BENDER'S CALIFORNIA
LABOR & EMPLOYMENT
BULLETIN

Vol. 2017, No. 04 • April 2017
Michael C. Sullivan, Editor-in-Chief

Inside This Issue

Another Chapter in *Tibble v. Edison International* – Ninth Circuit's *En Banc* Decision

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Introduction

In 2016, the Ninth Circuit Court of Appeals revisited its 2013 decision in *Tibble v. Edison International*,[1] which held that an ERISA[2] fiduciary has an ongoing duty to monitor plan investments, and that allegations of a breach of this duty may give rise to a timely claim even when a challenge to the fiduciary's initial selection of that same investment would be barred by ERISA's six-year statute of repose. The Ninth Circuit revisited its 2013 decision both as a panel and *en banc*, after the United States Supreme Court reversed and remanded the case on the issues of forfeiture and the scope of a plan sponsor's fiduciary duty.[3] The Ninth Circuit panel held that the beneficiaries had forfeited their claims and affirmed the district court's original opinion.[4] Then the Ninth Circuit reviewed the decision *en banc*. It reversed the panel's decision and held that Plaintiffs' breach of fiduciary duty claims were not barred by ERISA's six-year limitations period - even though the plan fiduciary selected the subject investments more than six years before Plaintiffs filed suit.[5] The Ninth Circuit remanded the case to the district court for trial to determine the scope of the plan sponsor's duty to its beneficiaries.[6]

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1 729 F.3d 1110, 1119 (9th Cir. 2013) ("*Tibble III*").

2 Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461.

3 Tibble v. Edison Int'l, 135 S. Ct. 1823, 1827-28 (2015) ("*Tibble IV*").

4 Tibble v. Edison Int'l, 820 F.3d 1041, 1049 (9th Cir. 2016) ("*Tibble V*").

5 Tibble v. Edison Int'l, 843 F.3d 1187, 1196, 1199 (9th Cir. 2016) ("*Tibble VI*").

6 *Tibble VI,* 843 F.3d at 1196, 1199.

(Continued on page 107)

A NOTE ON CITATION: The correct citation form for this publication is: 2017 Bender's Calif. Lab. & Empl. Bull. 105 (April 2017).

EBOOK ISBN 978-0-3271-6747-1

Another Chapter in *Tibble v. Edison International* – Ninth Circuit's *En Banc* Decision

Claire Lesikar & Roberta Vespremi

(Continued from page 105)

History of *Tibble*

Tibble I and *II*: Central District of California, 2007-2010

Plaintiffs, beneficiaries of Edison International's defined contribution 401(k) Savings Plan (the "Plan"), sued Edison International, among others (collectively "Edison"), in 2007 for alleged breaches of their fiduciary duties.[7] Under the Plan, beneficiaries' retirement benefits are limited "'to the value of their own individual investment accounts, which [are] determined by the market performance of employee and employer contributions, less expenses.'"[8] Initially, the Plan held six investment options, but added more investment options in 1999, including the three retail-class mutual funds at issue.[9] These funds were available to all investors and had higher administrative fees than other institutional-class funds available only to institutional investors.[10] After 2002, Edison added three more retail-class mutual funds as investment choices under the Plan.[11] Plaintiffs alleged, among other things, "that Edison violated its fiduciary duties under ERISA by selecting retail-class mutual funds when cheaper, institutional-class funds were available."[12]

Edison moved for summary judgment, asserting that Plaintiffs' claims concerning the three pre-2002 mutual funds were time barred under ERISA section 413, which provides that no action for fiduciary breach can be commenced six years after "the last action which constituted a part of the breach or violation."[13] The district court partially granted Edison's motion and held that ERISA's six-year statute of limitations precluded Plaintiffs' claims concerning the three funds that Edison added more than six years before Plaintiffs filed suit.[14] However, the district court permitted Plaintiffs to proceed with those claims if they could prove that "Edison, within the six-year limitations period, 'fail[ed] to convert the retail shares to institutional shares upon the occurrence of certain triggering events' that should have prompted a full due-diligence review."[15]

At trial, Plaintiffs argued that Edison breached its fiduciary duties as to the pre-2002 funds because "significant events within the limitations period" should have triggered a review of the funds.[16] To prove significant events occurred, the beneficiaries proffered that two of the funds' names changed due to a partial change in ownership of a sub-advisor and that the third fund's strategy changed.[17] The district court held that Edison did not breach a fiduciary duty concerning any pre-2002 fund, because the name change of the first two funds was insufficient to trigger review and the change in strategy in the third fund "triggered a review to which Edison responded adequately by adding another small-cap option."[18] However, the district court ruled in favor of Plaintiffs as to the retail-class funds selected within the statutory six-year period because Edison did "'not offer[] any credible explanation for why the retail share classes were selected instead of the institutional share classes,' and 'a prudent fiduciary acting in a like capacity would have invested in the institutional share classes.'"[19]

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7 843 F.3d at 1191; *Tibble V*, 820 F.3d at 1043-44.

8 843 F.3d at 1191 (quoting *Tibble IV*, 135 S. Ct. at 1826).

9 *Tibble V*, 820 F.3d at 1043.

10 820 F.3d at 1043.

11 820 F.3d at 1043.

12 820 F.3d at 1044.

13 29 U.S.C. § 1113.

14 Tibble v. Edison Int'l, 639 F. Supp. 2d 1074, 1080 (C.D. Cal. 2009) ("*Tibble I*"); *Tibble IV*, 135 S. Ct. at 1826; *see also* 29 U.S.C. § 1113(1).

15 *Tibble VI*, 843 F.3d at 1191 (quoting Tibble v. Edison Int'l, No. CV 07-5359 SVW (AGRx), 2010 U.S. Dist. LEXIS 69119, at *99 (C.D. Cal. July 8, 2010) ("*Tibble II*")).

16 *Tibble V*, 820 F.3d at 1044.

17 *Tibble II*, 2010 U.S. Dist. LEXIS 69119, at *102-07.

18 *Tibble VI*, 843 F.3d at 1192.

19 843 F.3d at 1191-92 (quoting *Tibble II*, 2010 U.S. Dist. LEXIS 69119, at *98).

Tibble III: Ninth Circuit Court of Appeals, 2013

Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit and argued that ERISA's statute of repose did not bar their claims concerning the pre-2002 funds.[20] In response, Edison argued that Plaintiffs did not show sufficiently changed circumstances.[21] The Ninth Circuit agreed with Edison and "concluded that any theory of a duty absent changed circumstances amounted to a continuing violation theory that [the Ninth Circuit] declined to read into the ERISA statute of limitations."[22]

Tibble IV: United States Supreme Court, 2015

Following the Ninth Circuit's decision, Plaintiffs successfully petitioned for certiorari to the Supreme Court of the United States.[23] The Supreme Court reversed the Ninth Circuit and held that "regardless of when an investment was initially selected, 'a fiduciary's allegedly imprudent retention of an investment' is an event that triggers a new statute of limitations period."[24] The Court rejected the Ninth Circuit's "conclusion that *only* a significant change in circumstances could engender a new breach of a fiduciary duty."[25] The Court remanded the case to the Ninth Circuit and cautioned against "applying a statutory bar to a claim of a 'breach or violation' of a fiduciary duty without considering the nature of the fiduciary duty," and to "recognize that under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances."[26]

Tibble V: Ninth Circuit Panel Decision, April 2016

On remand, the Ninth Circuit was tasked with (1) deciding "the scope of [Edison's] fiduciary duty to monitor investments"; and (2) determining "any questions of forfeiture" due to Edison's claim that the beneficiaries "did not raise the claim below that [Edison] committed new breaches of the duty of prudence by failing to monitor their investments and remove imprudent ones absent a significant change in circumstances."[27]

The panel did not reach the scope of Edison's ongoing fiduciary duty to monitor investments because it held that Plaintiffs forfeited their "ongoing-duty-to-monitor argument."[28] Therefore, the panel affirmed the district court's judgment.[29]

Tibble VI: Ninth Circuit *En Banc* Decision, December 2016

The Ninth Circuit granted Plaintiffs' petition to rehear this case *en banc*.[30] In its decision, the Ninth Circuit sitting *en banc* reversed the panel's forfeiture determination and held that (1) Plaintiffs did not forfeit their duty-to-monitor arguments and, further, Edison forfeited its forfeiture argument; and (2) the district court misunderstood the Ninth Circuit's decision in *Phillips v. Alaska Hotel and Restaurant Employees Pension Fund*,[31] to stand for the proposition that there is no continuing violation theory under ERISA. Accordingly, the Ninth Circuit remanded the case to the district court on an open record to consider the scope of Edison's fiduciary duty, and directed the district court to reconsider attorneys' fees and costs. [32]

Forfeiture

The Ninth Circuit first found that Plaintiffs did not forfeit their "duty-to-monitor" argument on appeal because "the beneficiaries argued on appeal for an ongoing duty to monitor investments and to remove imprudent investments - a duty that was not limited to 'changed circumstances.'"[33] Nor did the court find that the beneficiaries forfeited their claim at trial.[34] As evidence, the Ninth Circuit pointed to Edison's post-trial briefing, which stated:

> The [trial] court expressly held in its first summary judgment ruling that Plaintiffs could not revisit the prudence of selecting mutual funds that became part of the Plan's

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20 Tibble v. Edison Int'l, 729 F.3d 1110, 1119 (9th Cir. 2013) ("*Tibble III*").

21 *Tibble VI*, 843 F.3d at 1192.

22 843 F.3d at 1192 (citing *Tibble III*, 729 F.3d at 1119-20).

23 843 F.3d at 1192.

24 843 F.3d at 1192 (quoting *Tibble IV*, 135 S. Ct. at 1828-29).

25 *Tibble IV*, 135 S. Ct. at 1827 (emphasis in original).

26 135 S. Ct. at 1827-28.

27 135 S. Ct. at 1829.

28 *Tibble V*, 820 F.3d at 1043.

29 820 F.3d at 1049.

30 *Tibble VI*, 843 F.3d at 1192.

31 944 F.2d 509 (9th Cir. 1991).

32 843 F.3d at 1193-99.

33 843 F.3d at 1194.

34 843 F.3d at 1194.

> investment lineup more than six years prior to the filing of the Complaint. *By challenging the prudence of maintaining retail share classes* of the three "name change" funds, Plaintiffs have done what the [c]ourt has forbidden, by attempting to resurrect claims that were properly held barred by the six-year statute of limitations.[35]

Further, the Ninth Circuit itself read the district court's order granting summary judgment for Edison to provide that "the prudence claims arising out of [the initial decision to add retail mutual funds] are barred by the statute of limitations."[36]

The Ninth Circuit did not warm to the Panel's interpretation of the district court's colloquy with Plaintiff's expert, Dr. Steven Pomerantz, or the district court's decision to allow a similar claim as to the Money Market Fund.[37] The Ninth Circuit held that "[w]hatever the intent behind the district court's hypothetical questions to an expert, they did not constitute a change to its earlier ruling sufficient to put the beneficiaries on notice that they could then, contrary to the court's earlier ruling, put on evidence to prove their preferred continuing duty theory."[38] Further, "that the district court allowed a similar claim as to the Money Market Fund simply does not show that, contrary to both sides' understanding, the beneficiaries were allowed to put on a monitor-and-remove-absent-significant-changed-circumstances theory concerning the mutual funds."[39] Therefore, the Ninth Circuit held that the beneficiaries had not forfeited their claim at trial or on appeal.[40]

Further, the Ninth Circuit held that Edison itself waived its forfeiture argument by failing to raise it in the initial appeal.[41] The court provided that "Edison did not argue forfeiture in the initial appeal consistent with its understanding, as expressed in its post-trial motion, that the district court's summary judgment ruling barred claims relating to the funds first selected before 2001." Therefore, the beneficiaries' "duty-to-monitor" claims remain viable.[42]

Phillips v. Alaska Hotel and Restaurant Employees Pension Fund (9th Cir. 1991)

The Ninth Circuit held that the court below had "misunderstood *Phillips* to stand for the broad proposition that '[t]here is no 'continuing violation' theory to claims subject to ERISA's statute of limitations.'"[43] Instead, the Ninth Circuit clarified that "*Phillips* did not reject a continuing violation theory for the ERISA statute of limitations generally; it merely held that for claims subject to § 1113(2), the earliest date of actual knowledge of a breach begins the limitations period, even if the breach continues."[44] Thus, the court held that "*Phillips* is inapplicable to the continuing duty claims at issue here, namely to 29 U.S.C. § 1113(1)."[45]

Remand to the District Court

The Ninth Circuit remanded the case to the district court on an open record for trial, and instructed the court below on two issues: Edison's fiduciary duty and attorneys' fees and costs. The Ninth Circuit analyzed ERISA and trust law to decipher the contours of Edison's fiduciary duty to monitor investments, but ultimately agreed with the beneficiaries that the factual record needed further development before it could decide whether Edison had in fact violated its duty.[46] However, the court's discussion shed light on its future decisions concerning the scope of plan sponsors' fiduciary duty to monitor investments. The court provided that "a trustee cannot ignore the power the trust wields to obtain favorable investment products, particularly when those products are substantially identical - other than their lower cost - to products the trustee has already selected."[47]

The court also directed the district court to reconsider its attorneys' fees and costs award "in light of the significant amount of work that has been required to vindicate an important ERISA principle in our court and the Supreme Court."[48]

Post-*Tibble* VI Thoughts

Tibble VI indicates that plan fiduciaries and sponsors should continue to revisit and refine their current

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35 843 F.3d at 1194 (emphasis added by the Ninth Circuit).

