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California Employment Law Notes

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Co-Worker's Single Use Of "N-Word" Can Create A Hostile Work Environment

Bailey v. San Francisco Dist. Attorney's Office, 16 Cal. 5th 611 (2024)

Twanda Bailey, an African-American clerk in the San Francisco District Attorney's Office, sued her former employer for racial discrimination and harassment, retaliation, and failure to prevent discrimination in violation of California's Fair Employment and Housing Act. The claims stem from a single incident in which one of Bailey's co-workers with whom she shared an office called her the "N-word." The trial court granted, and the Court of Appeal affirmed summary judgment for the employer, concluding that no trier of fact could find severe or pervasive racial harassment based on being "called a '[N-word]' by a co-worker [rather than a supervisor] on one occasion."

However, in this opinion, the California Supreme Court reversed, holding that the trial and appellate courts placed undue emphasis on the speaker's status as a co-worker, rather than a supervisor. "This case involves an unambiguous racial epithet … [t]he word was used only once; it was not overheard but directed specifically at Bailey. Although it was not physically threatening, a jury could find that use of the slur was 'degrading and humiliating in the extreme.'" The Court further noted that Bailey and her co-worker shared an office space, shared work duties and were asked to cover each other's desks, which meant that Bailey could not distance herself — physically or otherwise — from her co-worker. Further, the record could support a finding the racial slur interfered with Bailey's work performance, as Bailey's psychiatrist provided a letter indicating she was being treated for severe anxiety and depression that developed as a result of workplace stress. Finally, the Court concluded that the HR Manager's "purposeful obstruction" of Bailey's complaint about her co-worker "could be understood as quintessentially retaliatory."

Co-Worker's Social Media Posts Can Create A Hostile Work Environment

Okonowsky v. Garland, 109 F.4th 1166 (9th Cir. 2024)

Lindsay Okonowsky, a former staff psychologist at the Federal Correctional Complex at Lompoc, discovered that a corrections lieutenant (Steven Hellman) with whom she worked and who was responsible for overseeing the safety of guards, prison staff, and inmates had created an Instagram page that contained multiple posts that were overtly sexist, racist, anti-Semitic, homophobic, and transphobic. Approximately 100 of Okonowsky's co-workers followed the page, which explicitly or impliedly referred to the prison, prison staff, and inmates. Additionally, some of the posts contained derogatory images resembling Okonowsky and specifically referred to her, including a post "joking" that the all-male custody officers would "gang bang" Okonowsky at her home.

After Okonowsky discovered the account, she promptly reported it to her supervisors. However, one of her supervisors told her the page was "funny" and another stated that the page was not "a problem." After her report, the Instagram page "began to increasingly target her with … posts [she] reasonably perceived to be an effort to intimidate her and discourage her from making further complaints." Two months after Okonowsky first complained about the Instagram postings (and after a new female warden arrived at Lompoc), the prison issued a cease-and-desist letter to Hellman, stating that his posts appeared to have violated the anti-harassment policy of the Bureau of Prisons. The letter did not stop Hellman, who continued for at least another month to make near-daily harassing posts on his Instagram page before he took down his Instagram page. Okonowsky later left the prison in search of a different job.

Okonowsky sued the Bureau of Prisons for sex discrimination under Title VII, alleging the Bureau failed to take adequate measures to address a hostile work environment at the prison. The district court granted the Bureau's motion for summary judgment. The district court limited its consideration of the evidence to just five posts made on the page that targeted Okonowsky because of her sex. The district court concluded that the five posts "occurred entirely outside of the workplace" because the posts were made on a staff member's personal Instagram page and none of the five posts was ever sent to Okonowsky, displayed in the workplace, shown to Okonowsky in the workplace, or discussed with Okonowsky in the workplace without her consent. The Ninth Circuit reversed, concluding that "offsite and third-party conduct [like the co-worker's Instagram page] can have the effect of altering the working environment in an objectively severe or pervasive manner." Furthermore, a triable issue of fact existed as to whether the prison failed to take prompt and effective remedial action to address Okonowsky's allegedly hostile work environment.

Unions Lose Latest Attempt To Classify Uber/Lyft Drivers As Employees

Castellanos v. State of Cal., 16 Cal. 5th 588 (2024)

In the latest attempt by the Service Employees International Union (SEIU) to prevent Uber, Lyft, DoorDash and similar app-based drivers from being classified as independent contractors (and thereby escape the union's reach), the California Supreme Court determined that Proposition 22 (passed overwhelmingly by the voters of the State of California in 2020 and supported by 87% of the drivers themselves) is constitutional. The purported constitutional infirmity of Proposition 22 (codified at Bus. & Prof. Code § 7451) identified by the SEIU concerns the California legislature's "plenary power" to create and enforce a "complete system of workers' compensation." The union argued that because the drivers are exempt from workers' compensation, Proposition 22 conflicts with the legislature's "plenary power." The Supreme Court held (consistent with an opinion of the California Attorney General) that the legislature does not have the sole authority – to the exclusion of the initiative power – to govern workers' compensation.

