Proskauer

California Employment Law Notes

January 2024

A Single Incident Of Harassing Conduct May Create A Hostile Work Environment

Beltran v. Hard Rock Hotel Licensing, Inc., 97 Cal. App. 5th 865 (2023)

Stephanie Beltran, a server at the Hard Rock Hotel in Palm Springs, alleged she had been sexually harassed by Juan Rivera, the former General Manager of the hotel. Beltran reported to Human Resources that Rivera had "grabbed or slapped her ass." Beltran also testified in her deposition about "multiple incidents of conduct over a period of months, including leering gestures, hand massages, and inappropriate questions, which culminated with the slapping or groping incident." Although the trial court granted summary adjudication in favor of the employer, the Court of Appeal reversed, holding that this evidence was more than sufficient to raise a triable issue of fact as to whether "a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job." In so holding, the Court relied principally upon Cal. Gov't Code § 12923 and the case law that post-dates the January 1, 2019 effective date of the statute.

The Court also published that portion of its opinion concerning the "appropriate scope" of a separate statement of undisputed material facts filed in support of a motion for summary judgment, concluding that the separate statement filed in this case, which included over 600 paragraphs and ran over 100 pages, was neither "convenient nor expeditious" in that it included not only "material" facts but also "merely background information that has [no] relevance to any cause of action or defense." The Court similarly criticized the plaintiff's opposition separate statement, holding that "it is completely unhelpful to evade the stated fact in an attempt to create a dispute where none exists."

New Trial Of Sexual Harassment Claim Ordered Following Admission Of Evidence Of Other Employees' Complaints Against Plaintiff

Argueta v. Worldwide Flight Servs., Inc., 97 Cal. App. 5th 822 (2023)

Eunices Argueta worked as an agent in the import department of the employer, a freight operations company, reporting to Dzung Nguyen whom she claimed had sexually harassed her. A jury returned a defense verdict, and Argueta filed a motion for new trial and for judgment notwithstanding the verdict, both of which the trial court denied. Over the spirited dissent of Justice Grimes, the Court of Appeal reversed, holding that Argueta was entitled to a new trial based on the lower court's admitting evidence of multiple complaints that other employees had made against Argueta. The complaints accused Argueta of "bullying, harassment, retaliation, yelling, making threats and other bad behavior, including discriminating against a pregnant subordinate employee." The trial court denied Argueta's motion in limine regarding the employee complaints against her on the ground that they were relevant to "the plaintiff's motive for making the complaints of sexual harassment." Argueta contended and the Court of Appeal agreed that the evidence in question was improper and irrelevant character evidence and that, in any event, motive is not an element of a sexual harassment claim and that the employer would be strictly liable for the harassment regardless of what motive Argueta may have had to complain.

Trial Court Gave Erroneous Jury Instructions In Whistleblower Case

Garrabrants v. Erhart, 2023 WL 9016436 (Cal. Ct. App. 2023)

Charles Matthew Erhart was an internal auditor for a financial institution who “blew the whistle” on the employer concerning the actions of the bank’s CEO, Gregory Garrabrants. While Erhart’s whistleblower case was pending in federal court, Garrabrants sued Erhart in state court for copying, retaining and transmitting to multiple regulatory authorities documents Erhart believed evidenced possible wrongdoing; those documents included personal and confidential information that belonged to Garrabrants. At trial, a jury awarded Garrabrants $1,502 on his claims against Erhart for invasion of privacy, receiving stolen property and unauthorized access to computer data in violation of Penal Code § 502. The trial court awarded Garrabrants more than $65,000 in costs and more than $1.3 million in attorney’s fees as the prevailing party. The Court of Appeal reversed the judgment, holding that the trial court erroneously instructed the jury that bank customers have an unqualified reasonable expectation of privacy in financial documents disclosed to banks; that Erhart needed to believe the documents may have been lost or destroyed had he not removed them; and other instructional errors regarding the Penal Code claims. *See City of Whittier v. Everest Nat’l Ins. Co.*, 97 Cal. App. 5th 895 (2023) (Cal. Ins. Code § 533 barring insurer liability for a loss caused by the wilful act of the insured does not preclude insurer indemnification of whistleblower claims arising under Cal. Lab. Code § 1102.5).

Health Care “Opt-Out Credits” Do Not Count Towards Calculation Of FLSA Regular Rate of Pay

Sanders v. County of Ventura, 87 F.4th 434 (9th Cir. 2023)

The Ninth Circuit affirmed the district court’s grant of summary judgment in favor of the employer (Ventura County) in this putative class action arising under the federal Fair Labor Standards Act (“FLSA”), brought by county firefighters and police officers who opted out of their union- and employer-sponsored health plans. The employees who opted out of these health plans received monetary compensation in return, however part of the compensation was deducted as a fee that was then used to fund the plans from which they had opted out. The employees argued that this opt-out fee should count as part of their “regular rate” of pay for purposes of calculating overtime compensation under the FLSA.

