arbitration agreement [made] it both procedurally and substantively unconscionable."[11] It found that the arbitration agreement was procedurally unconscionable "because it was offered on a take-it-or-leave-it basis" and that the employee's "onboarding experience presented a higher degree of oppressiveness than other situations where a new hire is provided copies of the agreement and given ample time to review the documents, ask questions about the terms, or request a modification,"[12] because the employee had a short period of time to click boxes on her computer and electronically sign her unmodifiable electronic arbitration agreement and other lengthy documents. The court found that the agreement was substantively unconscionable, in part, because it required each party to bear the "reasonable cost of compliance" with discovery requests, which imposed an obligation beyond the Discovery Act in violation of *Armendariz v. Foundation Health Psychcare Services, Inc*.[13] In addition, the court found substantive unconscionability in the agreement's superficially neutral discovery restrictions, noting: "Seemingly neutral limitations on discovery in employment disputes may be nonmutual in effect. This is because the employer already has in its possession many of the documents relevant to an employment discrimination case as well as having in its employ many of the relevant witnesses."[14] Finally, the court also found substantive unconscionability in the agreement's exclusion of claims that employers are most likely to bring: time limits on the hearing, and limits on witnesses, as well as the confidentiality provision.

In ***Hernandez v. Meridian Management Services, LLC***,[15] the court of appeal refused to allow nonsignatories to an arbitration agreement to piggyback off of the arbitration agreement between an employee and her employer to compel her employment claims against them into arbitration. The court rejected the nonsignatories' equitable estoppel, agency, and third-party beneficiary theories.

In another victory for employees, in ***Vaughn v. Tesla, Inc.***,[16] the court of appeal held that the Fair Employment and Housing Act[17] can be the basis of public injunction claims and that the Federal Arbitration Act (FAA)[18] does not allow for that substantive right to be waived by an arbitration agreement. On April 12, 2023, the California Supreme Court denied Tesla's petition for review.

In a victory for employers, in ***Chamber of Commerce v. Bonta***,[19] a panel of the Ninth Circuit struck down California's AB 51. The law imposed civil and criminal penalties on employers that required employees to sign arbitration agreements. The same panel previously held that the FAA preempted much of the law but declined to strike down AB 51's penalties for employers who had failed to get an employee to sign. In dissent, Judge Sandra Ikuta eviscerated the majority's "torturous ruling" which, she said, was analogous to a statute making it unlawful for a drug dealer to attempt to sell drugs, but lawful if the drug dealer had succeeded in the transaction. However, after *Viking River*, the panel voted to rehear the case and Judge William A. Fletcher switched sides. Now writing for the majority, Judge Ikuta noted that AB 51 singled out arbitration agreements in violation of the FAA.

In ***Doe v. Superior Court of City and County of San Francisco***,[20] yet another court of appeal examined section 1281.98(a)(1) of the California Code of Civil Procedure, which provides that, if the fees or costs of arbitration are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement and waives its right to compel arbitration. Consistent with prior decisions, the court held that statutory provision is to be strictly construed and strictly enforced. It explained: "[W]e strictly enforce the 30-day grace period in section 1281.98(a)(1) and conclude fees and costs owed for a pending proceeding must be *received* by the arbitrator within 30 days after the due date. We do not find that the proverbial check in the mail constitutes payment and agree with petitioner that real parties' payment, received more than 30 days after the due date established by the arbitrator, was untimely."[21]

DISCRIMINATION

In ***Opara v. Yellen***,[22] a wonderful decision for employers, the Ninth Circuit seemed to suggest both that a plaintiff must satisfy the *McDonnell Douglas* burden-shifting test even if that individual possesses direct evidence of discrimination and that the direct evidence of discrimination should be discounted where the plaintiff only presented "uncorroborated and self-serving" testimony in the form of a declaration prepared by the plaintiff's attorney.

