Proskauer

California Employment Law Notes

July 2021

Board of Directors Quota Law May Be Unconstitutional

Meland v. Weber, 2021 WL 2521615 (9th Cir. 2021)

In 2018, the California Legislature enacted Senate Bill 826, which requires all corporations headquartered in California to have a minimum number of females on their boards of directors; corporations that fail to comply with SB 826 are subject to monetary penalties. One shareholder of OSI Systems, Inc., Creighton Meland, brought an action challenging the constitutionality of SB 826 on the ground that it requires shareholders to discriminate on the basis of sex when exercising their voting rights in violation of the Fourteenth Amendment. The district court granted a motion to dismiss Meland's complaint for lack of Article III standing, reasoning that Meland had not suffered an injury in fact. In this opinion, the Ninth Circuit reversed the district court, holding that to the extent Meland's allegations that SB 826 "requires or encourages" him to discriminate on the basis of sex, he has suffered a concrete personal injury sufficient to confer Article III standing. The Court further held that Meland's "injury is ongoing and neither speculative nor hypothetical, and the district court can grant meaningful relief."

2:1 Ratio of Punitive to Compensatory Damages Was Appropriate

Contreras-Velazquez v. Family Health Ctrs. of San Diego, Inc., 62 Cal. App. 5th 88 (2021)

Rosario Contreras-Velazquez sued her former employer, Family Health Centers ("FHC"), for disability discrimination after she suffered a work-related injury and was terminated. A jury found FHC not liable, but the trial court ordered a new trial as to three claims; after the retrial, the jury awarded Contreras-Velazquez $916,645 in compensatory damages and $5 million in punitive damages, which the trial court reduced to $1.83 million (a 2:1 ratio of punitive to compensatory damages). In this appeal, the Court of Appeal affirmed the trial court's order reducing the punitive damages award, holding that FHC had engaged in misconduct that was "somewhat or moderately reprehensible" by inflicting emotional and mental distress upon Contreras-Velazquez for which the jury awarded her $750,000 in damages. However, because the emotional distress damages award was "substantial," it appears to have contained a punitive element. "Given all of these factors, we conclude the trial court did not err in determining the constitutional maximum ratio for a punitive damages award was twice the amount of the compensatory damages award."

See also Briley v. City of W. Covina, 2021 WL 2708945 (Cal. Ct. App. 2021) ($3.5 million emotional distress damages jury award was "shockingly disproportionate to the evidence of harm" and should have been no more than $1.1 million, which is still "high"); *Rubio v. CIA Wheel Group*, 63 Cal. App. 5th 82 (2021) (deceased employee's estate was properly awarded $500,000 in punitive damages even though non-economic damages could not be awarded after employee's death – punitive damages award was properly based upon more than just $15,000 in economic damages).

High School Football Coach's Title VII Claim Was Properly Dismissed

Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)

Joseph Kennedy, a high school football coach, was not rehired after he repeatedly kneeled with team members (some of whom may have felt pressured to join him) and prayed at mid-field following games. The school district warned Kennedy that his actions, which attracted media attention, could be perceived as endorsement of religion by the school district and that they interfered with the performance of job duties. Kennedy sued for violation of Title VII and his First Amendment rights. The district court granted the school district's motion for summary judgment on the ground that the school's actions were justified due to the risk of an Establishment of Religion Clause violation if Kennedy were allowed to continue with his religious conduct. The Ninth Circuit affirmed, holding that the school district had not violated Kennedy's First Amendment rights nor his rights under Title VII; the Court held that Kennedy had failed to make out a prima facie case of disparate treatment based upon his religious beliefs.

Third Party Was Not Liable for Aiding and Abetting Harassment

Smith v. BP Lubricants USA, Inc., 64 Cal. App. 5th 138 (2021)

Robert Smith's employer, Jiffy Lube, held a presentation for its employees to learn about a new Castrol product. Castrol employee Gus Pumarol made several comments during the presentation that Smith considered to be racist and offensive. Smith sued Castrol (a dba of BP) and Pumarol for racial harassment under the Fair Employment and Housing Act and discrimination under the Unruh Act; Smith also sued Pumarol for intentional infliction of emotional distress ("IIED"). The trial court sustained BP and Pumarol's demurrer without leave to amend.

The Court of Appeal reversed the dismissal of the IIED and Unruh Act claims, but affirmed dismissal of the FEHA claim on the ground that there were no allegations that BP and Pumarol had aided and abetted Smith's employer (Jiffy Lube) in harassing him. As for the other claims, the Court held that a reasonable jury could find that Pumarol's comments were sufficiently extreme and outrageous to have resulted in an infliction of emotional distress upon Smith. The Court reversed dismissal of the Unruh Act claim on the ground that a business establishment (Castrol) could face liability under the Act for its racially harassing conduct directed toward a customer. *See also Moreno v. Bassi*, 65 Cal. App. 5th 244 (2021) (plaintiff who lost all FEHA claims and prevailed on a minimum wage claim in the amount of $16 was entitled to reasonable attorney's fees pursuant to Cal. Lab. Code § 1194 rather than Cal. Code Civ. Proc. § 1031; cost recovery is limited to costs unrelated to the unsuccessful FEHA claims).

