Proskauer

California Employment Law Notes

November 2022

Equal Pay Act Claim Should Not Have Been Dismissed

Allen v. Staples, Inc., 84 Cal. App. 5th 188 (2022)

Joyce Allen worked at Staples as a field sales director (FSD) reporting to area sales vice president Bruce Trahey; FSD Charles R. Narlock also reported to Trahey. As part of a corporate reorganization in February 2019, Trahey informed Allen and several other FSDs of his decision to eliminate their positions and terminate their employment. In her lawsuit, Allen alleged violation of the Equal Pay Act (EPA); gender discrimination and sexual harassment under the Fair Employment and Housing Act (FEHA); failure to prevent discrimination and harassment under FEHA; retaliation and wrongful termination in violation of public policy. The trial court granted defendants' motion for summary judgment and, in the alternative, summary adjudication of each cause of action. The Court of Appeal affirmed dismissal of all claims except Allen's EPA claim, including her claim for punitive damages.

Allen's EPA claim was based on evidence showing a pay disparity between her starting salary as an FSD and, before that, an area sales manager (ASM) and Narlock's salary when he started in those positions. When Allen became an ASM, her base salary was set at $84,999.96; when Narlock became an ASM, his salary was set at $107,698.86 (approximately $22,000 more than Allen's starting salary in the position). When Allen was promoted to FSD, her annual salary was set at $86,912.46 (the same salary she was earning as an ASM); Narlock's base salary as an FSD was $135,000 ($48,087.54 more than Allen's salary). Staples argued that the salary differentials between Narlock and Allen are explained by bona fide factors other than gender, namely Narlock's time with the company and his experience before taking both the ASM and FSD positions. However, because Staples relied on evidence of its general practices to set salaries based on factors such as seniority and merit, Staples failed to set forth the "specific factors on which Narlock's base salary, in either position, was premised or the factors on which plaintiff's base salaries were premised." Accordingly, summary adjudication of Allen's EPA claim had to be reversed.

Whistleblower Claim Should Not Have Been Dismissed In Part

Killgore v. SpecPro Prof'l Servs., *LLC*, 51 F.4th 973 (9th Cir. 2022)

While consulting for an environmental project for the United States Army Reserve Command, Aaron Killgore believed he was being required to prepare an environmental assessment in a manner that violated federal law. Killgore was fired shortly after he reported the suspected illegality to his supervisor and the Army Reserve's project leader Chief Laura Caballero, who Killgore alleged gave the unlawful directives. The district court granted SpecPro's partial motion for summary judgment, but the Ninth Circuit reversed, holding that Killgore's disclosure to his supervisor was actionable even though the supervisor to whom Killgore made the disclosure did not have "authority to investigate, discover, or correct the violation" within the meaning of Cal. Lab. Code § 1102.5(b). The Court also held that Killgore's disclosure to Caballero was an actionable disclosure to a "government agency" within the meaning of the statute even though the disclosure was part of Killgore's normal duties and Caballero may have been a "wrongdoer" who was the subject of the disclosure. However, the Ninth Circuit affirmed dismissal of Killgore's retaliation claim, finding that Killgore failed to present evidence that he refused to participate in illegal activity within the meaning of Section 1102.5(c).

School District Employee May Have Been Discriminated Against On The Basis Of A Disability

Price v. Victor Valley Union High Sch. Dist., 2022 WL 16845113 (Cal. Ct. App. 2022)

La Vonya Price worked as a part-time substitute special education aide at the Victor Valley Unified School District before applying for a full-time position. Although she received an offer for a full-time position, it was contingent upon her passing a physical exam, which she failed. Price sued for disability discrimination and related claims. The trial court granted the District's motion for summary judgment, but the Court of Appeal reversed in part. The appellate court rejected the District's argument that Price was not qualified to perform the job because she failed the physical examination and was unable to perform the essential functions of the job, such as running after students. The Court disagreed that running after students was an essential function of a full-time instructional assistant's job especially given that Price worked in the same position in a part-time capacity before being offered a full-time position. Price also established that she could have been placed in a setting where special needs students do not require any physical assistance or supervision. Further, the Court determined that the comment (repeated four times) from the District's Director of Classified Personnel that Price was "a liability" created a triable issue of material fact as to whether the District's stated reasons for rescinding the job offer were pretextual. The Court also held that the District was under no obligation to engage in the interactive process with Price because her disability, resulting limitations, and necessary reasonable accommodations were not open and obvious (she denied having a disability or any limitations), which meant that she had the initial burden to initiate the interactive process and request a reasonable accommodation. Finally, the Court held that the retaliation claim was properly dismissed because the decision to terminate her employment was made before she allegedly engaged in any protected activity.

Offer To Settle Expired When The Court Granted Summary Judgment Motion

Trujillo v. City of Los Angeles, 2022 WL 15119812 (Cal. Ct. App. 2022)

In a negligence case, the City of Los Angeles made a settlement offer to the plaintiff pursuant to Cal. Code Civ. Proc. § 998 a few days before the hearing on defendant's motion for summary judgment. Just four minutes after the court granted defendant's summary judgment motion, plaintiff's counsel emailed a purported acceptance of the settlement offer to the City. The trial court entered judgment for the defendant, implicitly ruling that plaintiff's acceptance was inoperative. The Court of Appeal affirmed, holding that "[b]ecause a dispute is resolved and the outcome of the litigation becomes certain and known once a trial court issues its oral ruling granting summary judgment, that is the point in time at which both the text and purpose of section 998 dictate that the pending section 998 offer is no longer operative."