In ***Hittle v. City of Stockton***,[23] the Ninth Circuit clarified that a plaintiff can defeat summary judgment in an employment discrimination case in one of three ways—either by:

- satisfying the *McDonnell Douglas* burden-shifting test;
- showing direct evidence of discrimination; or
- showing circumstantial evidence of discrimination.

Notwithstanding this generous pro-employee standard, the Ninth Circuit affirmed summary judgment in favor of an employer in a religious discrimination case. Ronald Hittle served as Stockton's fire chief before he was fired, following an outside investigation, because he lacked effectiveness and judgment in his ongoing leaderships. Hittle sued the city under Title VII and the FEHA, alleging his termination was "based upon his religion." Hittle pointed to what he characterized as "direct evidence of discriminatory animus" based on a comment made by the deputy city manager Laurie Montes that Hittle was part of a "Christian coalition" and part of a "church clique" in the fire department. However, the evidence showed that Montes was merely repeating what was written in anonymous letters sent to the city. The court noted that such remarks were in any event "more akin to 'stray remarks' that have been held insufficient to establish discrimination."[24] Further, based on the investigation, it held that defendants' legitimate non-discriminatory reasons for firing Hittle were not mere pretext for religious discrimination.

In ***Lopez v. La Casa de Las Madres***,[25] the court of appeal affirmed a judgment in favor of an employer following a bench trial. The underlying cause of action was a claim of failure to provide a reasonable accommodation for a pregnancy-related condition. In finding for the employer, the court held that, as matter of first impression, a cause of action under California Government Code section 12945(a)(3)(A) requires proof that:

1. the plaintiff had a condition related to pregnancy, childbirth, or a related medical condition;
2. the plaintiff requested accommodation of this condition, with the advice of her health care provider;
3. the plaintiff's employer refused to provide a reasonable accommodation; and
4. with the reasonable accommodation, the plaintiff could have performed the essential functions of the job.

In ***Atkins v. St. Cecilia Catholic School***,[26] a long-term employee of a Catholic school sued for age discrimination in violation of the FEHA. The trial court granted the school's motion for summary judgment on the ground that the employee's suit was barred by the ministerial exception—a constitutional doctrine that precludes certain employment claims brought against a religious institution by its ministers. The court of appeal reversed, finding the existence of triable issues of material fact as to whether the ministerial exception applied given, among other things, the plaintiff's allegations that her job duties as both an office administrator and an art teacher were secular in nature, and did not involve teaching religion to the students.

In ***Lin v. Kaiser Foundation Hospitals***,[27] the court of appeal reversed a grant of summary judgment in favor of an employer on a disability discrimination claim even though the employee's disability did not occur until after the employer placed her on a tentative list of an employee reduction in force (RIF). The final decision and notice did not happen until after the employer became aware that the plaintiff, Suchin Lin, had a disability. The court underscored:

> The critical question is whether the summary judgment record, construed in Lin's favor, rationally supports both of the following inferences: (a) Kaiser's December 2018 selection of Lin for the RIF list was tentative, not final; and (b) Kaiser's ultimate decision to keep Lin on the RIF list and to terminate her employment was based, at least in substantial part, on Lin's disability.[28]

It concluded that the record "rationally supported" both of those inferences.

HARASSMENT

In ***Atalla v. Rite Aid Corporation,***[29] the court of appeal found there was no liability for an employer whose supervisor sent sexually inappropriate texts and photos to an employee while they were both outside of the office during after-work hours when the two had been friends before and while working together. The court also held there was no constructive termination because the employer took immediate action, terminated the harasser, and invited the employee back to work.