Teacher's Discrimination Claim Should Not Have Been Dismissed

Verceles v. Los Angeles Unified Sch. Dist., 63 Cal. App. 5th 776 (2021)

Junnie Verceles, who is Filipino and 46 years old, alleged that he was removed from his school and placed on reassignment with the local district office for three years (which he calls "teacher jail") due to an allegation of misconduct involving a student. After his employment was terminated, Verceles filed a discrimination complaint, alleging age, race and national origin discrimination. Verceles asserted that the school district has a "continuing policy, pattern and practice of age discrimination" and that the district's reliance on "illegitimate 'teacher jail'" to remove teachers has an adverse discriminatory impact on employees over the age of 40. The school district filed an anti-SLAPP motion in response to Verceles's lawsuit, asserting that his complaint arose from acts in furtherance of the school district's rights of petition and free speech – specifically, the investigation into teacher misconduct. The trial court granted the motion to strike under the anti-SLAPP statute, but the Court of Appeal reversed, holding that Verceles's complaint did not arise from the school district's protected activity. *See also Clark v. Superior Court*, 62 Cal. App. 5th 289 (2021) (FEHA's exhaustion of administrative remedies requirement should not be interpreted as a "procedural gotcha" where DFEH complaint contained an inaccuracy as to the employer's legal name).

Economic Damages Award Should Have Been Reduced by Post-Termination Earnings

Martinez v. Rite Aid Corp., 63 Cal. App. 5th 958 (2021)

Following two prior trials, which resulted in reversal of the judgments by the Court of Appeal, this wrongful termination/discrimination case was tried for a third time in 2018. The jury awarded Maria Martinez $2 million on her wrongful termination claim against her former employer (Rite Aid) and $4 million on her claim for intentional infliction of emotional distress against Rite Aid and her former supervisor, Kien Chau. The Court of Appeal largely affirmed the verdict in favor of Martinez, noting that Rite Aid was inappropriately challenging on appeal some of the same jury instructions it had *proposed* during the trial, thereby forfeiting its objections. The Court did order that the past economic damages award be reduced by $140,840, which was the amount of wages Martinez earned from post-termination employment. The Court rejected Martinez's argument (based upon *Villacorta v. Cemex Cement, Inc.*, 221 Cal. App. 4th 1425 (2013)) that wages earned from an "inferior job" may not be used to mitigate damages. *See also Felczer v. Apple, Inc.*, 63 Cal. App. 5th 406 (2021) (post-judgment interest on an award of prejudgment costs begins to run on the date of the judgment or order that establishes the right to recover a particular cost item, even if the dollar amount has yet to be ascertained).

Hotel Did Not Violate Santa Monica's Recall Ordinance

Bruni v. The Edward Thomas Hospitality Corp., 64 Cal. App. 5th 247 (2021)

Theodore Bruni worked as a restaurant server at the Hotel Casa del Mar in Santa Monica before he was laid off when the Hotel eliminated all part-time positions in food and beverage operations. At the time of his layoff in October 2018, Bruni had been employed by the Hotel for fewer than four months, though he had previously worked for the Hotel for approximately 10 months before voluntarily resigning due to scheduling difficulties. Pursuant to the recall ordinance of the City of Santa Monica, laid-off employees who have been employed for "six months or more" have a conditional right to be rehired. When Bruni was not recalled by the Hotel to fill an open position, he sued for violation of the recall ordinance and wrongful failure to rehire in violation of public policy. The trial court sustained the Hotel's demurrer and dismissed Bruni's complaint; the Court of Appeal affirmed, holding that the ordinance only provides a right of recall to employees with at least six months of uninterrupted employment and not those who, like Bruni, had voluntarily resigned. The Court also affirmed dismissal of Bruni's public policy claim on the ground that he had not alleged a violation of the recall ordinance, and, in any event, a municipal ordinance cannot serve as a predicate for a "*Tameny* tort claim" – nor can a "mere nonrenewal of employment" (as opposed to a termination) constitute the basis for such a claim.

Owner Was Not Personally Liable for Misclassification of Employees

Usher v. White, 64 Cal. App. 5th 883 (2021)

The plaintiffs in this putative class action lawsuit (service technicians) alleged they had been misclassified as independent contractors rather than employees. They amended their complaint to add Shirley White and her son Jeff White as individual defendants in the case, relying upon Cal. Lab. Code § 558.1, which creates personal liability for an "owner, director, officer, or managing agent" of an employer. The trial court granted Shirley White's summary judgment motion on the ground that she had not participated in the decision to classify plaintiffs as independent contractors and thus was not liable under Section 558.1. The Court of Appeal affirmed, holding that in the absence of "personal involvement" in violating the statute or in causing such violations, an owner has no personal liability. Here, Shirley White's involvement in the operation and management of the employer was "extremely limited," and she did not participate in the day-to-day operational/management decisions of the company.