Hirer Of Independent Contractor Is Not Liable For Injury To Contractor's Employee

Miller v. Roseville Lodge No. 1293, 83 Cal. App. 5th 825 (2022)

Roseville Lodge No. 1293, Loyal Order of Moose, Inc., hired Charlie Gelatini to move an ATM on its premises. Ricky Lee Miller, Jr., who worked for Gelatini and was the person who performed the work, was injured on the job when he fell from a scaffold. Miller sued the Lodge and its bartender for his injuries. Relying upon the well-established *Privette* doctrine, the Lodge and Dickinson argued that they were not liable for Miller's injuries since he was Gelatini's employee and not theirs. The trial court granted defendants' summary judgment motion, and the Court of Appeal affirmed, ruling that the *Privette* doctrine holds that a hirer generally delegates to an independent contractor all responsibility for workplace safety and is not liable for injuries sustained by the contractor or its workers while on the job. The Court rejected Miller's arguments that the retained control or concealed hazardous conditions exceptions to the *Privette* doctrine applied. *Compare Ramirez v. PK 1 Plaza 580 SC, LP*, 2022 WL 16846274 (Cal. Ct. App. 2022) (*Privette* doctrine does not apply where landowner did not hire independent contractor).

Employer Waived Right To Arbitration By Failing To Timely Pay Arbitration Fees

Espinoza v. Superior Court, 83 Cal. App. 5th 761 (2022)

Rosa M. Quincoza Espinoza sued her former employer, Centinela Skilled Nursing & Wellness Centre West, LLC, for discrimination and retaliation. The employer filed a motion to stay the litigation and compel arbitration, invoking the terms of an arbitration agreement that Espinoza had signed. After the employer's motion to compel arbitration was granted, Espinoza's counsel emailed the arbitration provider and initiated an arbitration. On May 24, 2021, the arbitration provider sent the parties an initial invoice for an administrative fee and telephonic arbitration management conference with a due date of May 31, 2021. On July 1, 2021, the arbitration provider confirmed to plaintiff's counsel that it had yet to receive payment of the invoice from the employer. Plaintiff then filed a motion in the trial court pursuant to Cal. Code Civ. Proc. §§ 1281.97 and 1281.98, contending that the employer had materially breached the arbitration agreement and waived its right to compel arbitration by failing to pay the invoice within 30 days of the due date. Although the trial court denied the motion on the ground that defendant was in "substantial compliance" with the arbitration provision and plaintiff did not suffer "material prejudice," the Court of Appeal held that Section 1281.97 does not contain exceptions for substantial non-compliance, inadvertent non-payment, or absence of prejudice and this interpretation of the statute is not preempted by the Federal Arbitration Act. Accordingly, the Court issued a peremptory writ of mandate directing the trial court to: vacate its order denying plaintiff's motion; order the lifting of the stay of litigation in court; and determine whether plaintiff's motion for sanctions should be granted pursuant to Cal. Code Civ. Proc. § 1281.99. *See also Davis v. Shiekh Shoes, LLC*, 2022 WL 16546189 (Cal. Ct. App. 2022) (employer waived right to arbitration by failing to file motion to compel arbitration for 18 months and by actively participating in the lawsuit).

Target Of Workplace Violence TRO Was Entitled To Cross Examine Witnesses

CSV Hospitality Mgmt. LLC v. Lucas, 84 Cal. App. 5th 117 (2022)

CSV Hospitality Management LLC obtained a restraining order under the Workplace Violence Safety Act against Jermorio Lucas who was living at the Aranda Residence, a residential hotel that provides supportive housing to formerly homeless individuals. In support of its petition against Lucas, CSV submitted affidavits from four of its employees establishing that Lucas had been "very aggressive and confrontational" towards other tenants and Aranda Residence employees. Among other things, Lucas verbally abused employees while they were working, stalked them, took photos and videos of them without their consent, and even forcefully pushed one of the employees into a window. The trial court granted a temporary restraining order against Lucas and set the matter for an evidentiary hearing. The trial judge denied Lucas's counsel's request to cross examine CSV's witnesses and ordered Lucas to refrain from harassing, threatening, following or contacting CSV's employees and Lucas was forbidden from possessing a firearm. The Court of Appeal reversed the workplace violence restraining order due to the denial of Lucas's due process right to cross examine one of CSV's witnesses.

Former Employee Was Not Injured By Alleged Violation Of FCRA

Limon v. Circle K Stores Inc., 2022 WL 14391789 (Cal. Ct. App. 2022)

Plaintiff Ernesto Limon was employed by Circle K (which operates gas stations and convenience stores in California) for just one month before filing this putative class action lawsuit against his former employer, alleging violation of the Fair Credit Reporting Act (FCRA). Limon alleged that Circle K's standard form in which it seeks a job applicant's consent to conduct a background check violated FCRA's "standalone disclosure" requirement because it contained "extraneous provisions" and, further, that he was "confused regarding the nature of his rights under the FCRA." After suing Circle K in federal court (and losing), Limon initiated this action in state court. The trial court also dismissed Limon's action based on Limon's inability to establish he had suffered a concrete injury as a result of Circle K's actions. The Court of Appeal affirmed on the ground that Limon had not suffered a sufficient concrete or particularized injury to have standing to sue Circle K.

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