36 *Tibble VI*, 843 F.3d at 1194 (emphasis added) (quoting *Tibble I*, 639 F. Supp. 2d at 1120).

37 843 F.3d at 1195.

38 843 F.3d at 1195.

39 843 F.3d at 1195.

40 843 F.3d at 1195.

41 *Tibble VI*, 843 F.3d at 1196.

42 843 F.3d at 1196.

43 843 F.3d at 1196 (quoting Tibble I, 639 F. Supp. 2d at 1086).

44 843 F.3d at 1196.

45 843 F.3d at 1196.

46 *Tibble VI*, 843 F.3d at 1198.

47 843 F.3d at 1198.

48 843 F.3d at 1199.

methods for monitoring the ongoing prudence of their ERISA plan investments. Important to this exercise will be evaluating whether such methods are properly documented and supported. As the contours of the scope of the duty to monitor become more defined, plan sponsors and fiduciaries should remain diligent in reviewing processes at regular intervals to ensure compliance.

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Is the End of the Line for Employee Non-Solicitation Provisions Drawing Even Closer?

Bill Whelan

Introduction

Business and Professions Code section 16600 invalidates any contractual restraint on the ability to engage in a trade, business, or profession. Such provisions are unenforceable in California unless one of the three statutory exceptions (intended to protect goodwill in connection with the sale or dissolution of a business) applies.[1]

Qualified employees are key to the success of any business. To grow any business, companies need to recruit and hire qualified candidates. Under post-termination non-solicitation of employees provisions, however, former employees are purportedly restrained from doing anything to induce their former colleagues to leave and join them at their new place of employment. Former employers sometimes use non-solicitation provisions to sue their former employees and their new employers, or threaten enforcement lawsuits, simply to economically intimidate their current or former employees or their competitors in the industry.

Both Employees and Employers Would Benefit from Judicial Guidance on the Continued Validity of *Loral Corporation v. Moyes* in Light of *Edwards v. Arthur Andersen*

Currently, we have no published guidance at the California appellate level as to whether *Loral Corporation v. Moyes*[2] survives the California Supreme Court's reasoning in *Edwards v. Arthur Andersen.*[3] While there have been excellent commentaries written on the subject,[4] there have been no published California decisions that directly answer this question. That day may be coming.

As previously reported in these pages, in 2015,[5] a trial court in San Diego in *AMN v. Grubaugh*[6] granted the defendant's motion for summary judgment, finding in pertinent part that under the analysis used in *Edwards*, non-solicitation of *employees* provisions are void and unenforceable as a matter of law. The court found the language of *Edwards* to be broad enough to also prohibit employee non-solicitation/non-interference agreements, *Loral* notwithstanding.[7] The trial court explained that the language from *Edwards* undermines the premise of the holding in *Loral* - the reasonableness of the non-interference provision. The trial court concluded that the analysis in *Edwards* eliminates the rule of reasonableness with respect to Section 16600. According to the trial court, without the rule of reasonableness, *Loral* cannot stand.

In January 2017, another trial court in San Diego reached the same conclusion. The trial court judge

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1 *See* Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 955 (2008); *see also* CAL. BUS. & PROF. CODE §§ 16601 (sale of business), 16602 (dissolution of partnership), and 16602.5 (limited liability company).

2 174 Cal. App. 3d 268 (1985).

3 44 Cal. 4th 937 (2008).

4 *See, e.g.*, Todd M. Maylynn, *Edwards v. Arthur Andersen LLP*: *The End of Judicially Created Restraints on Competition*, COMPETITION, Vol. 18, No. 1 (Spring 2009) (Anti. & Unfair Competiton L. Sec., State Bar of Cal.), at 35.

5 Bill Whelan, *Is This the End of the Line for Employee Non-Solicitation Provisions Drawing Closer?* 2015 Bender's Calif. Lab. & Empl. Bull. 321, 336 (October 2015).

6 Case No.: 37-2014-00024257-CU-CO-CTL, San Diego Superior Court.

7 The *Grubaugh* trial court cited the following excerpt from *Edwards*:

> Contrary to Andersen's belief, however, California courts have not embraced the Ninth Circuit's narrow-restraint exception. Indeed, no reported California state court decision has endorsed the Ninth Circuit's reasoning, and we are of the view that California courts "have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat." Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect. We reject *Andersen's* contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600. 44 Cal. 4th at 949-50 (internal citations omitted).

granted the defendants' motion for summary judgment; declared that the plaintiff's post-termination, non-solicitation of employees provision violated Section 16600 and California's Unfair Competition Law (UCL); and issued an injunction barring the plaintiff from attempting to enforce this provision in California. The defendants' motion for attorneys' fees has been filed and will be heard by the court in April 2017.

In light of these decisions, prudent practitioners will counsel their clients on the wisdom and risks of continuing to include such provisions in their employment agreements in California. Employer clients will want to be advised on whether including such provisions in employment documents could expose the employer to UCL claims and motions for attorneys' fees.

Does *Loral Survive Edwards*?

These "no poaching" provisions do not come within any of the three statutory exceptions to Section 16600. On their face, such provisions would therefore appear to be void and unenforceable. Those defending such provisions routinely cite *Loral Corporation v. Moyes*,[8] in which the court stated that broad employee non-solicitation provisions are in fact valid under California law.

The *Loral* court found employee non-solicitation provisions valid under California law, even though it acknowledged that such covenants have "the apparent impact of limiting [the restricted parties'] business practices . . . ."[9] Without explanation, the court distinguished between agreements not to solicit former *co-workers* to leave the employer and non-compete agreements that bar former employees from soliciting *customers* or *clients* of the former employer.[10] The *Loral* court reasoned that the potential effect on trade of a non-solicitation of employees agreement needs to be balanced or weighed before invalidating it.[11] The court concluded that non-solicitation restrictions are reasonable where the employer is looking to maintain a stable workforce. The court also found that non-solicitation provisions only limited the former employee's mobility in a small way and had no overall negative impact on trade or business.[12]

The *Loral* court's analysis was not based on any California law. Instead, *Loral* relied on three Georgia state court opinions to support the notion that the potential impact of a non-solicitation provision on trade must be considered before invalidating such a covenant. The *Loral* court explained that "enforceability depends upon [the covenant's] reasonableness evaluated in terms of the employee, the employer, and the public."[13]

The question is whether the reasoning used by the *Loral* court in 1985 survives the California Supreme Court's 2008 milestone decision in *Edwards v. Arthur Andersen*.[14] In the context of *customer* non-solicitation agreements, the supreme court in *Edwards*, rejected the so-called "narrow restraint" exception to Section 16600 (created by the Ninth Circuit Court of Appeals), as well as all other judicially-created exceptions to Section 16600.

The *Edwards* court did not address non-solicitation of employee provisions.[15] But the supreme court flatly rejected the analytical approach used by the *Loral* court. First, the Supreme Court did not accept the notion that Section 16600 applies only to contracts which completely prohibit an employee from engaging in his or her profession, trade, or business. The Supreme Court rejected the argument that those agreements which "merely regulate some aspect of post-employment conduct" do not fall within the scope of Section 16600.[16]

The holding and reasoning used by the Supreme Court in *Edwards* was clear: "Non-competition agreements are invalid under Section 16600 in California even if narrowly drawn, unless they fall within the applicable statutory exceptions of Section 16601, 16602, or 16602.5."[17] The *Edwards* majority also noted that "Section 16600 represents a strong public policy . . . which should not be diluted by judicial fiat."[18]

The *Loral* court's analytical approach to Section 16600 is the same as that addressed by the supreme court in *Edwards*. The *Loral* court applied a balancing test. The *Loral* court held that the agreement represented only a narrow restriction, which balanced the burden imposed by the non-solicitation provision on the employee against the risk of harm to the employer if

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8 174 Cal. App. 3d 268 (1985).

9 174 Cal. App. 3d at 280.

10 174 Cal. App. 3d at 276-79.

11 174 Cal. App. 3d at 278

12 174 Cal. App. 3d at 278.

13 174 Cal. App. 3d at 278-79 (citing Orcan Exterminating Co., Inc. v. Martin Co., 240 Ga. 662 (1978); Harrison v. Sarah Coventry, Inc., 228 Ga. 169 (1971); Lane Co. v. Taylor, 174 Ga. App. 356 (1985)).

14 44 Cal. 4th 937 (2008).

15 44 Cal. 4th at 946, n.4.

16 44 Cal. 4th at 947-48.

17 44 Cal. 4th at 955.

18 44 Cal. 4th at 949.

it was not enforced.[19] The reasoning of the *Loral* court was the kind of judicially-created, "narrow-restraint," "balancing test" exception to Section 16600 that *Edwards* has now rejected.

Even though the *Edwards* court did not expressly overrule *Loral*, the supreme court's analysis removed the intellectual foundation for the *Loral* decision. Both non-solicitation of customers and employees provisions are restraints of trade prohibited by the plain language of Section 16600, and the Legislature has not created an exception for either.

The cases decided after *Edwards* have also dealt with customer non-complete provisions rather than employee non-solicitation provisions. In deciding the non-compete issues before them, those courts have followed the *Edwards* court's instructions, rejecting judicially-created exceptions to Section 16600.[20]

There is no legal or policy basis to distinguish between "non-compete" provisions and "non-solicitation of employees" provisions. Both are restraints of trade to which Business and Professions Code section 16600 should apply. There is no logical way to distinguish between provisions that prevent a former employee from soliciting his or her former customers (as long as trade secrets are not misused), from provisions which purport to prevent a former employee from soliciting or recruiting his or her former co-workers (again assuming no misuse of trade secrets).

California Public Policy Guarantees Employee Mobility

California law of course allows employers to sue former employees who complete with them unfairly or illegally, such as by using the former employers' trade secrets.[21] Throughout this state, as is their legal right, employers recruit candidates who are currently employed. Not surprisingly, employees line-up their new jobs, even with a competitor of their current employer, before they actually start working at the new employer. This happens with employees in all industries because California law protects both an employee's right to mobility and a prospective employer's right to recruit and hire the most qualified candidates.[22]

California's strong and often-repeated public policy in support of employee mobility and the inherent right to compete with one's former employer is codified in Section 16600. Since it was originally enacted, California courts have consistently held that Section 166000 reflects "a settled legislative policy in favor of open competition and employee mobility."[23] The California Supreme Court has declared that Section 16600 "protects Californians and ensures 'that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.'"[24]

An employee may look for another job, or plan and develop a competitive enterprise, while still employed

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19 *Loral*, 174 Cal. App. 3d at 278.

20 *See, e.g.*, SRI Com, Inc. v. EBIS Logic, Inc., No. 12-cv-00904-LHK, 2012 U.S. Dist. LEXIS 131082 at *11 (N.D. Cal. 2012) (Edwards rejects the contention that Section 16600 "embrace[s] the rule of reasonableness in evaluating competitive restraints" (quoting *Edwards*, 44 Cal. 4th at 947)); Retirement Group v. Galante, 176 Cal. App. 4th 1226, 1238 (2009) ("Section 16600 bars courts from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employees new business . . . ."); and Dowell v. Biosense Webster, Inc., 179 Cal. App. 4th 564, 577 (2009) (Determining that the customer non-solicitation provision was not narrowly tailored to protect trade secrets, and therefore not reaching the issue of whether the trade secret exception still applies post-*Edwards*. However, the court noted in *dicta* that it "doubt[s] the continued viability of the common-law trade-secret exception to covenants not to compete . . . .").

