Proskauer

California Employment Law Notes

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Bank Employee Who Was Harassed By A Customer Can Proceed With Sexual Harassment Claim

Christian v. Umpqua Bank, 2020 WL 7777882 (9th Cir. 2020)

Jennifer Christian, a former employee of Umpqua Bank, alleged she was sexually harassed by one of the bank's customers in violation of Title VII and Washington state law. Among other things, the customer dropped off "small notes" stating that Christian was the "most beautiful girl he'[d] seen" and that he "would like to go on a date" with her. After Christian informed the customer that she was not interested, the customer sent her a long letter stating that she was his "dream girl" and they were "meant to be together." Flowers and references to their being "soulmates" soon followed. Christian notified the bank manager and others in the workplace about the customer's repeated overtures toward her, but her colleagues just warned her "to be careful." Eventually, in response to Christian's repeated requests, the bank closed the customer's account and told him not to return; the bank also temporarily transferred Christian to another branch before Christian resigned based upon her doctor's advice that it was "bad for her health to continue working at Umpqua Bank."

Christian sued for gender discrimination and retaliation, and the district court granted the bank's summary judgment motion. The Ninth Circuit reversed, holding that the incidents of harassment were severe or pervasive enough to create a hostile environment even though there was a seven-month gap between them and some of the incidents did not involve direct interaction with the customer (e.g., letters and notes that were left for her or persistent inquiries that the customer made about Christian to her colleagues). The Court also held there was a triable issue of fact as to whether the bank ratified or acquiesced in the harassment in view of its "glacial response – more than half a year after the stalking began – [which] was too little too late."

Laid-Off Employee Was Not Discriminated Against On The Basis Of Age

Foroudi v. The Aerospace Corp., 57 Cal. App. 5th 992 (2020)

The Aerospace Corporation hired David Foroudi as a senior project engineer when he was 55 years old. Several years later, Foroudi was among the lowest-ranked employees based upon his managers' assessment of his deficiencies in interpersonal communication skills and limited background in navigation relating to GPS, despite being a technical lead on a GPS project. Based upon his low ranking, Foroudi was included in a reduction in force that was necessitated by certain budget cuts. Foroudi's position was eliminated and his remaining duties were redistributed to a younger employee with better qualifications. Foroudi filed a putative class action against Aerospace in state court, which the company removed to federal court based upon Foroudi's assertion of a claim under the federal Age Discrimination in Employment Act (ADEA). While in federal court, Aerospace moved to strike the disparate impact and class allegations from the complaint, which the district court granted on the ground that the administrative filing with the Department of Fair Employment and Housing (DFEH) did not evidence an intention to sue on behalf of a class or include disparate impact allegations. Foroudi then dismissed the ADEA claim and the matter was remanded to state court.

Once the case was back in state court, Foroudi attempted to amend his EEOC/DFEH administrative charge to include class allegations – while the EEOC issued a new right-to-sue letter, the DFEH did not. Then, Foroudi sought leave to file a second amended complaint to add class and disparate impact claims to his lawsuit, which the trial court denied. The trial court subsequently granted Aerospace's motion for summary judgment, and the Court of Appeal affirmed on the ground that there was a legitimate nondiscriminatory reason for his termination (the company-wide RIF) and there was no "substantial evidence" that the reasons offered by Aerospace were untrue or pretextual.

Court Reverses $2.9 Million Jury Verdict For Failure To Accommodate Employee's Disability

Shirvanyan v. Los Angeles Community Coll. Dist., 2020 WL 7706321 (Cal. Ct. App. 2020)

Anahit Shirvanyan, a former kitchen assistant employed by the District, alleged the District failed to reasonably accommodate and/or engage in the interactive process with her based upon two injuries she had suffered (a wrist injury from carpal tunnel syndrome and a shoulder injury). Because the jury did not indicate whether it had relied upon one or both of the alleged injuries in awarding Shirvanyan a verdict of $2.9 million (including $2.8 million in emotional distress damages), the Court of Appeal reversed the judgment and remanded the case for a new trial on her claims for failure to accommodate/engage in the interactive process vis-à-vis the wrist injury. While a reasonable accommodation (a finite period of leave) was available for the wrist injury, there was no substantial evidence that an accommodation was available for the shoulder injury because Shirvanyan could not have engaged in many of the essential job duties as a kitchen assistant with the shoulder injury, and there were no other vacant positions for which she was qualified at the time.