Ninth Circuit Overturns $100 Million Wage-Hour Judgment Entered Against Walmart

Magadia v. Wal-Mart Assocs., Inc., 999 F.3d 668 (9th Cir. 2021)

In this class action, Roderick Magadia, a former Walmart employee, alleged violations of California's meal-break and wage-statement requirements (Cal. Lab. Code §§ 226.7 and 226(a)). After the district court (Judge Lucy H. Koh) determined that Magadia suffered no meal-break violation, it decertified the class, but permitted Magadia to still seek PAGA penalties on that claim based on alleged violations against other Walmart employees. The district court also ruled against Walmart on the wage statement claims (inadequate pay-rate information and failure to furnish pay-period dates with Magadia's last paycheck) and awarded Magadia and the class members over $100 million in damages and penalties.

The Ninth Circuit vacated the district court's judgment and award of damages on the meal-break violations and remanded with instructions to remand the claim to state court; as for the wage-statement violations, the Court reversed the judgment and remanded with instructions to enter judgment for Walmart. The Court held that because Magadia did not suffer any meal-break violation, he did not have standing to bring the claim, reasoning that PAGA differs in "significant respects" from traditional *qui tam* statutes that permit a claim to be brought on behalf of others. The Court further held that while Magadia did have standing to bring the wage-statement claims under Section 226(a), Walmart had not violated the statute because the quarterly bonus amounts that Walmart paid retroactively did not need to be included in the wage statements. The Court also determined that Walmart's statements of final pay did not violate the wage statement law because Section 226(a) permits employers to furnish wage statements semimonthly *or* at the time of each payment of wages, and Walmart did the former. *See also General Atomics v. Superior Court*, 64 Cal. App. 5th 987 (2021) (employer did not violate Section 226 by separately referencing multiple regular and overtime rates of pay on wage statements); *Levanoff v. Dragas*, 2021 WL 2621360 (Cal. Ct. App. 2021) (employer did not violate California law by using the "rate-in-effect" (rather than weighted average) method for calculating overtime for dual-rate employees).

Police Sergeant Who Accessed Computer Database in Exchange for Money Did Not Violate CFAA

Van Buren v. United States, 593 U.S. ___, 141 S. Ct. 1648 (2021)

Nathan Van Buren, a former police sergeant, ran a license-plate search in a law enforcement computer database in exchange for money. Among other things, Van Buren was charged with violation of the Computer Fraud and Abuse Act ("CFAA") for "exceed[ing] authorized access" to the law enforcement database. A jury convicted Van Buren of violating the CFAA, but Van Buren argued on appeal to the Eleventh Circuit that the "exceeds authorized access" clause of the statute applies only to those who obtain information to which their computer access does not extend, not to those who misuse access that they otherwise have. In this opinion, the Supreme Court resolved a conflict among the circuits and agreed with the narrower interpretation of the law as advocated by Van Buren – and as already followed in the Ninth Circuit since *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (*en banc*). The Supreme Court concluded: "In sum, an individual 'exceeds authorized access' [under CFAA] when he accesses a computer with authorization but then obtains information located in particular areas of the computer – such as files, folders, or databases – that are off limits to him."

Trial Court Properly Failed to Certify Signature Gatherers' Class Action

Wilson v. The La Jolla Group, 61 Cal. App. 5th 897 (2021)

The trial court declined to certify a class action filed by individuals who worked as signature gatherers for the La Jolla Group ("LJG") on behalf of political campaigns and political action committees. LJG classified these workers as independent contractors, though they alleged they were misclassified and should have been classified and paid as employees of LJG; they also alleged a violation of Cal. Lab. Code § 226(a) involving their wage statements. The trial court determined that plaintiffs had failed to show that common questions of fact or law predominate or that class treatment was superior to individual actions even if the workers were employees under *Dynamex Ops. W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018).

LJG provided evidence that the signature gatherers had no set workdays or hours; chose when and how long to work; worked in many different local jurisdictions with many differing minimum wage rates; were free to stop work for a meal or rest break any time (or not); were free to purchase supplies for their own use (or not); and there was no termination or resignation event that would trigger a final wage payment. Accordingly, the Court of Appeal affirmed denial of class certification on the misclassification issue, but reversed that determination as to the wage statement claim, holding that LJG has a uniform policy of not providing signature gatherers with itemized wage statements, which should have been certified as a class action. *See also Salazar v. See's Candy Shops, Inc.*, 64 Cal. App. 5th 85 (2021) (because individual issues predominate, motion to certify class action for missed meal breaks was properly denied); *Parada v. East Coast Transp. Inc.*, 62 Cal. App. 5th 692 (2021) (*Dynamex* applies retroactively and the "ABC Test" is not preempted by federal law); *Vendor Surveillance Corp. v. Henning*, 62 Cal. App. 5th 59 (2021) (*S.G. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341 (1989) rather than *Dynamex* provides an applicable standard for determining employment status for purposes of determining unemployment insurance taxes for work performed before Jan. 1, 2020).

Related Professionals

- **Anthony J. Oncidi**
  Partner