21 *See*, California's Uniform Trade Secrets Act, Cal. Civ. Code § 3426 et. seq.

22 Cal. Bus. & Prof. Code § 16600; Reeves v. Hanlon, 33 Cal. 4th 1140, 1149 (2004).

23 *Edwards*, 44 Cal. 4th at 946; *see* D'Sa v. Playhut, Inc., 85 Cal. App. 4th 927, 933 (2000).

24 *Edwards*, 44 Cal. 4th at 946 (quoting Metro Traffic Control, Inc. v. Shadow Traffic Network, 22 Cal. App. 4th 853, 859 (1994)); *see also* Reeves v. Hanlon, 33 Cal. 4th 1140, 1151 (2004) ("The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither employee nor his new employer has committed any illegal act accompanying the employment change."); *Metro Traffic Control*, 22 Cal. App. 4th at 859-60 (Competitors may solicit another's employees if they do not use unlawful means or engage in acts of unfair competition.).

by the employer against whom he or she plans to complete.[25] Under California law, an employee may go so far as to secretly incorporate a competing business while still employed.[26]

Conclusion

The latest trial court ruling can be appealed. Whether it is in that particular case, or in some other similar case that may now be working its way through the system, California employers and employees alike would benefit from having this recurring question definitively answered. Without this guidance, larger companies can continue to use *Loral* to economically intimidate their competitors and employees through expensive and time-consuming lawsuits or the threat of such lawsuits. This conflict between *Loral* and *Edwards*, which affects California's settled public policy favoring employee mobility and open competition, should be resolved for everyone's sake. Because of the risks involved, labor and employment counsel should analyze and advise their clients on these issues before deciding whether to keep these "no poaching" provisions in their California employment documents.

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[25] Bancroft-Whitney Company v. Glen, 64 Cal. 2d 327, 346 (1966) ("The mere fact that the officer makes preparations to compete before he resigns his office is not sufficient to constitute a breach of duty. It is the nature of his preparations which is significant."); Mamou v. Trendwest Resorts, Inc., 165 Cal. App. 4th 686, 719 (2008) ("An employee does not breach his duty of loyalty by preparing to compete with his employer."); Diodes, Inc. v. Franzen, 260 Cal. App. 2d, 254 (1968) (Employees' failure to disclose their plans to leave plaintiff corporation and thereafter to go into competition with it is not a breach of their fiduciary duties to the corporation in the absence of facts showing that non-disclosure was harmful to the corporation.).

[26] *Mamou,* 165 Cal. App. 4th at 719-20; *see also* Sarkes Tarzian, Inc. v. Audio Devices, Inc., 166 F. Supp. 250, 267 (S.D. Cal. 1958) (applying California law), *aff'd*, 283 F.2d 695 (9th Cir. 1960) (adopting district court opinion; employee not required to disclose future plans to employer, even though employee sent out announcements of his future plans before leaving his employ).

Wage & Hour Advisor: California Appellate Court Rules Commissioned Employees Must Be Paid Separately for Rest Breaks

Aaron Buckley

Introduction

On February 28, 2017, the California Court of Appeal issued a decision holding that employers must separately compensate commissioned ("inside sales") employees for legally required rest breaks.

Background on Rest Period Requirements and the "Inside Sales" Exemption

Under California law most employees are entitled to a paid 10-minute rest break for every work period of four hours, or major fraction thereof.[1] California law also provides an overtime exemption for commissioned salespeople, but this "inside sales" exemption does not exempt those employees from minimum wage or meal and rest break requirements.[2] (So-called "outside" salespeople are not subject to minimum wage, overtime, or meal/rest break requirements.[3])

Vaquero v. Stoneledge Furniture LLC[4]

Stoneledge Furniture LLC compensated its retail sales associates according to a standard commission agreement.[5] The agreement provided for sales associates to be compensated on a commission-only basis, but also guaranteed the associates a minimum income of $12.01 per hour.[6] The minimum income was paid to sales associates as a "draw" against future commissions.[7] If an associate earned commissions that met or exceeded the draw, the associate would be paid the commissions actually earned.[8] But if an associate's earned commissions were less than the draw, the associate would receive the minimum draw.[9] The agreement did not provide separate compensation for any non-selling time, such as time spent for meetings, training, or rest breaks.[10]

Two sales associates filed a class action against Stoneledge, alleging the company failed to provide paid rest breaks.[11] The trial court certified a class but later granted summary judgment to Stoneledge, finding that by guaranteeing sales associates a minimum income of $12.01 per hour, Stoneledge ensured they would be paid for all hours worked, including rest breaks.[12]

The California Court of Appeal reversed, holding that Stoneledge violated California law by not separately compensating sales associates for rest breaks.[13] The court relied on the applicable wage order, which provides, "authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."[14] The court reasoned that since the minimum pay guarantee was a draw against commissions, it was simply an advance subject to clawback, or deduction, from future commissions.[15] As a result, when a sales associate earned commissions that exceeded the draw, the only pay the associate received consisted of commissions, which did not account for rest breaks.[16] The court held that to comply with California law, commission-based compensation plans must provide for separate pay for legally required rest breaks.[17] In reaching its conclusion, the court relied

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1 *See, e.g.,* Cal. Code Regs., tit. 8, § 11040 (Wage Order 4), subdivision 12(A).

2 *See, e.g.,* Cal. Code Regs., tit. 8, § 11040 (Wage Order 4), subdivision 3(D).

3 *See, e.g.,* Cal. Code Regs., tit. 8, § 11040 (Wage Order 4), subdivision 1(C).

4 No. B269657, 2017 Cal. App. LEXIS 165 (Feb. 28, 2017).

5 2017 Cal. App. LEXIS 165, at *2.

6 2017 Cal. App. LEXIS 165, at *2.

7 2017 Cal. App. LEXIS 165, at *2.

8 2017 Cal. App. LEXIS 165, at *2.

9 2017 Cal. App. LEXIS 165, at *2.

10 2017 Cal. App. LEXIS 165, at *2.

11 2017 Cal. App. LEXIS 165, at *4.

12 2017 Cal. App. LEXIS 165, at *4-5.

13 2017 Cal. App. LEXIS 165, at *1.

14 2017 Cal. App. LEXIS 165, at *9 (citing Cal. Code Regs., tit. 8, § 11070, subdivision 12(A)).

15 2017 Cal. App. LEXIS 165, at *23-25.

16 2017 Cal. App. LEXIS 165, at *25-26.

17 2017 Cal. App. LEXIS 165, at *28-29.

on previous cases holding that piece-rate employees must be separately compensated for rest breaks,[18] a requirement the state legislature later codified at Labor Code section 226.2, which took effect in 2016.[19]

Recommendations

While this decision focused on rest breaks, its reasoning applies equally to other compensable yet "non-productive" time that is not accounted for and compensated under commission or piece-rate compensation plans. Employers with (inside) commissioned salespeople, or employees paid on a piece-rate basis, should review their compensation plans to ensure those employees are separately paid at least the minimum wage for rest breaks and other non-productive yet compensable time, and that this pay does not operate as a "draw" subject to deduction. In other words, pay for all non-productive compensable time, including rest breaks, must be *guaranteed* and independent from compensation tied to sales commissions or piece-rate production.

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18 2017 Cal. App. LEXIS 165, at *12-15.

19 Cal. Lab. Code § 226.2.

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CASE NOTES

AGE DISCRIMINATION

Dodson v. FedEx Corporate Servs., No. 15-55678, 2017 U.S. App. LEXIS 2755 (9th Cir. February 16, 2017)

On February 16, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that assuming that the employee met the low burden required to establish a prima facie case for age discrimination, she had not provided sufficient evidence to show that her employer's legitimate, non-discriminatory reasons for not promoting her were pretext.

Lee Dodson ("Dodson") appealed the district court's summary judgment order in her employment action against FedEx Corp. ("FedEx") in the U.S. Court of Appeals for the Ninth Circuit alleging age discrimination and retaliation in violation of the California Fair Employment and Housing Act ("FEHA").

The Ninth Circuit noted that under the FEHA, a prima facie case must show that the plaintiff: (1) was a member of a protected class; (2) was qualified for the position she sought or was performing competently in the position she held; (3) suffered an adverse employment action, such as termination, demotion, or denial of an available job; and (4) there is some other circumstance which suggests discriminatory motive. The court held that the amount of evidence required to make out a prima facie case of age discrimination was very low and assuming that Dodson had met the low burden required to establish a prima facie case for age discrimination, she did not provide sufficient evidence to show that FedEx's legitimate, non-discriminatory reasons for not promoting her were pretext.

The Ninth Circuit found that FedEx provided multiple specific examples of Dodson's areas for improvement in job performance and subpar interview performance. FedEx thus articulated a legitimate, non-discriminatory reason for not promoting her to sales executive or offering her a promotional placement in California.

The Ninth Circuit noted that Dodson incorrectly equated experience and seniority with qualification for a promotion. There was no evidence in the record as to what the employees' job duties were, how they performed, or whether they needed the same extra supervision as Dodson. Dodson did not meet her burden to show that FedEx's reason for not promoting her to sales executive was pretext. Furthermore, it was Dodson's burden to show that FedEx's proffered explanation for the adverse action was unworthy of credence because it was internally inconsistent or otherwise not believable. She failed to meet that burden when she did not provide substantial evidence that younger and equally qualified employees were promoted within California over her. Thus, the district court properly granted summary judgment on Dodson's age discrimination claim.

The Ninth Circuit held that Dodson engaged in a protected activity when she filed an administrative charge with California's Department of Fair Employment and Housing. Dodson suffered an adverse action when the El Segundo office closed and all of her colleagues who requested it were offered new positions in California, while she was only offered a position if she moved to Phoenix, Pittsburgh, Dallas, or Memphis. But there was not enough evidence in the record to show that these events were causally connected. Dodson filed her complaint in March 2014 and the El Segundo office closed in August 2014. Timing alone could not support an inference of causality, especially when there was no other information available about how those hiring decisions were made, or whether Dodson's colleagues were given more favorable placements because they were more qualified. Moreover, even if Dodson had established a prima facie case for retaliation, she had not provided sufficient evidence to show that FedEx's legitimate, non-retaliatory reasons for not offering her a promotion in California were pretext. Thus, the district court properly granted summary judgment on Dodson's retaliation claim.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law,* § 41.32, *Age Discrimination in Employment Act of 1967* (Matthew Bender).

AGENCY SHOP ARRANGEMENT

Orange County Water Dist. v. Public Employment Relations Bd., G052725, 8 Cal. App. 5th 52, 2017 Cal. App. LEXIS 76 (February 1, 2017)

On February 1, 2017, a California appellate court ruled that a modified agency shop arrangement proposed by a county employees' association, applying only to new employees, was permissible because it comported with the Gov't Code § 3502.5(a) definition of an agency shop as an arrangement requiring employees either to join the union or to pay a service fee.

The Orange County Water District ("District") was a public agency within the meaning of Gov't Code § 3501(c) and was therefore subject to the provisions of the Meyers-Milias-Brown Act, Gov't Code § 3500 et seq. The Orange County Water District Employees Association and the Orange County Employees Association (collectively, "Association") constituted an employee organization within the meaning of Gov't Code § 3501(a) and § 3501(b), which had been formally acknowledged by the District as an employee organization that represented employees of the District. The District and the Association had been parties to a memorandum of understanding ("MOU") and successor MOUs, which had set forth various wages, hours, and other terms and conditions of employment for the employees in the bargaining unit covered by the MOU. In the course of negotiations for a successor MOU, the Association proposed a "modified" agency shop arrangement that would apply only to new employees of the District, hired on or after a set future date, and not apply to then-current employees. The District rejected the Association's proposed modified agency shop arrangement on the ground that Gov't Code § 3502.5 did not authorize the creation of such an arrangement. The Association requested that the MOU be reopened to implement the proposed modified agency shop arrangement. The District rejected the Association's request on the same ground. The Association then served the District and the State Mediation and Conciliation Service with a petition and requested for an agency shop election, which stated, in part, that no management or confidential employees were included in the unit, and the petition had been signed by approximately 98% of the members of the unit. The District reconfirmed its position that an agency shop arrangement must apply to all employees in the unit and therefore could not be limited to employees hired after a future date.

