Proskauer

California Employment Law Notes

September 2020

Employee Entitled To $17.2 Million For Wrongful Termination/Defamation

King v. U.S. Bank Nat'l Ass'n, 52 Cal. App. 5th 728 (2020)

Timothy King sued his former employer for defamation, wrongful termination in violation of public policy, and breach of the implied covenant of good faith and fair dealing after he was terminated following an investigation into claims of gender discrimination and harassment that were made against him by a subordinate employee (Kim Thakur) about whom "King had performance concerns." A jury awarded King $6 million on the defamation claim; $2.5 million on the wrongful termination claim; and $200,000 on the implied covenant claim. The jury also awarded King $15.6 million in punitive damages for a total judgment of $24.3 million. The trial court conditionally granted the Bank's new trial motion subject to King's accepting a remittitur, which would reduce the judgment to $5.4 million; King accepted the remittitur.

The Bank then appealed, and King cross-appealed. The Court of Appeal reversed the trial court's new trial orders and, after conducting its "own independent review," it concluded King was entitled to a one-to-one ratio of punitive to compensatory damages, resulting in the judgment being increased to $17.2 million ($8.6 million in compensatory and $8.6 million in punitive damages). The Court found the claims supported by substantial evidence, including evidence of Human Resources' failure to properly investigate and its reliance on sources known to be unreliable or biased against King. Further, the Court found substantial evidence that the Bank wanted to terminate King in order to deprive him of his annual bonus. *Morgado v. City & County of San Francisco*, 2020 WL 5033169 (Cal. Ct. App. 2020) (after-tax mitigation income earned by wrongfully terminated employee may be deducted from front pay owed by former employer).

"Continuing Violation" Theory Saves Employee's Sexual Harassment Claim

Blue Fountain Pools & Spas Inc. v. Superior Court, 2020 WL 4581664 (Cal. Ct. App. 2020)

Daisy Arias alleged she suffered sustained, egregious sexual harassment for most of the time she was employed by Blue Fountain, which was directed at her by Sean Lagrave, a salesman who worked in the same office as Arias. Although the alleged harassment dated back to when she first began her employment with the company in 2006, Arias did not file an administrative complaint with the California Department of Fair Employment and Housing until after her employment ended in 2017. Blue Fountain filed a motion for summary adjudication seeking dismissal of the hostile work environment claim on the ground the claim was barred by the applicable statute of limitations.

When the trial court denied the motion for summary adjudication, Blue Fountain filed a petition for writ of mandate in the Court of Appeal seeking an order from the appellate court that would compel the trial court to grant defendant's motion. However, the Court of Appeal denied the petition, holding that Arias' claim was not barred by the statute of limitations on three grounds: (1) several incidents of sexual harassment occurred during the one-year period preceding the termination of her employment; (2) a new owner took over the business in 2015, "[t]hus, even if the conduct of prior management made further complaining futile [and thus commenced the running of the statute of limitations], the arrival of new management created a new opportunity to seek help"; and (3) there was a triable issue of fact as to whether a reasonable employee would have concluded complaining more was futile. Compare *Willis v. City of Carlsbad*, 48 Cal. App. 5th 1104 (2020) (city's actions in reassigning officer and repeatedly denying him promotions were sufficiently "permanent" to preclude application of continuing-violation theory).

Tortious Interference With At-Will Contract Requires Independently Wrongful Act

Ixchel Pharma, LLC v. Biogen, Inc., 9 Cal. 5th 1130 (2020)

In this commercial dispute between two companies, the California Supreme Court determined the bounds of a claim for tortious interference of an at-will contract – a holding that has application in the employment context as well. Plaintiff Ixchel Pharma, a biotechnology company, entered into an agreement with Forward Pharma to jointly develop a drug for the treatment of a disorder called Friedreich's ataxia. Forward subsequently decided to withdraw from the agreement with Ixchel as a result of a settlement Forward had entered into with another biotechnology company (defendant Biogen, Inc.)