Employer Did Not Willfully Interfere With Employee's FMLA Rights

Olson v. United States, 980 F.3d 1334 (9th Cir. 2020)

Andrea Olson provided reasonable accommodation services to employers such as the Bonneville Power Administration (BPA) to facilitate their compliance with the Americans with Disabilities Act. Olson began experiencing anxiety and requested, among other things, that she be allowed to telework to reduce her time spent onsite. After consulting with its legal counsel, BPA offered Olson a trial work period and continued telework and also made efforts to restore her to an equivalent position. However, BPA never provided Olson notice of her FMLA (Family Medical Leave Act) rights. The district court held a bench trial and determined that BPA's alleged interference with Olson's FMLA rights was not willful and, therefore, the applicable statute of limitations was two rather than three years. Because Olson waited more than two years to commence this action, the district court entered judgment in favor of BPA. The Ninth Circuit affirmed, holding there was insufficient evidence that BPA acted willfully because it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute" (citing *McLaughlin v. Richard Shoe Co.*, 486 U.S. 128 (1988)).

California Law Applies To Non-California Residents Working Off The Coast

Gulf Offshore Logistics, LLC v. Superior Court, 58 Cal. App. 5th 264 (2020)

Non-California resident crew members of the "Adele Elise" (a vessel that provides services to oil platforms located off the coast of California) filed this putative class action alleging multiple violations of California wage and hour law. The owner/operators of the vessel (all of whom are based in Louisiana) petitioned the Court of Appeal to issue a writ of mandate directing the superior court to vacate its order denying their motion for summary judgment. The owner/operators contended that Louisiana law applied to the claims, while the crew members claimed California law governed. The Court of Appeal initially agreed with the owner/operators and held that Louisiana law applied, but after review and remand from the California Supreme Court, the Court of Appeal denied the petition for writ of mandate on the ground that California not Louisiana law applies because the crew members performed the majority of their work within the boundaries of California (Port Hueneme and the Santa Barbara Channel).

Owner/Operators Are Personally Liable For $481,000 Wage/Hour Judgment

Kao v. Joy Holiday, 58 Cal. App. 5th 199 (2020)

Ming-Hsiang Kao was employed by Joy Holiday (a travel tour company) initially performing IT-related duties and then eventually as its office manager. While he was still in Taiwan, Kao worked with Jessy Lin (one of the owners of Joy Holiday) as a tour organizer. Kao later arrived in California on a tourist visa and moved into the home of Lin and her husband Harry Chen. Kao was paid a salary of $1,700 per month, representing a gross amount of $2,500 less an $800 rent deduction. After he received an H-1B visa, Kao was put on the company payroll and worked as the "office manager" of Joy Holiday where he booked hotels and coordinated bus tours. The trial court determined that Kao worked roughly 50 hours per week. Kao was later demoted to "non-manager status," moved into his own apartment and eventually was terminated after working for Joy Holiday for approximately two years. Kao filed suit for breach of contract and violation of various wage/hour statutes. Following a bench trial, the court awarded Kao $481,089 in unpaid wages, prejudgment interest, attorney's fees and costs. The trial court also determined that Lin and Chen had individual alter-ego liability based on the unity of interest and ownership between them and Joy Holiday; among other things, they commingled and made unauthorized use of corporate assets. The Court of Appeal affirmed the judgment.

CAFA-Removed Case Is Remanded Based On Insufficient Amount In Controversy

Harris v. KM Indus., Inc., 980 F.3d 694 (9th Cir. 2020)

KM Industrial removed from state to federal court the putative wage/hour class action under the Class Action Fairness Act (CAFA), asserting that the amount in controversy exceeded $5 million. Plaintiff's motion to remand was based on the argument that KMI unreasonably assumed that the hourly employee class members missed meal and rest periods in each of the workweeks at issue in the case – i.e., that all members of the hourly employee class also were members of the two subclasses (the meal period sub-class and the rest period sub-class). Since KMI failed to establish that all members of the hourly employee class worked shifts that were long enough to make them eligible for meal and/or rest periods, it failed to meet its burden to produce evidence supporting its assertion that the amount in controversy exceeded $5 million. Accordingly, the Ninth Circuit affirmed the district court's remand order in a 2-1 ruling.