The Association filed an unfair practice charge based on the District's denial of the Association's petition for a modified agency shop election as a violation of § 3502.5. The Association stated that it sought administrative relief by requiring the District to agree to conduct an election pursuant to the petitions signed by significantly more than the requisite 30% of the eligible members. The Public Employment Relations Board ("Board") issued a complaint. An unfair practice hearing was conducted before an administrative law judge. The administrative law judge's proposed decision concluded that the District had violated § 3502.5 because it refused to participate in a properly petitioned-for agency shop election. The administrative law judge's proposed decision further concluded that the District had failed to assert a valid defense. The District filed a statement of exceptions, and the Association filed a response. The Board reviewed the hearing record in its entirety and concluded that the administrative law judge's proposed decision was adequately supported by the evidentiary record, was well-reasoned, and was consistent with all relevant legal principles. The Board found no merit in the District's exceptions and adopted the proposed decision. The District timely filed a petition for a writ of extraordinary relief under Gov't Code § 3509.5(b) before a California appellate court. The California appellate court issued a writ of review.

The California appellate court observed that Gov't Code § 3502.5 permitted the establishment of an agency shop, whether by negotiation between the public agency employer and a recognized employee organization, or by a petition signed by 30% of the bargaining unit members combined with a majority approval in a secret ballot election. Gov't Code § 3502.5(a) defines the term "agency shop" as "an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization." Furthermore, California law provides that if negotiations between a public agency employer and a recognized employee organization to establish an agency shop fail, public-sector employees in a bargaining unit may decide by majority vote to create an "agency shop" arrangement under which all the employees are represented by a union selected by the majority. While employees in the unit are not required to join the union, they must nevertheless pay the union an annual fee to cover the cost of union services related to collective bargaining. Thus, the California appellate court held that Gov't Code § 3502.5 authorized the proposed modified agency shop.

The California appellate court found that the stipulated facts showed that the Association satisfied the procedural requirements of Gov't Code § 3502.5(b), which required that a secret ballot election regarding the establishment of an agency shop be held. The District indisputably refused to enter into a consent election agreement or otherwise allow an agency shop election to occur. The District did so on the ground that the

proposed agency shop was unauthorized by statute because it applied only to new employees hired on or after a future date and not to the entire bargaining unit.

The California appellate court held that Gov't Code § 3502.5 permits the establishment of agency shops without specifying whether agency shops must apply to all current and future employees in a bargaining unit. It found that the Association's proposed agency shop, modified to apply only to employees hired in the future, was an arrangement that required an employee, as a condition of continued employment, to either join the Association or pay the Association a service fee. It therefore appeared to fall squarely within the statutory definition of an agency shop, and thus appeared to be authorized by Gov't Code § 3502.5(a).

The California appellate court further held that its interpretation of Gov't Code § 3502.5 as authorizing the modified agency shop proposed by the Association was neither contrary to legislative intent nor did it render Gov't Code § 3502.5(d) meaningless.

The District argued that the Board erroneously concluded that a modified agency shop raised no First Amendment concerns. The California appellate court held that the U.S. Supreme Court has repeatedly expressed concern that the implementation of agency shops in general raises First Amendment issues. However, the Supreme Court has not held that an agency shop, in and of itself, is unconstitutional. The California appellate court stated that the instant case concerned whether the District wrongfully withheld its consent to the holding of an election for a modified agency shop. The instant case did not and had not raised issues or developed a record regarding how the Association might spend fees collected from nonunion members if a majority voted in favor of the proposed agency shop and whether any such spending decision might trigger the First Amendment concerns addressed before.

Accordingly, the California appellate court denied the petition for extraordinary relief.

References. See, e.g., California, *Public Sector Labor Relations*, § 31.11, *Requirement for Organizational Security Elections* (Matthew Bender).

ARBITRATION

Vasserman v. Henry Mayo Newhall Memorial Hosp., No. B267975, 2017 Cal. App. LEXIS 90 (February 7, 2017)

On February 7, 2017, a California appellate court ruled that a hospital employer's motion to compel arbitration of a former nurse employee's claims for violations of the Labor Code and other statutes relating to meal and rest breaks, unpaid wages, and unpaid overtime compensation was properly denied because although the collective bargaining agreement at issue required arbitration of claims arising under the agreement, it did not include an explicitly stated, clear and unmistakable waiver of the right to a judicial forum for claims.

Tanya Vasserman ("Vasserman") worked as a registered nurse at the Henry Mayo Newhall Memorial Hospital ("Hospital"). The Hospital contended that Vasserman's employment was controlled by a collective bargaining agreement ("CBA") between the California Nurses Association ("CNA") and the Hospital ("CNA CBA"). Article 12 of the CNA CBA was titled "Grievance and Arbitration." Article 14 of the CNA CBA was titled "Compensation." Article 15 of the CNA CBA discussed meal and rest periods. Vasserman did not allege that she filed any grievances for alleged violations of the CNA CBA during her employment at the Hospital. Vasserman filed a class action complaint, asserting statutory claims on behalf of herself and five putative classes of plaintiffs. She alleged that hourly employees, without valid Labor Code exemptions, were required to work shifts that exceeded eight hours per day and in excess of 80 hours per pay period, and the Hospital failed to pay required overtime wages for this work. Vasserman also alleged that the Hospital did not provide proper meal breaks, it required workers to work during meal breaks, and it did not provide pay for missed meal breaks in violation of the Labor Code. She further alleged that the Hospital did not provide itemized wage statements, and inappropriately calculated wages through a "rounding policy" in which calculations for time worked were rounded downward, resulting in the Hospital's failure to pay employees for actual time worked.

Vasserman asserted seven causes of action: (1) violation of Bus. & Prof. Code § 17200, et seq.; (2) violation of Lab. Code §§ 204, 510, 1194, and 1198; (3) violation of Lab. Code § 200 et seq.; (4) inaccurate wage statements under Lab. Code § 226; (5) failure to provide meal periods; (6) a claim under Lab. Code §§ 2698 and 2699 as a private attorney general; and (7) failure to pay wages in violation of Lab. Code §§ 510, 1198, and 1199. Vasserman requested injunctive relief, restitution, monetary damages, attorney fees, and civil penalties. The Hospital removed the case to federal court, asserting that the case involved a federal question. Vasserman moved to remand the case, and the district court granted the motion. The district court remanded the case to the trial court.

The Hospital moved to stay the case and compel arbitration, arguing that Vasserman and those she sought to represent as class members were represented by two different unions. The workers were covered by four different CBAs, each of which included mandatory grievance and arbitration provisions. Vasserman opposed the motion, arguing that the CNA CBA did not include a clear and unmistakable waiver of statutory rights because it made no reference to the statutes identified in the complaint, and it limited the arbitrator's authority to deciding only issues relating to the CNA CBA. The trial court denied the Hospital's motion to compel arbitration. The Hospital appealed the district court's judgment before a California appellate court.

The California appellate court held that under the *Wright/Vasquez*[1] standard, a CBA may require arbitration of a statutory claim if, in a waiver that is "explicitly stated," it is "clear and unmistakable" that the parties intended to waive a judicial forum for statutory claims. Article 12 contained the grievance and arbitration agreement. It defined a grievance as "any complaint or dispute arising out of the interpretation or application of a specific Article and Section of this Agreement." Article 12 limited the power of the arbitrator such that the arbitrator should be without authority to decide matters specifically excluded or not included in the agreement. It did not include any reference to the Labor Code or any other state or federal statutes. It could not be reasonably read to include an explicitly stated, clear and unmistakable waiver of a judicial forum for employees' statutory claims. Article 12 was no more specific. It made no mention of the Labor Code or any other statute, it did not discuss individual statutory rights, nor did it mention waiver of a judicial forum. Therefore, Article 12, standing alone, did not include a clear and unmistakable waiver of Vasserman's right to a judicial forum to bring statutory claims.

The California appellate court further held that Article 14 could not reasonably be read to include a clear and unmistakable waiver of a judicial forum for statutory claims. To meet that standard, at a minimum, the agreement must specify the statutes for which claims of violation will be subject to arbitration. Article 14 did not do so. Given the lack of any statutory citation in Article 14, along with the definition of a "grievance" in Article 12 that did not include any suggestion that Labor Code violations should be grieved and arbitrated, Articles 12 and 14 together could not be read to constitute a clear and unmistakable waiver of a judicial forum for statutory rights.

In addition, the California appellate court held that Article 15 stated that if a nurse fails to receive a penalty, he or she may file a grievance as stated in Article 12. However, Article 12 limited arbitration to grievances that consisted of disputes arising out of the CNA CBA, and it limited an arbitrator's power to that necessary to decide only issues that qualified as grievances. Rather than expressly incorporating Labor Code provisions, therefore, Article 15 impliedly excluded requirements not included in the CNA CBA itself.

The California appellate court concluded that the broad, nonspecific language in the CNA CBA arbitration clause was therefore not coupled with an explicit incorporation of statutory requirements in Articles 14 or 15. The CNA CBA did not include an expressly stated, clear and unmistakable waiver of the right to a judicial forum for individual statutory claims. The trial court properly denied the Hospital's motion to compel arbitration.

Accordingly, the California appellate court affirmed the trial court's ruling.

References. See, e.g., Wilcox, *California Employment Law*, § 90.10, *Collective Bargaining Arbitration Agreements* (Matthew Bender).

Poublon v. C.H. Robinson Co., No. 15-55143, 846 F.3d 1251, 2017 U.S. App. LEXIS 1969 (9th Cir. February 3, 2017)

On February 3, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that in an employee's wage and hour suit, although an arbitration provision in an incentive bonus agreement was an adhesion contract, the employee failed to establish a high degree of procedural unconscionability.

Lorrie Poublon ("Poublon") began working for C.H. Robinson Co. and C.H. Robinson Worldwide, Inc. ("C.H. Robinson") as an account manager in Los Angeles, California. While employed at C.H. Robinson, Poublon signed an agreement titled "Incentive Bonus Agreement" each December in order to receive a financial bonus. In December 2011, as in prior years, Poublon met with her supervisor, Gerry Nelson ("Nelson"), to discuss her compensation and bonuses for the following year. At this meeting, Nelson gave Poublon the agreement to take home and review. He told her that the agreement would have to be signed and returned within

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[1] Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 142 L. Ed. 2d 361, 119 S. Ct. 391 (1998) (Wright)/Vasquez v. Superior Court, 80 Cal. App. 4th 430, 95 Cal. Rptr. 2d 294 (2000) (Vasquez).

a specified time period in order for her to receive her bonus. Poublon and Nelson did not discuss the dispute resolution provision in the agreement. Poublon later asked Nelson "what would happen if she did not sign the document," and he responded that "failure to sign would result in Poublon not being paid her bonus." Poublon signed the agreement and returned it to C.H. Robinson. Poublon's employment at C.H. Robinson ended in February 2012. In March 2012, Poublon alleged that C.H. Robinson had misclassified her as exempt from overtime pay requirements and demanded mediation of her claims pursuant to the terms of the agreement that she had signed in 2011. After mediation was unsuccessful, Poublon filed a class action complaint against C.H. Robinson in Los Angeles County trial court, making the same misclassification claims on behalf of herself and other employees.

In August 2012, C.H. Robinson removed Poublon's action to a federal district court. Poublon filed a first amended complaint, which added a claim on behalf of California under the Private Attorneys General Act ("PAGA") [Lab. Code §§ 2698–2699.5]. The district court denied C.H. Robinson's motion to compel arbitration, holding that the dispute resolution provision was both procedurally and substantively unconscionable, and therefore unenforceable. C.H. Robinson appealed before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit found that the incorporation of the documents, American Arbitration Association's rules or C.H. Robinson's Employment Dispute Mediation/ Arbitration Procedure ("Arbitration Procedure"), by reference did not support Poublon's claim that the dispute resolution provision was oppressive. In addition, there was no evidence in the record that C.H. Robinson ever stated or suggested that Poublon would be fired for failing to sign the agreement. Therefore, although the dispute resolution provision in the agreement was an adhesion contract, Poublon failed to establish a high degree of procedural unconscionability

With respect to substantive unconscionability, the Ninth Circuit held that even if the parties cannot lawfully agree to waive a PAGA representative action, *AT&T Mobility LLC v. Concepcion*[2] weighs sharply against holding that the waiver of other representative, collective or class action claims, as provided in the dispute resolution provision, is unconscionable. Therefore, the unenforceability of the waiver of a PAGA representative action did not make the dispute resolution provision substantively unconscionable.