The first legal question posed to the California Supreme Court by the Ninth Circuit was whether Ixchel could sue Biogen for tortiously interfering with the at-will contract that existed between Ixchel and Forward in the absence of an independently wrongful act; the second question was whether Cal. Bus. & Prof. Code § 16600 voids a contract by which a business is restrained from engaging in a lawful trade or business with another business. The Supreme Court answered the first question "No": To state a claim for interference with an at-will contract by a third-party, the plaintiff must allege the defendant engaged in an independently wrongful act. With respect to the second question, the Court held that Section 16600 ("every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void") *does* apply to business contracts and that violation of Section 16600 could constitute an independently wrongful act. The Court further held that in the commercial context (as distinguished from the employment context), a "rule of reason" applies to determine the enforceability of a restrictive covenant such as the one at issue in this case.

Time Spent By Employees In Exit Searches Is Compensable

***Frlekin v. Apple, Inc.*, 2020 WL 5225699 (9th Cir. 2020)**

Earlier this year, the California Supreme Court answered a question certified to it by the Ninth Circuit: “Is time spent on the employer’s premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as ‘hours worked’ within the meaning of Wage Order 7?” The California Supreme Court answered the question “Yes.” Putative class member employees estimated the searches took between five and 20 minutes regularly, and up to 45 minutes when stores were busy. The Supreme Court determined that time spent during bag or security checks was time that was subject to the employer’s control because: (1) Apple made employees find and flag down a security guard to conduct the search and confined employees to the premises during the search; and (2) although the bag search was not “required” because employees could choose not to bring a bag, the search was required as a practical matter because employees routinely bring personal belongings to work, including (of course) their iPhones. In this follow-on opinion from the Ninth Circuit, the Court reversed the district court’s grant of Apple’s motion for summary judgment and remanded with instructions to: (1) grant the class members’ motion for summary judgment as to the compensability of time spent waiting for and undergoing exit searches; and (2) determine the remedy to be afforded to individual class members.

Ashley Judd May Proceed With Sexual Harassment Claim Against Harvey Weinstein

Judd v. Weinstein, 967 F.3d 952 (9th Cir. 2020)

Actor Ashley Judd brought this sexual harassment claim against motion picture producer Harvey Weinstein under Cal. Civil Code § 51.9, which prohibits such harassment in the context of a "business, service, or professional relationship" between the plaintiff and a physician, psychotherapist, dentist, attorney, real estate agent, accountant, banker, trust officer, executor, trustee, landlord or property manager, teacher, among others, including "a relationship that is substantially similar to any of the above." Judd alleged that the relationship she had with Weinstein was "substantially similar" to the enumerated examples in the statute. The district court dismissed Judd's sexual harassment claim, but the Ninth Circuit reversed the dismissal, holding that the relationship between Judd and Weinstein involved "an inherent power imbalance" by which Weinstein was "uniquely situated to exercise coercion or leverage" over Judd. The Court held that this "considerable imbalance of power [was] substantially similar to the imbalances that characterize the enumerated relationships in Section 51.9." (The Court noted but disregarded the fact that Section 51.9 was amended in 2019 to add "director or producer" to the list of persons covered by the statute.)

Court Affirms Dismissal of Medical Assistant's Discrimination Lawsuit

Arnold v. Dignity Health, 53 Cal. App. 5th 412 (2020)

