Proskauer

California Employment Law Notes

March 2024

Terminating Sanctions Entered Against Employee Who Deleted Relevant Text Messages

Jones v. Riot Hospitality Group LLC, 2024 WL 927669 (9th Cir. 2024)

Alyssa Jones, a former waitress at a Scottsdale, Arizona bar, sued the owner of the bar and his company (Riot) for violations of Title VII and common law tort claims. After two of Jones' coworkers testified in their depositions that they had exchanged text messages with Jones about the case, the district court ordered Jones to produce the text messages. When Jones failed to produce the text messages, the district court ordered the parties to jointly retain a third-party forensic search specialist to review Jones' and the other witnesses' phones. The forensic search specialist (K.J. Kuchta) extracted messages from Jones' phone and forwarded them to Jones' lawyer, who had been ordered to forward the extracted messages to Riot's lawyer. Despite multiple district court orders and deadline extensions, Jones' lawyer failed to forward the text messages to Riot's lawyer. The district court then ordered Kuchta to send all non-privileged messages directly to Riot and assessed $69,576 in fees and costs against Jones and her lawyer. After receiving the text messages from Kuchta, Riot successfully moved for terminating sanctions pursuant to Fed. R. Civ. P. 37(e)(2) based on an expert report from Kuchta who concluded that "an orchestrated effort to delete and/or hide evidence subject to the Court's order had occurred." The Ninth Circuit affirmed the judgment.

"Dispute" Does Not Exist Under Ending Forced Arbitration Act Until Employee Asserts A Claim Or Demand

Kader v. Southern Cal. Med. Ctr., Inc., 99 Cal. App. 5th 214 (2024)

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (9 U.S.C. §§ 401, *et seq.*) became effective on March 3, 2022. A "statutory note" to the Act states that the "Act shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." Omar Kader worked as the CFO and then the COO of the employer, where he signed an arbitration agreement on June 25, 2019 by which he agreed to arbitrate "employment disputes." Kader alleges he was subjected to multiple acts of sexual assault and harassment both before and after he signed the arbitration agreement though he did not file a complaint with the California Department of Fair Employment and Housing (DFEH) until May 2022. Defendants moved to compel arbitration on the ground that the alleged conduct began before Kader signed the arbitration agreement and, therefore, the "dispute" between the parties arose before the effective date of the Act. However, the trial court denied the motion to compel arbitration, and the Court of Appeal affirmed on the ground that "there was no evidence that Kader asserted any right, claim, or demand prior to filing charges with the DFEH in May 2022."

Really, Really Pay Those Arbitration Fees Within 30 Days – Really!

Hohenshelt v. Superior Court, 318 Cal. Rptr. 3d 475 (Cal. Ct. App. 2024)

For the *seventh* time since they became effective in 2020, the California Court of Appeal has published an opinion holding that Cal. Code Civ. Proc. §§ 1281.97 and 1281.98 truly mean what they say: "[I]f the [arbitration] fees or costs… are not paid [by the employer] within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee … to proceed with that arbitration." *See, e.g., Suarez v. Superior Court*, 99 Cal. App. 5th 32 (2024) (intervening national holiday does not extend time for employer to pay fees). Consistent with the holdings of the prior cases, the Court held that the ADR provider has no discretion to extend the period for the employer to pay, and if the payment is received by the ADR provider even one day late, the employer is in "material breach" of the arbitration agreement and irretrievably waives its right to compel arbitration. Like courts before it, this Court held that the Federal Arbitration Act (FAA) does not preempt this strict state statute "because [it] prescribes further—rather than frustrates—the objectives of the FAA… [In fact, the California statute] is a friend of arbitration and not its foe" (citations omitted).

Associate Justice John Shepard Wiley Jr. filed a particularly pithy dissent worthy of the late Justice Scalia in which he first noted that:

> California state law disagrees, strongly and persistently, with federal law about whether arbitration is desirable… This California statute "singles out arbitration agreements for disfavored treatment." No other contracts are voided on a hair-trigger basis due to tardy performance. Only arbitration contracts face this firing squad.