Termination Of Employment 56 Days After EEO Complaint Was Not Retaliatory

Kama v. Mayorkas, 107 F.4th 1054 (9th Cir. 2024)

Meyer Kama, who was formerly a transportation security officer with the TSA, alleged Title VII retaliation after he was terminated for failing to cooperate with an investigation into whether Kama and other officers improperly received compensation for serving as personal representatives to other employees during internal agency investigations. Kama contended his employment was terminated 56 days after he complained about being denied intermittent leave under the FMLA – Kama claimed the termination had "temporal proximity" to his EEO complaint. The district court granted summary judgment to the employer, and the Ninth Circuit affirmed, holding that "temporal proximity" alone is not enough to establish retaliation in every case. The Court held that 56 days was a relatively long period of "proximity" as compared to "only a few days" as existed in the cases cited in Kama's brief. Further, there was a relatively "close temporal link" between Kama's noncooperation with the investigation and the termination of his employment. Finally, the Court recognized that the TSA must be given "wide latitude" to determine the terms of employment of its screeners. *Compare* Cal. Labor Code §§ 98.6(b)(1), 1102.5, and 1197.5 (rebuttable presumption of retaliation if employer takes adverse action against employee within 90 days of protected activity).

Party To Contract May Assert Fraudulent Concealment Claim Under Certain Circumstances

Rattagan v. Uber Techs., Inc., 324 Cal. Rptr. 3d 433 (Cal. S. Ct. 2024)

In this nonemployment case, attorney Michael R. Rattagan (self-described as "one of the top and most renowned business lawyers in Buenos Aires") had agreed to act as Uber's registered legal representative in Argentina before Uber launched in Buenos Aires in April 2016. Following the launch, "public reaction was immediate and hostile, sparking violent demonstrations in the streets of Buenos Aires" and resulting in protestors surrounding and blocking the exits of Rattagan's office for hours. Rattagan then asked Uber to designate someone else as its legal representative in Argentina. Subsequently, Rattagan was formally charged with unauthorized use of public space with a commercial aim and aggravated tax evasion, was subjected to interrogation, mugshots and fingerprinting, and was temporarily banned from traveling abroad.

In this lawsuit, Rattagan sued Uber for fraudulent concealment, among other claims, based on his allegations that Uber intentionally concealed Uber's launch plans from him even though Uber knew that local government authorities would consider the launch to constitute a "legally non-compliant and tax evasive transportation business." The district court dismissed the fraudulent concealment claim based upon the "economic loss rule", which generally prohibits the recovery of tort damages by a party to a contract. On appeal, the Ninth Circuit certified a question of state law to the California Supreme Court, and in this opinion, the Supreme Court concluded that an independent fraudulent concealment tort may arise during an ongoing contractual relationship if the elements of the claim can be established independently of the parties' contractual rights and obligations and the tortious conduct exposes the plaintiff to a risk of harm beyond the reasonable contemplation of the parties when they entered into the contract.

Non-Compete Associated With Partial Sale Of Business Must Be "Reasonable" To Be Enforced

Samuelian v. Life Generations Healthcare, LLC, 104 Cal. App. 5th 331 (2024)

Robert and Stephen Samuelian co-founded Life Generations Healthcare, LLC. When they sold a portion of the business, the company adopted a new operating agreement that restrained its members (including the Samuelians) from competing with the company. The Samuelians later filed a dispute in arbitration challenging the enforceability of the non-compete, contending that it was per se unenforceable pursuant to Cal. Bus. & Prof. Code § 16600; in response, the company contended that the "reasonableness standard" (as set forth in *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130 (2020)) should be applied to determine the enforceability of the non-compete.

The arbitrator and the trial court agreed with the Samuelians and held that the agreement was per se unenforceable pursuant to Section 16600. In this opinion, the Court of Appeal reversed, holding that Section 16600 only applies if the restrained party sells its *entire* business interest and that the statute does not apply "to partial sales after which an individual retains a significant interest in the business." In the case of a partial sale, the *Ixchel* reasonableness standard applies to determine the enforceability of the noncompete. The court also held that the "sale of the business" exception to Section 16600 (Sections 16601, *et seq*.) only applies if there has been: (1) a sale of the entire business interest; and (2) a transfer of "some goodwill" as part of the transaction. The opinion also contains a detailed discussion of members' fiduciary duties in a manager-managed company under the Revised Uniform Limited Liability Company Act (RULLCA) and holds that an operating agreement can impose reasonable non-compete restrictions on members of a manager-managed company.