The Ninth Circuit further found that Poublon had not met the burden of proving that the forum selection clause in the Arbitration Procedure was unreasonable. Poublon's interpretation of the venue provision in the Arbitration Procedure was wrong on its face, the provision did not require a Minnesota venue, but allowed the parties to agree on a different venue, and allowed the arbitrator to select a different venue "for good reason." Therefore, the court concluded that the venue provision was not substantively unconscionable.

The Ninth Circuit found that the confidentiality provisions in both the Arbitration Procedure at issue in the instant case and in *Sanchez v. CarMax Auto Superstores California, LLC*[3] were substantially identical: they both required that the arbitration, including the record of the proceeding, be confidential, and they both included the same enumerated exceptions. In *CarMax*, the California appellate court rejected the same policy argument that Poublon made in the instant case, namely that such confidentiality provisions "inhibit employees from discovering evidence from each other." In the absence of any decision on this issue from the California Supreme Court, the Ninth Circuit was bound by *CarMax*, as the ruling of the highest state court issued to date. Further, there was no "persuasive data," that the state supreme court would reach a different conclusion than *CarMax*, and the fact that the state supreme court declined to review *CarMax* supported this conclusion. Poublon did not cite any California case reaching a different conclusion than *CarMax*. Accordingly, the confidentiality provision in the Arbitration Procedure was not substantively unconscionable.

The Ninth Circuit found that Poublon misconstrued the sanctions provision of Arbitration Procedure as authorizing the arbitrator to award attorneys' fees to the prevailing party in the arbitration. On its face, the sanctions provision did not give the arbitrator such power. Rather, the provision authorized the arbitrator to award attorneys' fees against a party that brought a frivolous or harassing claim, or in the course of the proceeding, engaged in unreasonable delay, failed to cooperate in discovery, or violated confidentiality requirements. As such, it was consistent with Code Civ. Proc. §§ 128.7 and 2023.030(a) which authorize courts to impose similar sanctions in judicial proceedings. Furthermore, because the sanctions provision was silent on whether an arbitrator could award attorneys' fees to a prevailing employee, it was not inconsistent with Lab. Code

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[2] 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

[3] 224 Cal. App. 4th 398, 168 Cal. Rptr. 3d 473 (2014), review denied, 2014 Cal. LEXIS 3835 (June 11, 2014) (CarMax).

§ 1194. Rather, the Arbitration Procedure required the arbitrator to comply with applicable California law, which would include § 1194 to the extent applicable. Accordingly, the sanctions provision was not substantively unconscionable.

With respect to unilateral modification, the Ninth Circuit found that at the time Poublon executed the agreement, it incorporated the then-existing Arbitration Procedure, regardless of whether this document was attached to the contract or was posted on the company intranet. While the parties may agree to incorporate a document as it is updated or amended, the parties did not do so in the instant case; nothing in the dispute resolution provision gave C.H. Robinson the authority to modify any part of the agreement unilaterally, including any incorporated document. Therefore, the incorporation provision was not substantively unconscionable.

The Ninth Circuit found that reading the dispute resolution provision and the Arbitration Procedure together, Poublon could obtain all "relevant documents," request her personnel records, and take three depositions. Poublon could obtain additional discovery merely by showing good cause, which would include a demonstrated need for discovery sufficient to adequately arbitrate her claim. Finally, Poublon failed to make any showing that she would be unable to vindicate her rights under the standard provided in the agreement. Therefore, the discovery limitations provision was not substantively unconscionable.

The Ninth Circuit found that Poublon failed to explain how the provision reaffirming prior agreements applied to the agreement to arbitrate so as to render it unconscionable.

The Ninth Circuit concluded that the dispute resolution provision was valid and enforceable once the judicial carve-out clause was extirpated and the waiver of representative claims was limited to non-PAGA claims, and the district court erred in holding otherwise.

Accordingly, the Ninth Circuit reversed and remanded the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 90.20[2][b], *Collective Unconscionability as a Matter of Contract Law* (Matthew Bender).

COMPENSATION FOR REST PERIODS

Vaquero v. Stoneledge Furniture LLC, No. B269657, 2017 Cal. App. LEXIS 165 (February 28, 2017)

On February 28, 2017, a California appellate court ruled that the employees paid on commission are entitled to separate compensation for rest periods mandated by state law.

Ricardo Bermudez Vaquero and Robert Schaefer (collectively, "plaintiffs") worked as sales associates for Stoneledge Furniture, LLC ("Stoneledge"). From September 30, 2009, through March 29, 2014, Stoneledge compensated sales associates pursuant to the Sales Associate Commission Compensation Pay Agreement ("Agreement"). After a training period during which new employees received $12.01 per hour, Stoneledge paid sales associates on a commission basis. The Agreement did not provide separate compensation for any non-selling time, such as time spent in meetings, on certain types of training, and during rest periods. Plaintiffs filed a putative class action, alleging causes of action for failure to provide paid rest periods under Lab. Code § 226.7[1] and the applicable wage order, failure to pay all wages owed upon termination under Lab. Code § 203, unfair business practices, and declaratory relief. Pursuant to the parties' stipulation, the trial court certified a class comprised of three subclasses of sales associates corresponding to plaintiffs' three primary claims: unpaid rest periods, unpaid wages upon termination, and unfair business practices.

Stoneledge filed a motion for summary judgment or in the alternative for adjudication, arguing that the rest period claim failed as a matter of law because Stoneledge paid its sales associates a guaranteed minimum for all hours worked, including rest periods. Stoneledge argued that because the class claims for failure to pay for rest periods and for wages owed at termination failed as a matter of law, the derivative claim for unfair business practices also failed. The trial court granted Stoneledge's motion for summary adjudication on the rest period claim for violation of Lab. Code § 226.7. It concluded that the remaining claims failed because they were derivative of the rest period claim. Plaintiffs appealed the trial court's judgment before a California appellate court.

The California appellate court agreed with *Bluford v. Safeway Inc.*[4] that Wage Order No. 7 requires employers to separately compensate employees for rest periods if an employer's compensation plan does not already include a minimum hourly wage for such time. Furthermore, Wage Order No. 7 applies equally to commissioned employees, employees paid by piece rate, or any other compensation system that does not separately account for rest breaks and other nonproductive time. The Agreement used by Stoneledge during the class period was analytically

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[4] 216 Cal. App. 4th 864, 157 Cal. Rptr. 3d 212 (2013) (Bluford).

indistinguishable from a piece-rate system because it did not allow employees to earn wages during rest periods. Also, the DLSE Enforcement Policies and Interpretations Manual ("DLSE Manual") supported the court's conclusion. It treats commissioned and piece-rate employees alike for purposes of applying the minimum wage requirement to nonproductive working hours.

The California appellate court further found that both Stoneledge and the trial court improperly discounted the language of Wage Order No. 7, which counts rest periods as "hours worked" and requires compensation for those hours even though rest periods are, admittedly and by design, nonproductive. In addition, by requiring employers to compensate a commissioned employee for time during which the employee is working but precluded from selling (such as while in a department meeting or training session), Section 47.7 of the DLSE Manual does not negate that requirement for time attributable to rest periods. Furthermore, nothing in Lab. Code § 226.2 suggested that the Legislature intended to adopt a different rule for commission-based employees or to nullify the plain language of Wage Order No. 7. Section 226.2 does not even mention commission-based employees. Section 226.2 does not limit or alter the obligation of employers to compensate commission-based employees "for all hours worked," including for rest periods.

The California appellate court agreed with Stoneledge that, under the Agreement in effect during the class period, Stoneledge did in fact keep track of hours worked, including rest periods. The court also agreed that Stoneledge treated "break time identically with other work time." However, the problem with Stoneledge's compensation system was that the formula it used for determining commissions did not include any component that directly compensated sales associates for rest periods. Stoneledge merely multiplied weekly "Delivered Sales" (less returns and credits) by an applicable commission rate and paid that amount if it exceeded the minimum contractual rate. Stoneledge's Agreement did not compensate for rest periods taken by sales associates who earned a commission instead of the guaranteed minimum.

The California appellate court found that for sales associates whose commissions did not exceed the minimum rate in a given week, Stoneledge clawed back (by deducting from future paychecks) wages advanced to compensate employees for hours worked, including rest periods. The advances or draws against future commissions were not compensation for rest periods because they were not compensation at all. At best, they were interest-free loans. Stoneledge cited no authority for the proposition that a loan for time spent resting was compensation for a rest period. To the contrary, taking back money paid to the employee effectively reduces either rest period compensation or the contractual commission rate, both of which violate California law. Thus, when Stoneledge paid an employee only a commission, that commission did not account for rest periods.

The California appellate court concluded that because Stoneledge did not separately compensate sales associates for rest periods as required by California law, the trial court erred in granting summary adjudication on plaintiffs' cause of action for violation of Lab. Code § 226.7. Consequently, the trial court's ruling that plaintiffs' other causes of action failed because the § 226.7 claim failed was also erroneous.

Accordingly, the California appellate court reversed and remanded the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 2.09, *Rest Periods* (Matthew Bender).

DISABILITY DISCRIMINATION

Atkins v. City of Los Angeles, No. B257890, 8 Cal. App. 5th 696, 2017 Cal. App. LEXIS 115 (February 14, 2017)

On February 14, 2017, a California appellate court ruled that the injured police recruits could not prevail on a disability discrimination claim under Gov't Code § 12940(a) because they could not meet the fitness standards for peace officers under Gov't Code § 1031(f), and thus they were not qualified to perform the essential functions, as defined in Gov't Code § 12926(f), of police recruits.

The City of Los Angeles ("City") hired Ryan Atkins ("Atkins"), Douglas Boss ("Boss"), Justin Desmond ("Desmond"), Anthony Lee ("Lee"), and Eriberto Orea ("Orea") (collectively, "plaintiffs") as recruit police officers of the Los Angeles Police Department ("Department") between mid-2008 and early 2009. Atkins trained in the police academy ("academy") for three months before suffering a knee injury that eventually required surgery. Boss fractured his ankle two weeks into training. Desmond suffered an injury while running on the third day of the academy training, received medical attention, and eventually joined another recruit class before injuring his groin and back five or six weeks later. Lee started the academy training in July 2008, resigned a month later for personal reasons, then joined another recruit class in December 2008. A week later he injured his knee and

underwent knee surgery in mid-2009. Orea injured his knee on his third day at the academy. At the time plaintiffs were injured, the Department had been assigning injured recruits to light-duty administrative positions indefinitely until their injuries healed or they became permanently disabled. The City provided physical therapy for some plaintiffs and placed all of them in the "Recycle" program, which gave plaintiffs desk jobs while they recuperated. However, rather than allowing them to remain in their light-duty assignments, the Department asked them to resign or they would be terminated, unless they could get immediate medical clearance to return to the academy. None of the plaintiffs was able to obtain the necessary clearance, and the Department terminated or constructively discharged all of them.

Plaintiffs sued the City and its police chief, alleging six causes of action, including unlawful discharge from the "Recycle" program based on physical disability, mental disability, or medical condition in violation of the California Fair Employment and Housing Act ("FEHA"); failure to accommodate based on physical disability, mental disability, or medical condition in violation of FEHA; and failure to engage in the interactive process based on physical disability, mental disability, or medical condition in violation of FEHA. The jury found that the City unlawfully discriminated against plaintiffs based on their physical disabilities, failed to provide them reasonable accommodations, and failed to engage in the interactive process required by FEHA. The jury awarded each plaintiff past and future economic and noneconomic losses. The City moved for a new trial and for judgment notwithstanding the verdict, both of which the trial court denied. The City appealed before a California appellate court.

The California appellate court agreed that plaintiffs were not "qualified individuals" under FEHA for purposes of their discrimination claim under Gov't Code § 12940(a). Plaintiffs could not meet the fitness standards for peace officers under Gov't Code § 1031(f), and thus they were not qualified to perform the essential functions, as defined in Gov't Code § 12926(f), of police recruits.