The Court held that these opt-out fees should not be considered part of the employees' "regular rate" of pay. Instead, the fees should be exempted as "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing" health insurance, per the statutory exemption set forth in 29 U.S.C. § 207(e)(4). The opt-out fees deducted from the credit employees received was provided to their union, and employees had no ability to access this sum. The court also rejected an argument from the plaintiffs that the 29 U.S.C. § 207(e)(4) exception should only apply to contributions made to support plaintiffs' own health care (not that of other employees).

Employer May Not Challenge Voided Employment Agreements Via Interlocutory Appeal

Dominguez v. Better Mortgage Corp., 88 F.4th 782 (9th Cir. 2023)

Underwriter Lorenzo Dominguez filed this putative class and collective action against his former employer, alleging that the company failed to pay proper overtime to him and other similarly situated underwriters. After Dominguez filed the lawsuit, his former employer allegedly attempted to persuade other underwriters at the company not to participate in the lawsuit, offering each of them $5,000 in exchange for an agreement to release all of their non-FLSA claims. The employer also circulated a new draft employment agreement to the underwriters that did not specifically call attention to the existence of the arbitration provision contained therein. Dominguez challenged the enforceability of these new agreements, and in response the district court issued an order invalidating the agreements because they were signed "coercively." The district court also ordered the employer to refrain from communicating with any putative class members about the lawsuit, except by way of court-approved writings.

The employer appealed the order restricting its communications, and in this opinion, the Ninth Circuit confirmed its jurisdiction to hear the interlocutory appeal and affirmed the district court's communication restriction as a "tailored response." However, the Ninth Circuit concluded it did not have appellate jurisdiction to determine the enforceability of the nullified employment agreements. The Court concluded that the communication restriction and the order nullifying the employment agreements were not "inextricably intertwined" and that the lower court's nullification of the employment agreements did not constitute injunctive relief. Thus, the appellate court could not decide that issue at this stage of the litigation.

“Poison-Pill” Provision Voided Entire Arbitration Agreement

DeMarinis v. Heritage Bank of Commerce, 2023 WL 9113099 (Cal. Ct. App. 2023)

Former bank employees filed a lawsuit against their former employer for various wage-and-hour violations. The lawsuit included a Private Attorneys General Act (“PAGA”) claim, under which plaintiffs sued on behalf of all other “aggrieved employees” of the company. In response, the bank filed an unsuccessful motion to compel plaintiffs’ “individual” claims to arbitration. Pursuant to the arbitration agreement, the parties waived their respective rights to bring any claims against one other “in any purported class or representative proceeding. There shall be no right or authority for any dispute to be brought, heard, or arbitrated on a class, collective, or representative basis and the Arbitrator may not consolidate or join the claims of other persons or Parties who may be similarly situated.”

The appellate court rejected the bank’s argument that the waiver provision did not constitute a “wholesale waiver” of plaintiffs’ PAGA claims, but instead was an enforceable waiver pertaining only to plaintiffs’ “nonindividual” PAGA claims, though the waiver provision made no distinction between “individual” and “non-individual” PAGA claims. Furthermore, the waiver provision contained a “poison-pill provision” that stated that if the waiver provision were severed in any way, the entire arbitration agreement would be voided. Thus, the Court concluded that the “poison pill” clause invalidated the entire arbitration agreement*. See also Westmoreland v. Kindercare Education LLC*, 90 Cal. App. 5th 967 (2023) (also holding that a poison-pill provision invalidated an entire arbitration agreement).

Rest-Break Class Gets Second Chance for Class Certification

Miles v. Kirkland’s Stores, 2024 WL 74698 (9th Cir. 2024)

Ariana Miles was employed by Kirkland's, a chain of home décor stores, from February 2011 to July 2018. She sued her former employer under two theories. First, she alleged that the company unlawfully required its employees to remain in the store during their rest breaks. She also alleged that employees were forced to work off-the-clock, because company policy stated that employees who brought bags to work would be subject to visual inspections when they left, but these inspections would take place at the store entrance, after they clocked out. Miles filed a motion to certify classes based on both of these theories, but the district court denied the motion after concluding that individual issues would predominate over common issues for both proposed classes.

In this appeal, the Ninth Circuit affirmed the denial of certification for the "bag check" class, but reversed and remanded the denial of the certification of the rest break class. As to that claim, the company's policy explicitly required employees to remain on the premises during their rest breaks, unless they had their supervisors' permission to leave. While the company submitted declarations from employees to prove that the store did not in fact require its employees to get their managers' permission, the panel held that these declarations only discussed store conditions in 2021, which was after the relevant time period. On the other hand, the declarations submitted by the plaintiff, alongside the company policy, provided "overwhelming evidence" that the company consistently enforced its policy for all employees during the relevant period.

Related Professionals

- **Anthony J. Oncidi**
  Partner