PAGA Notice Was Sufficient To Support Claims

Rojas-Cifuentes v. Superior Court, 2020 WL 7488653 (Cal. Ct. App. 2020)

Miguel Angel Rojas-Cifuentes filed a Private Attorneys General Act (PAGA) claim against his former employer, American Modular Systems, Inc. (AMS), in which he alleged violations of the law that requires employers to keep accurate time and payroll records and to compensate employees "for substantial portions of their workday." AMS filed a motion for summary adjudication in which it contended that Rojas-Cifuentes had failed to exhaust administrative remedies with the Labor and Workforce Development Agency because the letter to the Agency failed to properly allege "facts and theories" supporting his claims. The trial court granted AMS's motion, but in this opinion, the Court of Appeal granted Rojas-Cifuentes' petition for writ of mandate, holding that Rojas-Cifuentes' allegations sufficed to notify AMS of the general basis for his claims.

Court Properly Denied Certification Of Call Center Workers' Class Action

Castillo v. Bank of Am., 980 F.3d 723 (9th Cir. 2020)

Cindy R. Castillo filed this putative class action in which she alleged that more than 5,000 similarly-situated call center employees had not been paid minimum wages or overtime pay and that they had been deprived of a second meal period. The district court denied Castillo's motion for class certification of the overtime claim based upon the lack of predominance, though the court found sufficient commonality and typicality. The Ninth Circuit affirmed, holding that there was sufficient commonality (i.e., whether the bank's policy of calculating overtime wages is lawful) and typicality (i.e., whether Castillo's claims were typical of the putative class claims), but not predominance because Castillo sought to certify a class that contained many members who "were never exposed to the challenged [overtime] formulas or, if they were, were never injured by them."

Statute Of Limitations Tolled By Related Class Actions

Hildebrandt v. Staples the Office Superstore, LLC, 58 Cal. App. 5th 128 (2020)

Von Hildebrandt filed a putative class action against Staples asserting that he and other general managers of Staples had been misclassified as exempt from overtime and that, accordingly, they were owed compensation for unpaid overtime, missed rest and meal periods, inaccurate wage statements and waiting time penalties. Hildebrandt's lawsuit was filed after two other Staples general managers had filed similar class actions. In response to Hildebrandt's class action, Staples moved for summary judgment based upon the applicable statutes of limitations. In response, Hildebrandt argued that application of the class action tolling doctrine was necessary to protect the "efficiency and economy of the class action device; otherwise putative class members would be induced to file individual actions to avoid the statute of limitations bar, even while class certification proceedings were pending" in other cases. The trial court granted Staples' motion for summary judgment, but the Court of Appeal reversed, holding that Hildebrandt was entitled to claim the benefit of the class action tolling rule, due to the pendency of the class certification proceedings in the other two cases. *Another recent wage/hour case of note: Calleros v. Rural Metro of San Diego*, 2020 WL 7364161 (Cal. Ct. App. 2020) (passage of voter initiative requiring ambulance employees to remain reachable by a communications device during their work shifts (including rest breaks) mooted plaintiffs' class action challenging employer's on-call rest-break policy).

Employer's Counsel Admitted *Pro Hac Vice* Should Not Also Have Represented Employee Witnesses

Big Lots Stores, Inc. v. Superior Court, 57 Cal. App. 5th 773 (2020)

Big Lots, an Ohio corporation, applied to have Ohio counsel (Vorys, Sater, Seymour & Pease LLP) admitted to represent it in a putative class action pending in California. The trial court granted the application but when it learned that attorneys from the Vorys firm also were attempting to represent various current and former Big Lots managers in depositions noticed by plaintiffs, it revoked the authorization for the Vorys lawyers to continue to represent the employer in the ongoing proceeding on the ground that the attorneys should have sought the court's permission to represent the employees in their depositions. In response to Big Lots' petition for writ of mandate, the Court of Appeal ordered the trial court to vacate its order granting plaintiffs' motion to revoke pro hac vice authorization and to conduct further proceedings to determine the appropriate remedy.

- **Anthony J. Oncidi**
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