Virginia M. Arnold worked as a medical assistant at Dignity Health before her employment was terminated for, among other things, failure to safeguard a patient's personal health information (a HIPAA violation); display of inappropriate materials in the workplace (a picture of a bare-chested male model); careless performance of duties; failure to communicate honestly during the course of an investigation; and failure to take responsibility for her actions. In her lawsuit, Arnold alleged she was discriminated against based upon her age and her association with African-Americans. The trial court granted summary judgment to Dignity Health, and the Court of Appeal affirmed, holding that alleged comments about her age from other employees who were not materially involved in Arnold's termination did not raise a triable issue of fact – further, an employee's expressing surprise that Arnold was "that old" around the time of her birthday did not show discriminatory animus. As for Arnold's association discrimination claim, the Court found no evidence that the supervisor to whom she complained about alleged mistreatment of a Black coworker was involved in Arnold's termination. Finally, the fact that Dignity allegedly failed to follow its own disciplinary process did not create a triable issue of fact regarding Arnold's claims. *See also Henry v. Adventist Health Castle Med. Ctr.*, 2020 WL 970 F.3d 1126 (9th Cir. 2020) (hospital emergency department surgeon was an independent contractor and not an employee who was eligible for the protections of Title VII).

Later-Filed, Substantially Identical PAGA Claim Was Properly Dismissed

Starks v. Vortex Indus., Inc., 2020 WL 5015248 (Cal. Ct. App. 2020)

Chad Starks gave notice to the Labor and Workforce Development Agency (LWDA) of his allegations that his employer (Vortex) had violated certain Labor Code requirements that employers pay overtime wages and provide meal and rest periods and comply with various other requirements of the Labor Code. After the LWDA failed to respond, Starks filed a complaint alleging violations of the Private Attorneys General Act (PAGA). Sixteen months later, Adolfo Herrera filed a "substantially identical" PAGA action against Vortex, which Herrera never moved to consolidate with the Starks' action. Starks later settled with Vortex, and Herrera moved to vacate the judgment and to intervene in the Starks action. The trial court denied Herrera's motions and granted summary judgment to Vortex. The Court of Appeal affirmed, holding that Herrera's motion to intervene was untimely and, because the LWDA already had accepted the proceeds from the judgment in the Starks action, Herrera as the LWDA's agent could not attack that judgment. *See also Robinson v. Southern Counties Oil Co.*, 2020 WL 4696742 (Cal. Ct. App. 2020) (former employee who opted out of class action settlement was barred from bringing PAGA action asserting the same claims).

Amount In Controversy Satisfied CAFA Minimum

Salter v. Quality Carriers, Inc., 2020 WL 5361459 (9th Cir. 2020)

Clayton Salter, a truck driver, filed this putative class action against his employer, Quality Carriers and Quality Distribution, alleging that he and the other class members had been misclassified as independent contractors rather than employees. Quality removed the action to federal court, asserting the amount in controversy exceeded $5 million as required by the Class Action Fairness Act (CAFA). The district court granted Salter's motion to remand on the ground that the declaration Quality submitted from its Chief Information Officer was insufficient to establish that the amount in controversy exceeded $5 million. The Ninth Circuit reversed, holding that the district court erred in treating Salter's attack on Quality's evidentiary presentation as a "factual, rather than facial, challenge" and that "Quality only needed to include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." Compare *Canela v. Costco Wholesale Corp.*, 2020 WL 4920949 (9th Cir. 2020) (named plaintiff's pro-rata share of civil penalties from putative class action did not meet the $75,000 amount-in-controversy diversity jurisdiction threshold; district court also lacked subject matter jurisdiction over PAGA action).

Trial Court Properly Denied Massage Parlor's Request For Waiver Of Bond In Wage/Hour Matter

Li v. Department of Indust. Relations, 2020 WL 4814112 (Cal. Ct. App. 2020)

Fushan Li, the owner of four massage parlors in Lawndale, received three citations from the Labor Commissioner for violations of the state's wage and hour laws. Citations ordering Li to pay a total of $198,576 in unpaid wages and liquidated damages were issued in 2017. After filing a petition for writ of mandate in the superior court challenging the Labor Commissioner's decision, Li requested relief from Labor Code § 1197.1 requiring that Li post a bond based upon his alleged indigency. In opposition to Li's motion for relief, the Labor Commissioner submitted evidence that Li and his wife transferred real property valued in excess of $370,000 to their children and that the children then quitclaimed the property back to Li's wife; the Labor Commissioner also provided evidence that a massage parlor (owned by Li's daughter) was still operating at one of the four locations where Li had previously conducted business. The Court of Appeal affirmed the trial court's judgment denying Li's motion to waive the bond requirement.