The California appellate court concluded that reassignment to the Recycle program until plaintiffs recovered or became permanently disabled was not unreasonable under the facts of the instant case and that substantial evidence supported the jury's verdict that plaintiffs were qualified for such an assignment. Requiring the City to assign plaintiffs to light-duty administrative assignments was not unreasonable as a matter of law in light of the City's past policy and practice of doing so. Because the court affirmed the City's liability on this basis, it did not address the City's challenge to the verdict on plaintiffs' claim for failure to engage in the interactive process. Also, the City failed to demonstrate that assigning plaintiffs to the Recycle program would cause undue hardship.

The California appellate court found that despite the fact that plaintiffs had completed only hours or weeks of their academy training, the jury awarded each of them future economic losses through the time of their hypothetical retirements from the Department as veteran police officers. The court agreed with the City that such damages were unreasonably speculative.

Accordingly, the California appellate court affirmed in part, reversed in part, and remanded the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.51, *Accommodation of Disabilities* (Matthew Bender).

GENDER DISCRIMINATION

Mayes v. WinCo Holdings, Inc., No. 14-35396, 846 F.3d 1274, 2017 U.S. App. LEXIS 1968 (9th Cir. February 3, 2017)

On February 3, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that a former employee offered sufficient evidence of pretext to survive summary judgment on her gender discrimination claims under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-2(a)(1)] and state law; she offered direct evidence of her supervisor's discriminatory animus, and she also offered circumstantial evidence that she was fired for following a common, accepted practice and was replaced with a less qualified male worker.

Katie Mayes ("Mayes") worked at Winco Holdings, Inc. ("WinCo"), an Idaho Falls grocery store, for 12 years. WinCo promoted her to a Person in Charge ("PIC"). As a PIC, Mayes supervised employees on the night-shift freight crew. Mayes testified that Mark Wright, then WinCo's general manager, gave her permission to take cakes from the store bakery to motivate the crew to stay past the end of their shifts and boost their morale. Furthermore, the bakery department instructed Mayes and the other freight crew PIC, Andrew Olson ("Olson"), that they should take cakes only from the "stales" cart. The bakery department told Mayes that she did not need to enter the cake from the stales cart into the in-store use log because the cakes had already been removed from the store inventory and tracked as lost product. At about the same time the bakery department instructed Mayes to take cakes

only from the stales cart, Mayes started experiencing difficulties with Dana Steen ("Steen"), the general manager. Mayes was fired for taking a stale cake from the bakery to the break room to share with fellow employees and telling a loss prevention investigator that management had given her permission to do so. After Mayes was fired, WinCo replaced her with a man who had only one month of freight crew experience and had no supervisory experience at WinCo.

Because the definition of "gross misconduct" in WinCo's personnel policies included theft and dishonesty, WinCo denied Mayes benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). As a result of COBRA benefits denial, Mayes was unable to elect continued coverage for herself and her minor children. WinCo also refused to pay Mayes her accumulated vacation pay, claiming that it had no obligation to do so under the store's collective bargaining agreement ("CBA"). Mayes sued WinCo. WinCo moved for summary judgment on all claims. The district court granted the motion, ruling that although Mayes established a prima facie case of discrimination, she did not present sufficient evidence of pretext for her claims to survive summary judgment. The district court also found that, because WinCo terminated Mayes for gross misconduct, WinCo properly denied her COBRA benefits and credit for accrued vacation under the CBA. Mayes appealed before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit disagreed with the district court's ruling that Mayes failed to raise a genuine issue of material fact regarding pretext, either directly or indirectly. It found that Mayes offered ample direct evidence of discriminatory animus: (1) Steen's alleged comment that a man "would be better" leading the safety committee; (2) Steen's alleged comment that she did not like "a girl" running the freight crew; and (3) Steen's alleged criticism of Mayes, but not her male counterpart, for leaving work early to care for her children. These remarks directly concerned Mayes and the decisional process for retaining and promoting employees. Mayes's failure to give precise dates for the remarks or show a closer temporal link between the comments and her termination did not defeat her claims.

The Ninth Circuit held that Mayes's direct evidence alone was sufficient to defeat summary judgment, but here, the claim was further bolstered by indirect evidence. To show pretext using circumstantial evidence, in contrast to direct evidence, a plaintiff must put forward specific and substantial evidence challenging the credibility of the employer's motives. Mayes met this burden for purposes of summary judgment. Furthermore, multiple employees testified that it was a common, accepted practice—rather than an offense punished by termination—for PICs to take cakes to the break room. Olson stated that he understood that PICs could take stale cakes from the stales cart. That WinCo purportedly fired Mayes for following a practice described by some witnesses as "common," and that another PIC thought was authorized, was specific and substantial evidence that WinCo's proffered explanation for her termination was not believable. Mayes could not have stolen a cake that she had permission to take. Nor could management have reasonably thought that Mayes lied about having permission if they knew that PICs were allowed to use stale cakes to motivate employees.

The Ninth Circuit found additionally that Mayes presented evidence that WinCo replaced her with a less qualified male employee. The man who replaced Mayes had only worked for WinCo for about three weeks, had no supervisory experience at WinCo, and could only work during limited hours. In contrast, Mayes received no negative performance reviews over the course of 12 years with WinCo, earned promotions within the company, and held a supervisory position for approximately five years. In sum, circumstantial evidence raised a material dispute of fact regarding pretext. This was particularly true when the circumstantial evidence was viewed in conjunction with the powerful direct evidence of Steen's discriminatory comments. It was error to dismiss Mayes's discrimination claims.

With regard to COBRA claims, the Ninth Circuit held that Mayes presented both direct and indirect evidence that the reasons stated for her termination were pretextual, and it concluded that there was a genuine dispute of material fact regarding the true reason for her termination. If WinCo fired Mayes for discriminatory reasons, Mayes could be entitled to COBRA benefits. The district court therefore erred in dismissing Mayes's COBRA claim at summary judgment. With regard to wage claims, the court held that because Mayes presented sufficient evidence to create a genuine dispute of material fact regarding why WinCo fired her, Mayes could be entitled to payment for accrued vacation time, and this claim should not have been dismissed at summary judgment.

Thus, the Ninth Circuit concluded that it could not be determined at summary judgment whether WinCo's stated reasons for firing Mayes were pretextual. Accordingly, the Ninth Circuit reversed the order granting summary judgment on all claims and remanded the case.

References. See, e.g., Wilcox, *California Employment Law*, § 41.36[2][a][i], *Discrimination Based Solely on Sex* (Matthew Bender).

RACIAL HARASSMENT

Daniel v. Wayans, Nos. B261814, B263950, 8 Cal. App. 5th 367, 2017 Cal. App. LEXIS 103 (February 9, 2017)

On February 9, 2017, a California appellate court ruled that comparing a movie extra to a Black cartoon character and calling him "nigga" was protected activity under Code Civ. Proc. § 425.16, even though the gravamen of the complaint was race-based harassment, because the uncontradicted evidence established that all of the alleged misconduct was based on the exercise of free speech in the creation and promotion of the full-length motion picture, including the off-camera creative process.

EFS Entertainment, ICM Partners, and IM Global employed Pierre Daniel ("Daniel") as an actor for *A Haunted House 2*. Marlon Wayans ("Wayans") co-wrote, produced, and starred in the movie. Daniel sued Wayans and others, alleging that he was the victim of racial harassment. The complaint asserted a total of 13 different causes of action, eight of which were asserted against Wayans: a race-based harassment claim brought pursuant to Gov't Code § 12940 et seq., a claim alleging a violation of the Unruh Civil Rights Act [Civ. Code § 51 et seq.], a claim brought pursuant to Civ. Code § 3344 for the unauthorized use of another's photograph for advertising, a common law misappropriation of likeness claim, a common law "false light"/invasion of privacy claim, a common law claim for breach of a quasi-contract, a common law claim for unjust enrichment, and a common law claim for intentional infliction of emotional distress. Daniel's claims against Wayans stemmed from two different but related contexts of alleged misconduct. The first alleged misconduct occurred solely on the movie set (the on-set comments and conduct). Specifically, Daniel alleged that Wayans subjected him to "offensive and derogatory language regarding his race/national origin," such as repeatedly referring to him in a demeaning manner, as "nigga," a derogatory term and racial slur used to refer to African-Americans; repeatedly mocking Daniel's "afro"; repeatedly and negatively referring to Daniel as "Cleveland Brown," an African-American cartoon character in the adult cartoon comedy series "Family Guy"; routinely leering, staring, and rolling his eyes at Daniel; ridiculing Daniel in the presence of other crew members; and treating Daniel differently, disparately, and negatively because of his race or national origin, including making demeaning, abusive, and derogatory comments and gestures. The second arena or context of alleged misconduct evolved primarily on the Internet ("the internet posting").

In response, Wayans, pursuant to Code Civ. Proc. § 425.16, moved to strike Daniel's claims against him as a SLAPP suit (strategic lawsuit against public participation), arguing that all of Daniel's claims arose from Wayans's constitutional right of free speech because the core injury-producing conduct arose out of the creation of the movie and its promotion over the Internet. Wayans further argued that he met his burden under the anti-SLAPP statute because his creative spark in referring to Daniel as "Cleveland" resulted in the birth of a character in the film; his use of the word "nigga" helped advance or assist in the creation of dialogue for the film; and by promoting Daniel in the Internet and Twitter post as a Cleveland Brown look-alike, Wayans helped promote the film. The trial court agreed with Wayans and also found that Daniel had failed to establish the probability that he would prevail on any of his claims against Wayans. As a result, the trial court entered judgment in favor of Wayans and awarded him his attorney fees. Daniel appealed the trial court's judgment before a California appellate court.

The California appellate court held that the gravamen of Daniel's complaint stemmed not from any conduct incidental to Wayans's free speech rights; rather, all of the alleged misconduct was based squarely on Wayans's exercise of free speech—the creation and promotion of a full-length motion picture, including the off-camera creative process. As such, Daniel's complaint was subject to an anti-SLAPP motion.

The California appellate court held that the testimony and documentary evidence submitted by Wayans regarding the movie's creative process—which was uncontradicted by Daniel—established that the on-set comments and conduct were done to assist Wayans in the exercise of his right to free speech—that is, to make *A Haunted House 2*. Furthermore, Wayans submitted evidence that the making of *A Haunted House 2* was an issue of public interest. Wayans is a popular and prolific entertainer—since 1988, Wayans had acted in 21 films; since 1991, he had acted in 13 different television shows, specials, or movies; since 1992, he had written or co-written 16 different films and/or television movies or shows; and since 1996, he had produced or served as an executive producer of 13 different films and/or television movies or shows. The longevity and breadth of Wayans's career demonstrated continuing public interest in his work. In addition, many of

Wayans's projects involved making fun of pop culture, racial stereotypes, and current events, adding to the public's interest in his work. In light of Wayans's extensive body of work and the subject matter of that work, *A Haunted House 2* fell easily within the anti-SLAPP statute's definition of an "issue of public interest." In sum, Wayans met his burden of making a prima facie showing that the on-set comments and conduct fell within the definition of protected activity set forth in Code Civ. Proc. § 425.16(e)(4).

The California appellate court held that advance information from Wayans about the making of *A Haunted House 2*, including a photo of someone acting in the film, constituted a topic of public interest, even though Daniel himself might not have been known to the public. The post both referred to a topic of widespread public interest ("the film") and contributed to the public "debate" or discussion regarding the film by giving fans and those interested a glimpse of someone in the film. The court therefore concluded that the internet posting constituted protected activity as provided in Code Civ. Proc. § 425.16(e)(3).

The California appellate court held that Wayans introduced evidence that "nigga" as used by him—generally and on the set of *A Haunted House 2*—and as received by others working on the movie was not a racial slur, but a term of endearment. The use of the term "nigga" did not create a "hostile or abusive work environment." The alleged acts of racial harassment did not alter the conditions of Daniel's employment and create an abusive environment. Even when the court credited Daniel's evidence, that evidence was insufficient as a matter of law to sustain a judgment favorable to him. Therefore, the trial court properly struck Daniel's racial harassment claim against Wayans.

The California appellate court found that Daniel's claims for statutory and common law misappropriation of name and likeness were based solely on the internet posting. Daniel failed to meet his burden of showing a probability of prevailing with respect to these claims for two reasons: first, Daniel failed to overcome evidence that he waived his claims when he signed the voucher, which contained a broad release consenting to the use of his image in connection with the movie; second, even if Daniel did not release his claims or the voucher was inadmissible, Wayans's transformative use of Daniel's photograph established a complete defense.

