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Trial Court Properly Dismissed Employee's CFRA And Disability Discrimination Claims

Choochagi v. Barracuda Networks, Inc., 60 Cal. App. 5th 444 (2021)

George Choochagi worked as a technical support manager for Barracuda Networks where he reported to Hossein Ghazizadeh. Choochagi complained to HR that Ghazizadeh had made inappropriate sexual comments to him about having sex with women at the office and about Choochagi's not being "man enough" for his position. Approximately 18 months after Choochagi transferred to another supervisor, he began experiencing severe migraine headaches and eye irritation, which required him to seek medical treatment. When Choochagi requested additional leave time, Barracuda allegedly moved to terminate his employment or force him to quit. Choochagi sued for interference and retaliation under the California Family Rights Act (CFRA), disability discrimination, wrongful termination, retaliation, gender discrimination and related claims. The trial court granted summary adjudication in favor of Barracuda on the CFRA and the gender discrimination claims, and the remaining two claims (disability discrimination and wrongful termination) went to trial where the jury returned a verdict against Choochagi and in favor of Barracuda.

The Court of Appeal affirmed, holding that the trial court had properly dismissed the CFRA claim because Choochagi did not submit evidence that he requested additional time off due to his medical condition or was denied such leave or that he was the victim of illegal retaliation under the statute. The Court also affirmed dismissal of the FEHA retaliation claim on the ground that there was no evidence that the decision makers regarding the termination were aware of Choochagi's HR complaint concerning Ghazizadeh or that, under the "cat's paw" theory, the decision makers were "mere instrumentalities" of Ghazizadeh.

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LAUSD Teacher Can Proceed With Claim For Disability Allegedly Caused By School's Wi-Fi System

Brown v. Los Angeles Unified School Dist., 2021 WL 631030 (Cal. Ct. App. 2021)

Laurie Brown, a teacher at Millikan Middle School, alleged she experienced chronic pain, which was allegedly caused by a new Wi-Fi system the school had installed. Brown's medical provider diagnosed her with "electromagnetic hypersensitivity sensitivity" (EHS). Brown eventually quit, claiming she could not return to work "without being overcome with crippling pain." Among other things, Brown alleged discrimination based upon a physical disability, failure to accommodate her disability, and retaliation. The trial court sustained the District's demurrer to Brown's complaint, but the Court of Appeal reversed, holding that Brown had sufficiently alleged a disability under the Fair Employment and Housing Act (FEHA), even though at least two other (non-California) courts have held that EHS is not a recognized disability under the federal Americans with Disabilities Act (ADA). The Court also held that Brown had adequately alleged a cause of action for failure to provide a reasonable accommodation for a physical disability. However, the appellate court agreed with the District that Brown had failed to allege a failure to engage in the interactive process or that any adverse action was taken against her with discriminatory or retaliatory motive – in short, there was a "disagreement between the parties as to whether the Wi-Fi was causing her disability."

In a stunningly candid concurring opinion, Justice John Shepard Wiley Jr., expressed concern that this is the "first court in the United States of America – a nation of over 300 million people – to allow a claim that 'Wi-Fi can make you sick.'" Justice Wiley continued: "The law worries about junk science in the courtroom. One concern is that a partisan expert witness can bamboozle a jury with a commanding bearing, an engaging manner, and a theory that lacks respectable scientific support… It does not take much experience as a trial judge in Los Angeles to realize the use of expert witnesses has run riot." A potential solution? Justice Wiley suggests the use of court-appointed experts pursuant to Cal. Evid. Code §§ 730-732 – "few judges have tried this option, though, because the parties never suggest it."

Supreme Court Invalidates Rounding Time Punches For Meal Periods

Donohue v. AMN Servs., LLC, 2021 WL 728871 (Cal. S. Ct. 2021)

A unanimous California Supreme Court issued its long-awaited decision in this case, answering two important questions about meal periods: (1) Employers cannot engage in the practice of rounding time punches in the meal period context; and (2) time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage.

The timekeeping system used by the employer rounded all employee punch times to the nearest 10-minute increment—including those reflecting meal periods. As a result, for example, if an employee punched out for lunch at 11:02 a.m. (rounded back to 11:00 a.m.) and punched back in at 11:25 a.m. (rounded forward to 11:30 a.m.), the system recorded a 30-minute meal period (even though only 23 minutes had actually elapsed). When an employee's rounded meal punches indicated that a meal was missed, shorter than 30 minutes, or late (e.g., commencing after more than five hours), the system provided a drop-down menu by which an employee was asked to indicate either that the missed, late, or short meal period was the result of: (1) the employee's own choice; or (2) the press of work. Only if the employee selected the latter (press of work) would the employer credit the employee with a meal premium of one additional hour of pay at the regular rate of compensation.

While the Supreme Court recognized that time rounding was, in general, permitted under federal law and prior California decisions, it decided not to follow that authority in the case of meal periods. Instead, citing "health and safety concerns" that underlie meal period requirements, the Court distinguished "the meal period context from the wage calculation context, in which the practice of rounding time punches was developed" and noted that "even relatively minor infringements on meal periods can cause substantial burdens to the employee." In dicta, the Court took a swipe at prior decisions that had endorsed rounding, in general, noting that, "[a]s technology continues to evolve, the practical advantages of rounding policies may diminish further."