In ***Sharp v. S&S Activewear***,[30] the Ninth Circuit put the final nail in the coffin of the purported "equal opportunity harasser" defense. In this case, seven women and one man sued their former employer, alleging that it created a sexually hostile work environment in violation of Title VII. They based their claims on the fact that the employer allegedly permitted its managers and employees to routinely play "sexually graphic, violently misogynistic" music throughout its warehouse. According to the plaintiffs, the songs' content denigrated women and contained offensive terms including "hos" and "bitches." The district court granted S&S's motion to dismiss, reasoning that the music's offensiveness to both men and women and audibility throughout the warehouse nullified any discriminatory potential. The Ninth Circuit reversed, holding that an employer's "status as a purported 'equal opportunity harasser' provides no escape hatch for liability"[31] and that a hostile work environment claim does not require targeting a specific person to be viable.

PROCEDURAL MATTERS

In ***Raines v. U.S. Healthworks Medical Group***,[32] a unanimous California Supreme Court held that a business entity with at least five employees that carries out FEHA-regulated activities on behalf of an employer can be directly liable under the FEHA. In this case, the Ninth Circuit had certified to the California Supreme Court the question of whether FEHA's definition of "employer" extends to corporate agents of the employer such as a company that conducts preemployment medical screenings. The putative class action plaintiffs alleged that their employment offers were conditioned upon completing pre-employment medical tests conducted by U.S. Healthworks Medical Group (USHW). They further alleged that during the screenings, USHW asked intrusive and illegal questions unrelated to their ability to work—including whether the applicants had cancer, mental illnesses, HIV, or problems with menstrual periods. The applicants asserted FEHA claims against the prospective employers that used USHW to conduct the medical screenings and USHW itself as an "agent" of the employers. The court examined FEHA's definition of "employer" and concluded that it encompasses third-party corporate agents such as USHW.

In ***Zirpel v. Alki David Productions, Inc.***,[33] the court of appeal upheld a punitive damages verdict with a six-to-one ratio between punitive damages ($6 million) and compensatory damages (approximately $1 million). It held that the jury correctly found malice based on the fact that the owner of the company, when firing an employee for blowing the whistle about a safety issue, yelled and screamed obscenities at the employee in front of his coworkers, called him a "faggot," told him to "suck my dick," and, while screaming at the employee, stood so close to him that spittle flew into the employee's face.

In ***Castelo v. Xceed Financial Credit Union***,[34] the court of appeal affirmed an arbitrator's enforcement of a release of claims, finding it did not violate California Civil Code section 1668, a statute providing that a predispute release

of claims is invalid as a matter of public policy. In this case, Elizabeth Castelo sued her former employer, Xceed Financial Credit Union, for wrongful termination and age discrimination in violation of the FEHA. After the parties stipulated to arbitration, the arbitrator granted summary judgment to Xceed based on a release Castelo signed after she was notified of the termination decision, but before her last day on the job. Castelo argued that the release violated section 1668, which prohibits predispute releases of liability. Xceed provided Castelo with a two-part release: a release of claims through the date of execution and a "reaffirmation" that Castelo was supposed to sign on her last day of her employment six weeks later. However, she signed both releases at the same time—six weeks before her employment ended—and then later contended that her wrongful termination claim was not barred by either release, because that claim "accrued" on the date of her separation, which occurred after the releases were executed. The arbitrator enforced the releases and determined they were not barred by the statute because their purpose was not to immunize Xceed from liability for a future legal violation. The trial court granted Xceed's petition to confirm the arbitration award; the court of appeal affirmed.