Justice Wiley then predicted: "By again putting arbitration on the chopping block, this statute invites a *seventh* reprimand from the Supreme Court of the United States." He proceeded to recount the six prior instances over the past 37 years in which the Supreme Court of the United States has "rebuked California state law that continues to find new ways to disfavor arbitration." Finally, Justice Wiley cited approvingly a recent U.S. District Court opinion that "debunks" the argument that the statute is really "pro-arbitration": *Belyea v. GreenSky, Inc.*, 637 F. Supp. 3d 745 (N.D. Cal. 2022) (holding that the FAA preempts Cal. Code Civ. Proc. § 1281.97).

Whistleblower Protection Laws Do Not Apply Outside the United States

Daramola v. Oracle Am., Inc., 92 F.4th 833 (9th Cir. 2024)

Tayo Daramola is a Canadian citizen who resided in Montreal at all relevant times and who worked for Oracle Canada, a wholly owned subsidiary of Oracle Corporation (a California-based company). Daramola's employment agreement stated that it was governed by Canadian law. During his employment, Daramola, who worked remotely, conducted business and collaborated with colleagues in Canada and the United States and was assigned as lead project manager for the implementation of an Oracle product at institutions of higher education in Texas, Utah, and Washington. In time, Daramola came to believe that by offering this product, Oracle was committing fraud, and he reported same to Oracle and the SEC. Eventually, Daramola resigned his employment based upon his "unwillingness to take part in fraud." He then filed a lawsuit in federal court in California, claiming violations of the Sarbanes-Oxley Act and the Dodd-Frank Act, as well as the California whistleblower protection act, Cal. Lab. Code § 1102.5. The district court dismissed the lawsuit after twice giving Daramola leave to amend his complaint. The Ninth Circuit affirmed dismissal of the action, holding that the anti-retaliation provisions of the state and federal statutes at issue did not apply to Daramola, a Canadian citizen working out of Canada for a Canadian subsidiary of a U.S.-based parent company.

Former Employer Was Entitled To Injunction And Fees For Employee's Misappropriation Of Trade Secrets

Applied Med. Distribution Corp. v. Jarrells, 2024 WL 1007523 (Cal. Ct. App. 2024)

Stephen Jarrells worked for Applied as a vice president in charge of group purchasing organizations and had previously held other positions during his tenure with the company. When he was hired, Jarrells signed Applied's proprietary information agreement in which he agreed to hold in "strictest confidence" Applied's trade secrets and confidential/proprietary information. Shortly before his resignation eight years later, Jarrells created a folder titled "Good Stuff" on the laptop computer supplied to him by Applied, which contained trade secrets and confidential information that belonged to Applied. Jarrells then transferred the contents of the "Good Stuff" folder onto a thumb drive and uploaded that data to a computer issued to him by his new employer, Bruin Biometrics, LLC, one of Applied's competitors. Then, Jarrells wiped his Applied computer and network drives and returned his Applied computer to Applied.

In the lawsuit that followed, Applied sued Jarrells for misappropriation of trade secrets and breach of the proprietary information agreement. At trial, the jury found Jarrells liable for breach of contract and misappropriation of trade secrets but awarded no damages to Applied on any of its claims. The court issued a permanent injunction against Jarrells and Bruin and awarded Applied $554,000 in attorney's fees and costs (though Applied had requested over $3.9 million). Both parties appealed. In this opinion, the Court of Appeal held the following: (1) Even though the jury awarded it no damages, Applied prevailed on its misappropriation of trade secrets and breach of contract claims and thus was entitled to a permanent injunction against Jarrells as well as prevailing-party attorney's fees; (2) the trial court erred in its assessment and apportionment of fees and costs recoverable by Applied; (3) the trial court erred in excluding from Applied's damages calculation the fees incurred by Applied's forensic computer expert; and (4) the trial court erred by granting nonsuit on the issue of whether Jarrells's conduct in misappropriating trade Applied's trade secrets was willful and malicious.