Former *LA Times* Columnist Was Properly Awarded $3.5 Million In Fees/Costs Following $1.25 Million Judgment

***Simers v. Los Angeles Times Commc'ns LLC*, 104 Cal. App. 5th 940 (2024)**

Former *Los Angeles Times* columnist T.J. Simers sued the *Times* for constructive termination of his employment and age and disability discrimination in violation of the Fair Employment and Housing Act. After three trials over the course of nine years, a jury awarded Simers $1.25 million (though his lawyer had asked the jury to return a verdict of between $30 and $50 million). The jury's verdict was the exact amount of a settlement offer the *Times* had made to Simers before the commencement of the third trial pursuant to Cal. Code Civ. Proc. § 998. Following the trial, Simers filed a motion for recovery of more than $15.6 million in attorney's fees and $578,000 in costs for all three trials and the previous appeals. The trial court awarded plaintiff $3.27 million in attorney's fees and $211,000 in costs, reducing the amounts claimed by plaintiff by the fees and costs he incurred after defendant's 998 offer. In reaching this conclusion, the trial court observed that plaintiff's lawyers "did not accurately assess the damages plaintiff would recover and asked for an astronomical sum in the eyes of the jury and the court" and noted that plaintiff's counsel "did not handle this case in a masterful way or achieve an outstanding result." Plaintiff's counsel sought reimbursement of up to $1,300 per hour for their senior lawyers. However, as a result of plaintiff's counsel's "inefficiency and excessive billing [by 11 lawyers]," the trial court reduced the number of hours of recoverable attorney time by 20 percent "across the board." The Court of Appeal affirmed the order.

Discrimination Claim Of Worker Who Performed "Mostly Menial Work" For Buddhist Temple Was Barred

Behrend v. San Francisco Zen Ctr., Inc., 108 F.4th 765 (9th Cir. 2024)

Alexander Behrend lived and worked at the San Francisco Zen Center as a work practice apprentice performing mostly menial work. In response to Behrend's lawsuit alleging violation of the Americans with Disabilities Act, the Zen Center moved for summary judgment on the ground that the ministerial exception under the First Amendment barred Behrend's claim. The district court granted the motion and the Ninth Circuit affirmed, holding that because Behrend lived and worked full time at the temple as a monk, he "performed vital religious duties," and his claim therefore was barred by the First Amendment.

PAGA Plaintiffs Did Not Have Standing To Intervene In Parallel Action Involving Overlapping Claims

Turrieta v. Lyft, Inc., 16 Cal. 5th 664 (2024)

This case involved "what has become a common scenario in PAGA litigation" in which multiple persons claiming to be an "aggrieved employee" within the meaning of the Private Attorneys General Act of 2004 (PAGA) file separate and independent lawsuits seeking recovery of civil penalties from the same employer for the same alleged Labor Code violations. The lower courts denied intervention motions filed by Brandon Olson and Million Seifu in an action Tina Turrieta filed against Lyft. In this opinion, the California Supreme Court affirmed the lower court, holding that "an aggrieved employee's status as the State's proxy in a PAGA action does not give that employee the right to seek intervention in the PAGA action of another employee, to move to vacate a judgment entered in the other employee's action, or to *require* a court to receive and consider objections to a proposed settlement of that action." *See also Taylor v. Tesla, Inc.*, 104 Cal. App. 5th 75 (2024) (Tesla's anti-SLAPP motion was properly denied where PAGA claim based on Tesla's failure to produce personnel records did not rest on any written or oral statement or writing undertaken in connection with a public issue).

Corporate Pilots Are Exempt From FLSA Overtime Pay

Kennedy v. Las Vegas Sands Corp., 110 F.4th 1136 (9th Cir. 2024)

Sean Kennedy and the other plaintiffs worked as full-time corporate jet pilots for defendants. The pilots were paid between $125,000 and $160,000 annually. After an eight-day bench trial, the district court ordered judgment in favor of the employers on the ground that the pilots qualified as highly compensated exempt employees under the federal Fair Labor Standards Act (FLSA) who primarily performed non-manual labor and who customarily and regularly made significant discretionary decisions. The district court further held that even if the pilots were not exempt from overtime, their waiting time between flight assignments did not constitute "work" mandating overtime pay under the FLSA because the pilots could and did freely engage in personal activities during that time. The Ninth Circuit affirmed the judgment. *See also Silloway v. City and County of San Francisco*, 2024 WL 4140633 (9th Cir. 2024) (district court erred in concluding that city and county nurses were compensated on a salary basis as required for exemption under the FLSA).

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