In ***Hacker v. Fabe***,[35] the court of appeal affirmed the liability of the principal of a former employer on an alter ego theory. Attorney Jacqueline Fabe filed a claim for unpaid wages against her employer with the labor commissioner. Her employer then filed a malpractice suit against Fabe; in response, she filed a retaliation suit with the labor commissioner. Fabe and the commissioner later won on all claims. Fabe filed a motion to add Ron Hacker, the principal of Fabe's former employer, to the judgment as a judgment debtor. This motion was denied without prejudice. Fabe and the commissioner tried to enforce the judgment against the employer for years without success. After years of back and forth, the trial court granted a motion to amend the judgment to add Hacker as an alter ego judgment debtor. Hacker appealed the order. He contended there was "virtually no evidence" that he commingled his assets or operations with those of the judgment debtor; that the original judgment was not renewed during the 10-year limitation period; that the doctrine of laches bars the alter ego motion; and that the denial of an earlier alter ego motion barred the current motion under res judicata principles. The court rejected Hacker's arguments. Among other reasons, it cited Hacker's complete control over Fabe's former employer, his control of the litigation, his sharing of attorneys with Fabe's former employer, his transfer of the company to another person immediately after the judgment, and his destruction of relevant records of assets as evidence that Hacker acted in bad faith and was hiding behind the corporate shell of Fabe's former employer.

RETALIATION

In ***People ex rel. Garcia-Brower v. Kolla's, Inc.***,[36] the California Supreme Court held that California Labor Code section 1102.5 encompasses reports and complaints of a violation made to an employer or governmental agency even if the recipient already knows of the violation, disapproving the appellate court's earlier holding in *Mize-Kurzman v. Marin Community College District*.[37]

In ***Kourounian v. California Dept. of Tax & Fee Administration***,[38] the appellate court reversed a retaliation verdict in favor of an employee on the rather unremarkable grounds that, "as a matter of both logic and law, acts of retaliation must occur after the protected activity."[39]

WAGE AND HOUR

This was another bumper year for wage and hour decisions. We highlight only a few of them.

In ***Espinoza v. Warehouse Demo Services, Inc.***,[40] the court of appeal addressed the question of whether an employee working at a fixed site not owned or leased by the employer is subject to the outside salesperson exemption where the employer controls the employee's hours and working conditions. The court explained that the pertinent inquiry as to whether an employee works away from the employer's place of business is not whether the employer owns or controls the worksite, but the extent to which the employer maintains control or supervision over the employee's hours and working conditions. In this case, the court concluded that the outside salesperson exemption did not apply because the employer carefully monitored and controlled the hours and schedule the employee worked.

In ***Olson v. California***,[41] the Ninth Circuit, in the latest in a string of defeats for the state of California, unanimously held that AB 5, the anti-independent contractor law, may violate the equal protection rights of independent contractor drivers and the gig companies that retain them. In an opinion that shines a bright light on "how the salami gets made" in Sacramento, the panel found that the plaintiffs plausibly alleged that AB 5 had unfairly targeted drivers and companies such as Uber and Lyft. Specifically, it noted that a legislative desire to harm a politically unpopular group is not a legitimate governmental interest even under the "fairly forgiving" and deferential rational basis test for judicial review.

In ***Rocha v. U-Haul Co. of California.***,[42] Thomas and Jimmy Rocha alleged their employer, U-Haul, had violated the FEHA and California Labor Code. The brothers' individual

PAGA claims were compelled to arbitration, where they lost on all causes of action. The Rochas then moved to vacate the arbitrator's award, but the trial court confirmed the award and imposed sanctions. The court of appeal affirmed, holding that issue preclusion applied because the Rochas were not "aggrieved employees" as required for standing under PAGA. Therefore, the arbitrator's finding that the brothers did not suffer any statutory violations precluded them from acting as aggrieved employees. The opinion criticized *Gavriiloglou v. Prime Healthcare Management, Inc.*,[43] which held that issue preclusion did not apply to the subsequent PAGA action because the plaintiff was not operating in the same capacity. The *Rocha* court noted that there is no "same capacity" requirement for issue preclusion.