Trial Court May Not Dismiss PAGA Claims On Manageability Grounds

Estrada v. Royalty Carpet Mills, Inc., 15 Cal. 5th 582 (2024)

The California Supreme Court affirmed an appellate court judgment that "trial courts lack inherent authority to strike PAGA claims on manageability grounds"—that is, trial courts may not "dismiss [them] with prejudice." In so holding, the Supreme Court overruled *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021).

The Court was careful to limit its decision to the question of whether trial courts can dismiss a PAGA claim on manageability grounds, but it assiduously avoided interfering with trial judges' discretion to control their dockets. Thus, it "le[ft] undisturbed various case management tools" short of dismissing claims outright. In doing so, the Court expressly endorsed lower court decisions holding that trial courts may "limit the evidence to be presented at trial or otherwise limit the scope of the PAGA claim." And it observed that because trial courts have the ability to limit evidence or claims, "it behooves the PAGA plaintiff to ensure that trial of the action is manageable[.]"

Because the California Supreme Court left intact a trial court's inherent authority to control its own docket in the face of unwieldy PAGA claims, the ultimate impact of *Estrada* may prove to be relatively minor. Many trial courts already proactively work with litigants to manage individualized issues in PAGA cases, including requiring plaintiffs to submit trial plans at an early but practicable time. Nothing in *Estrada* casts any doubt on the propriety of these practices. Thus, employers may take the ruling as tacit encouragement to continue to try to limit PAGA claims in a way that allows parties and courts to manage individualized issues, even if outright dismissal is now off the table.

Prevailing Employer May Only Recover Costs If FEHA Action Was "Objectively Frivolous"

Neeble-Diamond v. Hotel Cal. By the Sea, LLC, 99 Cal. App. 5th 551 (2024)

Amanda Neeble-Diamond sued her employer for violation of the Fair Employment and Housing Act (FEHA), but after a jury concluded she was an independent contractor rather than an employee, the trial court entered judgment in favor of the employer (Hotel California). Hotel California then filed a motion for attorney's fees and a cost memorandum. Neeble-Diamond successfully opposed the motion for attorney's fees on the ground that Hotel California had failed to establish that her FEHA claims were "objectively frivolous," relying upon *Williams v. China Valley Indep't Fire Dist.*, 61 Cal. 4th 97 (2015) and Cal. Gov't Code § 12965(c)(5), but she failed to file a timely motion to tax costs. The trial court refused to excuse the failure to file a timely motion to tax costs and awarded Hotel California more than $180,000 in costs. The Court of Appeal reversed, holding that Hotel California had failed to file a motion for an award of costs but had simply filed a cost memorandum requesting the court clerk to enter costs – but "the clerk has no authority to exercise discretion in awarding costs, let alone to make the frivolousness finding required by Cal. Gov't Code § 12965."

Dismissal of Representative PAGA Claim Vacated Following *Adolph v. Uber Techs.*

Johnson v. Lowe's Home Centers, LLC, 93 F.4th 459 (9th Cir. 2024)

The Ninth Circuit vacated a district court's dismissal of a former employee's "non-individual" Private Attorneys General Act (PAGA) claims in the wake of the California Supreme Court's holding in *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023). Plaintiff in this case signed a contract with her employer (Lowe's) that contained an arbitration agreement for claims arising from her employment. After her termination, she filed a complaint in California state court (later removed to federal court), asserting both individual and representative claims under PAGA. Lowe's successfully moved to arbitrate the individual PAGA claims following the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), which held that the Federal Arbitration Act preempts PAGA's mandatory joinder rule and allows for an employer to compel individual PAGA claims to arbitration.

The district court then dismissed the representative claims, citing the majority opinion in *Viking River*: "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate [arbitration] proceeding." However, a year after *Viking River* (and before the Ninth Circuit heard oral argument in this case), the California Supreme Court held in *Adolph* that "an order compelling arbitration of individual claims does *not* strip the plaintiff of standing to litigate non-individual claims in court."

Related Professionals

- **Anthony J. Oncidi**
  Partner