The Court went on to endorse a concurrence by Justice Werdegar in *Brinker Restaurant Corp. v. Superior Court,* 53 Cal. 4th 1004 (2012), oft-cited by plaintiffs' lawyers, in which she suggested that if an employer's records did not reflect a compliant meal period, it would raise a rebuttable presumption that none was provided. However, the Court did provide helpful clarification about how employers could overcome such a presumption: "by presenting evidence that employees were compensated for noncompliant meal[s] … or that they had in fact been provided compliant meal periods during which they chose to work." And the Court reiterated its prior holding from Brinker that an "employer is not liable if … [an] employee chooses to take a short or delayed meal period or no meal period at all" and affirmed there is no need "to police meals to make sure no work is performed."

Ninth Circuit Clarifies FMLA Leave For Rotational Employees

Scalia v. State of Alaska, 985 F.3d 742 (9th Cir. 2021)

"Rotational employees" of the State of Alaska work a regular schedule of seven days on, followed by seven days off of work. Under the Family and Medical Leave Act (FMLA), eligible employees may take a total of "12 workweeks of leave." The question in this case is whether both the on and off weeks count toward the "12 workweeks of leave." The U.S. Secretary of Labor (on behalf of the state employees) alleged that the employees were entitled to 24 weeks of leave because a rotational employee's off weeks should not be counted as "workweeks of leave" under the statute. The district court granted summary judgment in favor of the Secretary, but the Ninth Circuit reversed, holding that a "workweek" does not revolve around an individual employee's own work schedule, it is instead simply a week-long period designated in advance by the employer, during which the employer is in operation.

Ninth Circuit Applies *Dynamex* Retroactively And Offers "Guidance"

Vazquez v. Jan-Pro Franchising Int'l, Inc., 986 F.3d 1106 (9th Cir 2021)

Following the California Supreme Court's answer in the affirmative to the certified question from the Ninth Circuit as to the retroactive effect of *Dynamex Ops. W. Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), the Ninth Circuit in this opinion amended and reissued its prior opinion and offered the following "observations and guidance" on remand to the district court: (1) There is no "*Patterson* gloss" to the ABC Test, meaning that the opinion in *Patterson v. Domino's Pizza LLC*, 60 Cal. 4th 474 (2014) (involving the absence of franchisor liability for the alleged sexual assault of an employee of a franchisee) has no application to the ABC test and wage/hour cases; (2) Other courts have considered the three-tier franchise structures in applying the ABC Test; and (3) Prong "B" of the ABC Test (the one involving the question of whether the hiring entity is engaged in the same usual course of business as the worker) "may be the most susceptible to summary judgment."

California Law Applies To Flight Attendants' Wage/Hour Class Action

Bernstein v. Virgin Am., Inc., 2021 WL 686281 (9th Cir. 2021)

Approximately 25% of Virgin's flights were between airports in California, and approximately 75% of Virgin's flight took off or landed at a non-California airport, but the vast majority of those flights retained some connection to California (i.e., arrived in or departed from an airport in California); members of the class spent approximately 31.5% of their time working within California's borders. Virgin disputed that it is subject to California law, but did not contend that any other state's labor laws ought to apply to it either. The district court certified the class action and granted summary judgment to the flight attendants as to most of their wage/hour claims against Virgin. The Ninth Circuit held that the dormant Commerce Clause permits application of California labor law in the context of this case.

The Court reversed the district court's summary judgment in favor of the flight attendants on their claims for minimum wage and payment for all hours worked, but held that California overtime rules did apply to the class and that the class' meal and rest claims were properly adjudicated in favor of the flight attendants, as were their clams for wage statement violations and waiting time penalties. Finally, the Ninth Circuit held that Virgin was not subject to the "heightened penalties" of the Private Attorneys General Act (PAGA) because it was not notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the district court partially granted plaintiffs' summary judgment motion in this case. *See also Ward v. United Airlines, Inc.*, 986 F.3d 1234 (9th Cir. 2021) (federal law does not preclude California from applying its wage statement law to airline pilots and flight attendants); *International Bhd. of Teamsters v. Federal Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021) (federal law preempts California meal and rest break rules as applied to property-carrying commercial motor vehicles).

PAGA Claim Venue Is ProperAnywhere Employer Committed Violations

Crestwood Behavioral Health, Inc. v. Superior Court, 2021 WL 613700 (Cal. Ct. App. 2021)

In this writ proceeding the Court of Appeal determined that venue is proper under the Private Attorneys General Act (PAGA) in any county in which the employer allegedly committed Labor Code violations – rather than only in the county where the representative plaintiff was employed or the employer's principal place of business is located. The Court concluded: "We see no reason why the Legislature would restrict the proper venue to the location of an individual employee when she is suing on behalf of all aggrieved employees, not herself, and she has no individual claim."

Per Diem Benefits Should Have Been Included As Compensation In Calculating Overtime Rate

Clarke v. AMN Servs., LLC, 987 F.3d 848 (9th Cir. 2021)

Plaintiffs who worked as travelling clinicians for AMN (a healthcare staffing company) were paid a weekly per diem benefit for weeks in which they worked at facilities located more than 50 miles from their homes. In this class action, plaintiffs argued that the per diem benefits were improperly excluded from their regular rate of pay under the Fair Labor Standards Act (FLSA), thus decreasing their wage rate for overtime hours. The Ninth Circuit determined the per diem benefits functioned as compensation for work rather than as reimbursement for expenses incurred and, therefore, should have been included in plaintiffs' regular rate of pay for purposes of calculating overtime pay. Among other things, the Court relied on the fact that AMN paid clinicians a per diem even for days they were not working and allowed them to offset missed or incomplete shifts with hours they had "banked."