Trial Court Properly Refused To Certify Rest Break Class Action

Davidson v. O'Reilly Auto Enter., LLC, 968 F.3d 955 (9th Cir. 2020)

Kia Davidson worked as a delivery specialist at one of O'Reilly's stores in San Bernardino. In this putative class action, Davidson alleged that she and other employees did not receive their rest breaks as required by state law based upon the fact that O'Reilly's policy documents required 10-minute rest breaks for every four hours of work but did not include the language of the regulation, requiring such breaks for every four hours "or major fraction thereof." The district court denied Davidson's motion to certify the class on the ground that Davidson did not show that the policy was applied to employees in a way that violated California law or that the putative class of employees suffered a common injury. The Ninth Circuit affirmed, holding that "the mere existence of a facially defective written policy – without any evidence that it was implemented in an unlawful manner – does not constitute significant proof that a class of employees [was] subject to an unlawful practice." *See also Sanchez v. Martinez*, 2020 WL 5494239 (Cal. Ct. App. 2020) (trial court properly calculated damages owed to farmworkers who were denied rest periods).

Litigant's Attorney Is Entitled To Fees As "Prevailing Party" In UTSA Case

Aerotek, Inc. v. The Johnson Group Staffing Co., 2020 WL 5525180 (Cal. Ct. App. 2020)

The law firm Porter Scott, P.C., defended its client The Johnson Group Staffing (TJG) through two rounds of litigation against claims asserted by TJG's chief competitor Aerotek. In the litigation, Aerotek alleged that TJG (whose founder came from Aerotek) misappropriated trade secrets by soliciting Aerotek's customers. Aerotek lost the underlying cases and was ordered to pay prevailing-party attorney fees in the amount of $735,781 pursuant to Cal. Civ. Code § 3426.4. The trial court determined that Porter Scott (not TJG) was entitled to the fees, because "attorney fees awarded under section 3426.4 (exceeding fees the client already paid) belong to the attorneys who labored to earn them, absent an enforceable agreement to the contrary" (relying on *Flannery v. Prentice*, 26 Cal. 4th 572 (2001), which involved prevailing-party attorney fees under FEHA). *See also Department of Fair Employment & Housing v. Cathy's Creations, Inc.*, 2020 WL 5405797 (Cal. Ct. App. 2020) (prevailing defendant in Unruh Civil Rights Act claim is not entitled to recover its attorney fees against DFEH).

CUIAB Should Have Considered Additional Evidence In Support Of Unemployment Claim

Land v. CUIAB, 2020 WL 5200858 (Cal. Ct. App. 2020)

Justin Land's employer terminated his employment as a field service specialist based upon his "violation of company policy," involving his failure to finish a job or return the next day to finish it because he "just forgot"; Land also gave out his personal phone number to another customer before returning to that customer's home while off duty with his children to complete the job, and he failed to notify his employer that the customer called him complaining about missing items she suspected his children had taken from the customer's home. After the administrative law judge (ALJ) issued an opinion upholding the Employment Development Department's denial of unemployment benefits to Land, he submitted a declaration to the California Unemployment Insurance Appeals Board (CUIAB) seeking to correct a "factual mistake" in the record involving the chronology of events. Notwithstanding the new evidence, the CUIAB adopted the ALJ's decision, and the trial court denied Land's petition for writ of administrative mandamus to compel the CUIAB to set aside the denial of benefits. In this opinion, the Court of Appeal ordered the CUIAB or the ALJ to consider the additional evidence submitted by Land and to reconsider its decision denying him unemployment benefits based upon "the need for accuracy as to the chronology of the events."

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