ENDNOTES

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1. *Groff v. DeJoy*, 600 U.S. 447 (2023).
2. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).
3. *Hodges v. Cedars-Sinai Med. Ctr.*, 91 Cal. App. 5th 894 (2023).
4. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), *reh'g denied*, 2022 WL 3580311 (Aug. 22, 2022).
5. *Adolph v. Uber Tech., Inc.*, 14 Cal. 5th 1104 (2023).
6. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 at 1925 (2023) (Sotomayor, J., concurring).
7. *Adolph*, 14 Cal. 5th 1104 at 1114 (2023).
8. "California Employee Civil Action Law and PAGA Repeal Initiative (2024)," https://ballotpedia.org/California_Employee_Civil_Action_Law_and_PAGA_Repeal_Initiative_(2024).
9. *Murrey v. Superior Court*, 87 Cal. App. 5th 1223 (2023).
10. 9 U.S.C. § 402(a).
11. *Murrey*, 87 Cal. App. 5th at 1230.
12. *Id.* at 1238.
13. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, 24 Cal. 4th 83 (2000).
14. *Murrey*, 87 Cal. App. 5th at 1249, citing *Baxter v. Genworth North Am. Corp.*, 16 Cal. App. 5th at 727 (2017).
15. *Hernandez v. Meridian Mgmt. Serv., LLC*, 87 Cal. App. 5th 1214 (2023).
16. *Vaughn v. Tesla, Inc.*, 87 Cal. App. 5th 208 (2023).
17. Cal. Gov't Code §§ 12900-12951.
18. 9 U.S.C. §§ 1-16.
19. *Chamber of Commerce v. Bonta*, 62 F.4th 473 (2023).
20. *Doe v. Superior Ct. of San Francisco*, 95 Cal. App. 5th 346 (2023).
21. *Id.* at 351. *See also Espinoza v. Superior Court*, 83 Cal. App. 5th 761 (2022); *De Leon v. Juanita's Foods*, 85 Cal. App. 5th 740 (2022); *Williams v. West Coast Hosp., Inc.*, 86 Cal. App. 5th 1054 (2022).
22. *Opara v. Yellen*, 57 F.4th 709 (9th Cir. 2023).
23. *Hittle v. City of Stockton*, 76 F.4th 877 (9th Cir. 2023).
24. *Id.* at 890, citing *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145 (1997).

25. *Lopez v. La Casa de Las Madres*, 89 Cal. App. 5th 365 (2023).
26. *Atkins v. St. Cecilia Cath. Sch.*, 90 Cal. App. 5th 1328 (2023).
27. *Lin v. Kaiser Found. Hosp.*, 88 Cal. App. 5th 712 (2023).
28. *Id.* at 723.
29. *Atalla v. Rite Aid Corp.*, 89 Cal. App. 5th 294 (2023).
30. *Sharp v. S&S Activewear*, 69 F.4th 974 (9th Cir. 2023).
31. *Id.* at 977, citing Swinton v. Potomac Corp., 270 F. 3d 797 at 897 (9th Cir. 2001).
32. *Raines v. U.S. Healthworks Med. Group*, 15 Cal. 5th 268 (2023).
33. *Zirpel v. Alki David Productions, Inc*, 93 Cal. App. 5th 563 (2023).
34. *Castelo v. Xceed Fin. Credit Union*, 91 Cal. App. 5th 777 (2023).
35. *Hacker v. Fabe*, 92 Cal. App. 5th 1267 (2023).
36. *People ex rel. Garcia-Brower v. Kolla's, Inc.*, 14 Cal. 5th 719 (2023).
37. *Mize-Kurzman v. Marin Community C. Dist.*, 202 Cal. App. 4th 832 (2012).
38. *Kourounian v. California Dept. of Tax & Fee Admin.*, 91 Cal. App. 5th 1100 (2023).
39. *Id.* at 1113.
40. *Espinoza v. Warehouse Demo Serv., Inc.*, 86 Cal. App. 5th 1184 (2022).
41. *Olson v. California*, 62 F.4th 1206 (9th Cir. 2023).
42. *Rocha v. U-Haul Co. of Cal.*, 88 Cal. App. 5th 65 (2023).
43. *Gavriiloglou v. Prime Healthcare Mgmt., Inc.*, 83 Cal. App. 5th 595 (2022).