The California appellate court found that the internet posting referred only to Daniel's physical resemblance to the Cleveland Brown cartoon character. Twice, it expressly referred to how Daniel looked. It did not insinuate or imply that Daniel shared any personality characteristics or, as Daniel argued, suggest that Daniel was a real-life incarnation of the cartoon figure. In addition, it was a combination of an expression of an opinion by Wayans that Daniel looked like Cleveland Brown and an accurate photographic comparison. Therefore, Daniel did not show a probability of prevailing on his false light claim, and the trial court properly struck it.

The California appellate court held that there was a valid express contract covering the use of Daniel's photograph in connection with *A Haunted House 2*: the voucher. By signing the voucher, Daniel not only gave Wayans the right to use his photograph "in any manner whatsoever and for any reason" in connection with the movie, but also acknowledged that the wages he received for his work on the movie were "payment in full"—that is, he was not entitled to any other payment, including payment for the use of his photograph. Because Daniel did not show a probability of prevailing on his quasi-contract claim, the trial court properly struck it.

The California appellate court found that Daniel failed to show a probability of prevailing on his quasi-contract claim, and the trial court properly struck it.

Accordingly, the California appellate court affirmed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.82[3], *Racial Harassment* (Matthew Bender).

SEXUALLY HOSTILE WORK ENVIRONMENT

Zetwick v. Cnty. of Yolo, No. 14-17341, 2017 U.S. App. LEXIS 3260 (9th Cir. February 23, 2017)

On February 23, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that where an employee alleged that her supervisor greeted her with unwelcome hugs on more than 100 occasions, and a kiss at least once, during a 12-year period, her sexually hostile work environment claims under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.] and the California Fair Employment and Housing Act [Gov't Code § 12900 et seq.] survived because a reasonable juror could find, from the frequency of the hugs, that the supervisor's conduct was out of proportion to "ordinary workplace socializing" and had, instead, become abusive.

Victoria Zetwick ("Zetwick"), a county correctional officer, alleged that Edward G. Prieto ("Prieto"), the county sheriff, created a sexually hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.], and the California Fair

Employment and Housing Act ("FEHA") [Gov't Code § 12900 et seq.], by, among other things, greeting her with unwelcome hugs on more than 100 occasions, and a kiss at least once, during a 12-year period. Prieto and the County of Yolo (collectively, "defendants") argued that such conduct was not objectively severe or pervasive enough to establish a hostile work environment, but merely innocuous, socially acceptable conduct. The district court granted defendants' motion for summary judgment. Zetwick appealed before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit held that a reasonable juror could conclude that the differences in hugging of men and women were not, as defendants argued, just genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. Thus, the district court's grant of summary judgment was inappropriate.

The Ninth Circuit also held that the district court's contrary conclusion might have been influenced by application of incorrect legal standards. The first incorrect legal standard that the district court applied involved extraction of a sort of black letter rule, from just a few cases, that courts do not consider hugs and kisses on the cheek to be outside the realm of common workplace behavior. In support of this proposition, the district court cited three cases: *Lefevre v. Design Prof'ls Ins. Cos.*,[5] *Graves v. City of Durant*,[6] and *Joiner v. Wal-Mart Stores, Inc*.[7] None of these decisions stated or properly stood for that proposition. Furthermore, none identified either the number of times or the period of time over which unwelcome hugging occurred; they were factually distinguishable.

The Ninth Circuit held that the district court also applied an incorrect legal standard when it found that Prieto's conduct was not severe and pervasive. The proper standard, however, was whether Prieto's conduct was "severe or pervasive." The Ninth Circuit did not dismiss this mistake as a typographical error, notwithstanding that the district court properly stated the requirement as "severe or pervasive" elsewhere in its decision. The incorrect statement of the legal standard occurred precisely where the district court made the pertinent finding that Zetwick had not met the standard.

The Ninth Circuit concluded that the district court had not properly considered the totality of the circumstances. For example, the district court failed to consider whether a reasonable juror would find that the hugs, in the kind, number, frequency, and persistence described by Zetwick, created a hostile environment. The district court completely overlooked legal recognition of the potentially greater impact of harassment from a supervisor and the highest ranking officer in the department. Prieto's position as Zetwick's supervisor was significant as to whether or not a reasonable juror could find that the hugs and the kisses that Zetwick was subjected to created an abusive environment. The district court also overlooked the import of its observation that Zetwick had stated in a deposition that it was difficult for her to go to work and that she was always stressed, suffered from anxiety, and took a sleep aid, which the district court conceded certainly would interfere with an individual's job. This concession suggested that a reasonable juror would have an evidentiary basis to find that Zetwick's environment was abusive.

The Ninth Circuit found that Zetwick had submitted evidence that she never saw Prieto hug men and evidence that others agreed that Prieto hugged women more frequently than men. Thus, she submitted evidence from which a reasonable juror could conclude that even if Prieto also hugged men on occasion, there were "qualitative and quantitative differences" in the hugging conduct toward the two genders.

Accordingly, the Ninth Circuit reversed and remanded the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.81[1][b], *"Hostile Work Environment" Harassment* (Matthew Bender).

TORTIOUS INTERFERENCE WITH EMPLOYMENT CONTRACT

Brandon v. Maricopa County, No. 14-16910, 2017 U.S. App. LEXIS 3259 (9th Cir. February 23, 2017)

On February 23, 2017, the U.S. Court of Appeals for the Ninth Circuit held that where plaintiff, who worked as a civil litigation attorney for a county attorney's office and as a direct employee of the county, was terminated after she made a comment to a reporter about settlement offers, plaintiff's tortious interference with contract claim failed because the county was the client, and risk management officials had a legally protected interest in ensuring the county attorney's office provided quality legal services to the county.

Maria Brandon ("Brandon") worked as a civil litigation attorney for the Maricopa County Attorney's Office ("MCAO"), and later (briefly) as a direct employee of Maricopa County ("county"), defending the county and

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5 1994 U.S. Dist. LEXIS 22012 (N.D. Cal. Sept. 15, 1994).

6 2010 U.S. Dist. LEXIS 20335 (N.D. Iowa Mar. 5, 2010).

7 114 F. Supp. 2d 400 (W.D.N.C. 2000).

related entities in civil lawsuits, before again returning to her previous employment at the MCAO. During her time as a direct employee of the county, she received a call at her office from a newspaper reporter inquiring about a case she was handling for the Maricopa County Sheriff's Department. One of her comments to the reporter about the case was later published in an article in that newspaper. This article suggested that the county substantially increased settlement offers to avoid having key county officials testify. After Brandon returned to the MCAO, county officials, Sandra Wilson and Rocky Armfield (collectively, "officials"), responsible for overseeing risk management and civil lawsuits against the county thought her conduct in talking about the case mentioned was unprofessional for a lawyer representing the county. In light of what they considered were justifiable misgivings regarding Brandon's judgment, these officials requested that Brandon not be assigned further cases in which the county was a party and which involved risk management. Brandon was later terminated from employment with the MCAO. She filed a lawsuit against the county and certain county officials. A jury found for Brandon and against the county on her claim that she had been fired in retaliation for her exercise of First Amendment rights in speaking to the newspaper reporter, and against county officials for state-law based tortious interference with her employment contract. MCAO and the officials later filed a motion for judgment as a matter of law or, alternatively, for a new trial, as to the First Amendment and contract interference claims, which the district court denied. The district court entered judgment on the basis of the jury's verdicts.

MCAO and the officials (hereinafter, appellants) filed an appeal before the U.S. Court of Appeals for the Ninth Circuit. They first argued that, as a matter of law, the jury wrongfully imposed liability for the tortious interference with contract claim, for their conduct did not create legal liability under Arizona tort law. Appellants next argued that Brandon's speech to the newspaper was, again as a matter of law, made pursuant to her official duties and, therefore, not protected by the First Amendment from discipline, such that any adverse employment actions taken against Brandon by her employer because of the newspaper interview did not give rise to any legal liability under 42 U.S.C. § 1983. Appellants sought reversal on both claims.

The Ninth Circuit held that individuals who have a legitimate interest in the performance of a contract between two third parties (such as the employment contract between Brandon and the MCAO) should not face potential tort liability for concerning themselves with the performance of that contract. The communications of a client (the county, as represented by the officials) speaking to its attorney (the MCAO) requesting specific legal personnel be removed from certain county matters fit the situation contemplated by *Snow v. Western Sav. & Loan Ass'n*[8] and *McReynolds v. Short*.[9] The district court, however, rejected appellants' argument on this point by finding that the county's risk management office (where the officials worked) was "not the 'client' for purposes of this analysis." The Ninth Circuit found that this conclusion was factually incorrect because the record was undisputed that the risk management office coordinated, on behalf of the county, with the MCAO to manage the resolution of civil lawsuits against the county. The record established that the county was acting through its risk management office and personnel in its interactions with the MCAO. No reasonable jury could find otherwise from the record here.

Thus, the Ninth Circuit concluded that the officials had a legally protected interest in ensuring that the MCAO provided quality legal services to the county. The officials requested reassignment of risk management cases because Brandon publicly commented on a sensitive and ongoing county legal matter in a manner they reasonably perceived as unprofessional and betraying her duty of loyalty. On this record, requesting that MCAO supervisors remove from certain cases one of their lawyers reasonably perceived as a liability to the county could not be considered an improper means for protecting the county's legitimate legal interests, even if the officials did not have statutory authority to fire Brandon. Under *Snow* and *McReynolds*, no reasonable jury could conclude that the officials "improperly" interfered with Brandon's employment contract when they requested reassignment of risk management cases to other MCAO lawyers. No reasonable jury could conclude that the county's risk management office was "not the 'client.'" The tortious interference with contract judgment entered upon the jury's verdict against the officials was thus reversed because, as a matter of law, their conduct was not improper.

Appellants claimed that Brandon's comment quoted by the *Arizona Republic* was made in her official capacity and thus not protected by the First Amendment. They argued that her speech would not be citizen speech constitutionally protected under the First Amendment. The district court concluded that Brandon's speech was entitled to First Amendment protection and declined to

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8 152 Ariz. 27, 730 P.2d 204 (1987) (Snow).

9 115 Ariz. 166, 564 P.2d 389 (Ct. App. 1977) (McReynolds).

overturn the jury's conclusion that Brandon was speaking as a citizen. The Ninth Circuit held that the error in the district court's conclusion stemmed from its failure to undertake the "practical inquiry" required by *Garcetti v. Ceballos*.[10] Under Arizona law, as an attorney for the county Brandon had a broad fiduciary duty to her client—the county.

The Ninth Circuit held that with the legally defined scope of an attorney's duties in mind, it became obvious that Brandon's comments to the newspaper could not constitute constitutionally protected citizen speech under the principles from *Dahlia v. Rodriguez*.[11] While Brandon was not speaking within her chain of command, she was inevitably speaking as a lawyer representing the county as her public statements touched on the very matter on which she represented the county. Further, while the newspaper article suggested the county paid too much to protect certain employees from public criticism, Brandon's published statement made no such allegation but merely reflected negatively on her client. Taken together, the only possible outcome of the practical inquiry was that Brandon's speech to the *Arizona Republic* fell under the broad set of official duties she owed the county as its attorney, and so was not constitutionally protected citizen speech.

Accordingly, the Ninth Circuit reversed the First Amendment retaliation verdict and remanded for the district court to enter judgment for appellants.

References. See, e.g., Wilcox, *Labor and Employment Law*, § 70.23, *Interference With Contractual Relations* (Matthew Bender).

VICARIOUS LIABILITY

Lynn v. Tatitlek Support Services, Inc., No. E063585, 2017 Cal. App. LEXIS 145 (February 22, 2017)

On February 22, 2017, a California appellate court ruled that an employer was not vicariously liable for an accident, which was caused by a temporary employee who had been role playing in military exercises and was traveling home, under the doctrine of respondeat superior.

Tatitlek Support Services, Inc. ("TSSI") entered into an employment contract with the U.S. Marine Corps to recruit and hire foreign language role players to participate in military exercises at the U.S. Marine Corps military base located at Twentynine Palms ("Base"). TSSI recruited role players from Afghan communities located in Fremont and San Diego, California, and Phoenix, Arizona. When hiring role players for a mission, TSSI would ask if the employee was going to drive to/from the jobsite or wanted round-trip bus transportation from Fremont, San Diego or Phoenix. TSSI provided this optional bus service to role players at no charge. Abdul Formoli ("Formoli") was hired by TSSI as a "civilian," "Afghan villager" role player to participate in the exercises at the Base. Formoli chose to drive himself to and from TSSI's Twentynine Palms facility, rather than make use of the bus services provided by TSSI. As Formoli was driving home to Sacramento, after completing his job assignment, he crashed into a pickup truck driven by Brian Griffin Lynn ("Brian"). Formoli's vehicle burst into flames, fatally incinerating Formoli. Formoli died at the scene and Brian died shortly thereafter from serious injuries. Gail M. Lynn ("Gail"), Brian's wife, survived the accident.

Gail and her son (collectively, "plaintiffs") filed a wrongful death complaint against TSSI. The complaint included causes of action for wrongful death negligence, alleging that Formoli failed to drive in a safe and reasonable manner. TSSI filed a motion for summary judgment. Relying on *Hinman v. Westinghouse Electric Company*,[12] plaintiffs argued in their opposition that TSSI was liable under the doctrine of respondeat superior based on the employer special benefit exception to the going and coming rule. Plaintiffs also argued that the accident occurred while Formoli was being paid by TSSI for his travel time and therefore TSSI was liable under the respondeat superior doctrine. Plaintiffs argued that a triable issue existed as to whether the incidental benefit and special risk exceptions to the going and coming rule applied. TSSI requested the trial court to strike an expert opinion declaration on the ground that the expert declaration lacked foundation under Evid. Code §§ 801 and 802, and Formoli's mental state at the time of the accident was purely speculative. The trial court granted TSSI's summary judgment motion on the ground that TSSI had met its prima facie burden of showing that Formoli was not acting within the course and scope of his employment when he collided with Brian, shifting the burden of production onto plaintiffs, and plaintiffs had failed to present evidence sufficient to show the existence of any triable issue of material fact as to the scope of Formoli's employment. The trial court sustained TSSI's objection to the expert opinion declaration on the ground that, although it seemed possible and even likely that

[10] 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

[11] 735 F.3d 1060 (9th Cir. 2013).

[12] 2 Cal. 3d 956, 88 Cal. Rptr. 188, 471 P.2d 988 (Hinman).

Formoli was tired when he left Twentynine Palms, the expert's opinion that his fatigue was the reason Formoli crossed into oncoming traffic seemed to be mere speculation especially in the absence of evidence showing how long it had been since Formoli had last slept. Plaintiffs appealed the trial court's judgment before a California appellate court.

The California appellate court concluded that plaintiffs had not provided evidence establishing that the incidental benefit exception to the going and coming rule applied. Even though Formoli had a long commute, there was no evidence that Formoli's use of a personal vehicle was a condition of employment or that Formoli agreed to make his personal vehicle available as an accommodation to TSSI, with TSSI reasonably relying upon Formoli using it during his employment. The undisputed evidence showed that TSSI did not require Formoli to use his personal vehicle to perform his job responsibilities; TSSI did not require Formoli to drive to or from the jobsite; TSSI did not recruit employees from Sacramento, where Formoli lived; Formoli had the option of using bus services provided by TSSI for most of his commute; Formoli had discretion on when, where and how to commute to the jobsite; Formoli had completed his temporary employment assignment at the time of the accident; Formoli had left the jobsite over two hours before the accident; and the accident occurred nearly 100 miles from the jobsite. Under these circumstances, the relationship between Formoli's employment and driving home after completing his job assignment was too attenuated an employer benefit to require TSSI to bear the risk of an accident during Formoli's commute home. It was Formoli's personal activity that caused the accident and that did not occur within the course and scope of his employment. Formoli's negligent activity during his commute home was not part of the employer-employee relationship required for respondeat superior liability.

With respect to compensation for travel time, the California appellate court held that all of the evidence presented by plaintiffs and TSSI, and all of the inferences drawn therefrom, established that TSSI did not compensate Formoli at the time of the accident. The trial court therefore appropriately found that the *Hinman* exception to the going and coming rule did not apply. The undisputed evidence showed that, although TSSI paid Formoli for eight hours of work on the date of accident, this did not reflect the actual time he worked that day, and there was no evidence that TSSI paid Formoli for working after he left the Base or for his travel time or expenses. Concluding otherwise would constitute pure, unfounded speculation.

With respect to special risk exception, the California appellate court held that there was no evidence that Formoli was unfit to drive because of work-related fatigue or evidence that this was a substantial factor in causing or contributing to the accident. Therefore, a reasonable trier of fact could not find that the accident was a generally foreseeable consequence of Formoli's employment as a role player. There being a lack of evidence of an employer-caused driver impediment (fatigue) or that such impediment proximately caused the accident, the court concluded that the trial court appropriately granted TSSI's summary judgment motion. Evidence of Formoli's work hours and activities alone were not enough to raise a triable issue of fact that TSSI was vicariously liable based on the special risk exception to the going and coming rule.

With respect to expert opinion declaration, the California appellate court held that the expert opinion declaration stated conclusions, without stating any medical or scientific bases for reaching his opinions. For instance, without knowing how many hours Formoli slept while at the Base, including the night before the accident, the expert stated that Formoli was fatigued at the time of the accident. The expert also concluded that Formoli's fatigue was the cause of the accident, whereas this was nothing more than pure speculation. Furthermore, the expert's declaration stated opinions that rested on common knowledge rather than on matters of a type reasonably relied upon in forming a medical opinion. His opinions also overlooked evidence that TSSI took measures to ensure that role players such as Formoli received adequate sleep. Formoli might have been tired when he left the Base on the date of accident, but there was no evidence that he could not safely drive because of fatigue or that such fatigue substantially caused or contributed to the accident. Therefore, the trial court therefore properly sustained TSSI's objection to the expert's declaration and did not consider it when ruling on TSSI's summary judgment motion.

Accordingly, the California appellate court affirmed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 30.05[4][a], *Going and Coming Rule* (Matthew Bender).

WAGE AND HOUR

Estrada v. Kaiser Found. Hosps., No. 15-15133, 2017 U.S. App. LEXIS 1800 (9th Cir. February 1, 2017)

On February 1, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that the district court properly

denied plaintiffs' motion to remand because their California state law claims were preempted by Section 301 of the Labor Management Relations Act [29 U.S.C. § 185(a)] as their claims as alleged would require a court to interpret the collective bargaining agreement.

Danielle Estrada, Robert Hernandez, Armando Sanchez, Steven Sperling, Marcinella Call, Shirley Nelson (collectively, "plaintiffs") appealed before the U.S. Court of Appeals for the Ninth Circuit the district court's order denying their motion to remand on the grounds that plaintiffs' California state law claims were preempted by Section 301 of the Labor Management Relations Act [29 U.S.C. § 185(a)] ("Section 301"). Section 301 preempts the use of state contract law in the collective bargaining agreement ("CBA") interpretation and enforcement. If the asserted state law cause of action involves a right that exists independently of the CBA, which was undisputed in the instant case, then the court must consider whether the state law claim is "substantially dependent on analysis of a collective-bargaining agreement." The relevant CBAs relied upon in the complaint were a series of National Agreements ("NAs") negotiated and agreed to by Kaiser Foundation Hospitals; Permanente Medical Group, Inc.; Kaiser Foundation Health Plan, Inc.; Southern California Permanente Medical Group (collectively, "defendants") and a coalition of local labor unions, which referred to Local Agreements ("LAs"), negotiated and agreed to by defendants and the local union that represented defendants' California employees, including plaintiffs. Section 2.A.1 of each of the NAs provided across-the-board yearly wage increases of between 3% and 5%. Section 1.B.3 of the NA, the so-called "LMP Trust Provision," provided: "an amount equal to nine cents per hour per employee will be contributed to the LMP Trust throughout the term of this Agreement, consistently across the Program." Plaintiffs filed a class action in the California state court against defendants, alleging that the LMP Trust Provision constituted an unlawful deduction under Lab. Code § 222, and that the $.09-per-hour contribution was not listed on plaintiffs' wage statements, in violation of Lab. Code § 226. Plaintiffs further alleged that this practice constituted a violation of the Unfair Competition Law ("UCL") [Bus. & Prof. Code § 17200 et seq.]. After defendants removed the case to federal court, the district court denied plaintiffs' motion to remand and concluded that Section 301 preempted plaintiffs' state law claims.

The Ninth Circuit concluded that resolving plaintiffs' claims as alleged would require it to interpret the CBA. Because the complaint advanced a contested interpretation of the NA, resolving the parties' dispute required the court to interpret how the NA and LA interact with each other and, more specifically, to determine what combination of the LMP Trust Provision, across-the-board percentage wage increase provision, and negotiated wage rates table in the LA constituted the wage the parties agreed would be paid. Since the court had to interpret the parties' CBA to resolve plaintiffs' § 222 claim, Section 301 preempted the § 222 claim.

The Ninth Circuit further stated that resolving plaintiffs' § 226 claim would also require it to determine whether the LMP Trust Provision was a deduction from the agreed-upon wage or a factor in determining the agreed-upon wage. This analysis would require interpretation of the CBA. Therefore, the § 226 claim was preempted.

Finally, the Ninth Circuit found that since plaintiffs alleged in their complaint that the §§ 222 and 226 violations formed the basis of plaintiffs' UCL claim, the UCL claim was derivative of the §§ 222 and 226 claims. Given that the §§ 222 and 226 claims were preempted, the derivative UCL claim also failed.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 4.10[1][j], *Other Statutorily Prohibited Deductions* (Matthew Bender).

CALENDAR OF EVENTS

2017

April 5	CALBAR Litigation Section Webinar: *Discovery Competence: Mobile Devices*	12:00 PM - 1:00 PM
April 6-7	NELI: *ADA & FMLA Compliance Update*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
April 21	CALBAR Labor & Employment Law Section, *23rd Annual Public Sector Conference*	The Claremont Resort & Spa 41 Tunnel Road Berkeley, CA 94705 (415) 538-2590
April 22	CALBAR Workers' Compensation Section, *Workers' Compensation Section Fall Conference*	The State Bar of California 180 Howard Street San Francisco, CA 94105 (415) 538-2256
April 26	CALBAR Labor & Employment Law Section Webinar: *Winning and Healthier Strategies for Dealing with Bullies and Unreasonable People in the Litigation Context*	12:00 PM - 1:30 PM
May 4-5	NELI: *Employment Law Conference Mid-Year*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
May 7-12	CALBAR Litigation Section, *A Week in Legal London*	Various locations

June 10-11	CALBAR Workers' Compensation Section, *Workers' Compensation Legal Specialization Boot Camp 2017*	Monterey Marriott Hotel 350 Calle Principal Monterey, CA 93940
July 12	NELI: *California Employment Law Update*	Catamaran Resort 3999 Mission Blvd. San Diego, CA 92109 (858) 488-1081
July 13-14	CALBAR: Labor & Employment Law Section, *34th Labor & Employment Law Annual Meeting & 7th Annual Advanced Wage and Hour Conference*	Hyatt Regency Los Angeles International Airport 6225 West Century Blvd. Los Angeles, CA 90045 (415) 538-2590
July 13-14	NELI: *Employment Law Update*	Catamaran Resort 3999 Mission Blvd. San Diego, CA 92109 (858) 488-1081
Aug. 17-18	NELI: *Public Sector EEO and Employment Law Conference*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 7	CALBAR Workers' Compensation Section, *6th Annual Rating Extravaganza*	The State Bar of California, 845 S Figueroa Street Los Angeles, CA (415) 538-2256.
Oct. 25	NELI: *Affirmative Action Workshop*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 26-27	NELI: *Affirmative Action Briefing*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

Nov. 7	NELI: *Americans with Disabilities Act Workshop*	Luxe Sunset Blvd. Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Nov. 8	NELI: *California Disability Law Workshop*	Luxe Sunset Blvd. Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Nov. 18	CALBAR Workers' Compensation Section, *Workers' Compensation Section Fall Conference*	Hyatt Regency Los Angeles International Airport 6225 West Century Blvd. Los Angeles, CA 90045 (415) 538-2256
Nov. 30-Dec. 1	NELI: *Employment Law Conference*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

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