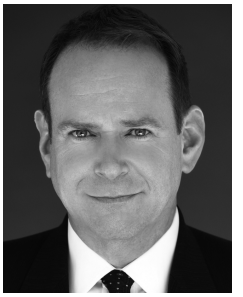
CALIFORNIA EMPLOYMENT LAW NOTES

By Andrew H. Friedman



Andrew H. Friedman is a founding partner of Helmer Friedman LLP in Beverly Hills, where he (almost) exclusively represents employees in all areas of employment law. Mr. Friedman is the author of a two-volume employment law treatise, Litigating Employment Discrimination Cases (James Publishing 2005-2020). Mr. Friedman served as Counsel of Record in *Lightfoot v. Cendant Mortgage Corp. et. al.* 137 S.Ct. 553 (2017), where he successfully persuaded the U.S. Supreme Court to grant *certiorari*. In January 2017, the Supreme Court, in a unanimous decision authored by Justice Sotomayor, reversed the Ninth Circuit and ruled in favor of Mr. Friedman's clients. Mr. Friedman's email address is afriedman@helmerfriedman.com. He is proud to guest write this column for his friend (and sometimes co-counsel and/or opposing counsel), Anthony J. Oncidi, who, until this issue, wrote this column without interruption for every issue of this publication for 30 years.

STANDARD FOR FEHA AIDING & ABETTING CLAIMS CLARIFIED AND IIED CLAIM SURVIVED DEMURRER

Smith v. BP Lubricants USA Inc., ___ Cal. Rptr. 3d ___, 2021 WL 1905229 (May 12, 2021)

Robert Smith, an African American, worked for Jiffy Lube for almost two decades. During that time, Smith alleged that he was passed over for promotions, criticized, and harassed because of his race. On one occasion, Jiffy Lube arranged for a third-party vendor–BP Lubricants USA, Inc. dba Castrol–and one of the vendor's employees, Gus Pumarol, to provide a presentation to Jiffy Lube's employees about a new Castrol product. During the presentation, Pumarol made a series of comments that Smith found racially offensive including saying to or about Smith: (1) "You sound like Barry White."; (2) "I don't like taking my car to Jiffy Lube because I've had a bad experience with a mechanic putting his hands all over my car. How would you like Barry White over there with his big banana hands working on your car?"; and (3) in response to a question from Smith, "What, I can't see your eyes, what?" All of the non-African Americans in attendance laughed at each of Pumarol's comments, including three of Smith's superiors. The next day, a Jiffy Lube employee crossed out Smith's name on the company's work schedule and replaced it with "Banana Hands."

Smith sued, alleging that BP and Pumarol violated the Fair Employment and Housing Act's (FEHA) prohibition on racial harassment in the workplace by "aiding and abetting" Jiffy Lube's harassment and discrimination against him. He also sued Pumarol for intentional infliction of emotional distress, and sued both Pumarol and BP for racial discrimination under the Unruh Civil Rights Act (Cal. Civ. Code § 51).

BP and Pumarol demurred to Smith's complaint. The trial court sustained the demurrer without leave to amend and entered judgment for BP and Pumarol.

Smith appealed, arguing that the trial court erroneously sustained the demurrer without leave to amend. The Court of Appeal disagreed as to Smith's FEHA claim, but agreed as to his intentional infliction of emotional distress (IIED) and Unruh Act claims.

With regard to Smith's FEHA aiding and abetting claim, the Court of Appeal initially rejected the argument of BP and Pumarol that they could not be liable under FEHA because they were never Smith's employer. In that regard, the Court held that individuals and entities who are not the employer of a plaintiff employee may nonetheless be liable under FEHA for aiding and abetting employer's violation of FEHA. The Court then explained that BP and Pumarol could be liable under FEHA for aiding and abetting Jiffy Lube's alleged harassment and discrimination against Smith if he could satisfy each of the following elements: (1) Jiffy Lube subjected Smith to discrimination and harassment; (2) BP and Pumarol knew that Jiffy Lube's conduct violated FEHA; and (3) BP and Pumarol gave Jiffy Lube "substantial assistance or encouragement" to violate FEHA. The Court held that the demurrer of BP and Pumarol was properly sustained because Smith's allegations failed to satisfy the second and third elements. Nowhere in his complaint did Smith allege either that BP and Pumarol knew of Jiffy Lube's alleged harassment and discrimination against Smith, or that BP and Pumarol gave Jiffy Lube substantial assistance or encouragement to Jiffy Lube's alleged violations of FEHA.

However, with regard to Smith's IIED claims, the Court held that, on the facts alleged by Smith, a reasonable jury could find that Pumarol acted intentionally or unreasonably with the recognition that his acts were likely to result in illness through mental distress.

PUNITIVE DAMAGES 30 TIMES GREATER THAN THE NON-PUNITIVE DAMAGES AWARD AFFIRMED

Rubio v. CIA Wheel Group, 63 Cal. App. 5th 82 (2021)

Maria Teresa Lopez was employed by CIA Wheel Group (CWG) as a sales representative. Lopez learned that she had cancer and took a three-month medical leave for surgery. Thereafter, she had to undergo chemotherapy and then have follow-up medical appointments. Lopez, who previously had a good relationship with her supervisor, A.J. Russo, noticed that everything changed between them when she was diagnosed with cancer. Russo began to make negative comments to both her and other employees about Lopez taking time off for medical appointments. Russo rolled his eyes and breathed heavily as if frustrated with Lopez. Russo began to complain about some of Lopez's behaviors which had not been an issue before her medical leave. Russo further treated Lopez in a poorer manner than he treated her peers, and started taking credit for Lopez's sales. Lopez complained to Human Resources about the disparate treatment but her complaint was ignored as Human Resources told her that she should not "bump heads" with her supervisor. Eventually, Russo informed Human Resources and CWG's Executive Vice President that he wanted to fire Lopez for poor performance. Human Resources and CWG's Executive Vice President authorized the termination even though the firing violated CWG's policy, which required a warning, ordinarily in writing, before termination. Neither Human Resources nor CWG's Executive Vice President checked to see if Russo's claims of poor performance were accurate. With CWG's authorization in hand, Russo fired Lopez, citing poor sales. Lopez believed that she was fired due to her cancer because: (1) her personnel file did not include any written performance warnings or disciplinary actions; (2) she was the highest producing sales person in the Los Angeles office; (3) the negative manner in which Russo began to treat her after her cancer diagnosis; and (4) the reason used to justify her firing was false. Lopez sued CWG alleging that it fired her in violation of public policy because she had cancer.

Lopez died during the first trial of this matter, and the court declared a mistrial. The court appointed Lopez's three children as her successors in interest. Following a second trial, the court found that CWG terminated Lopez due to her medical condition and awarded the plaintiffs $15,057 in economic damages. The court determined that punitive damages were warranted, and awarded punitive damages in the amount of $500,000. Even though the court found that Lopez's noneconomic damages were in the $100,000 to $150,000 range, they were not recoverable after Lopez's death pursuant to Cal. Code of Civil Procedure section 377.34. The court also added another company—Wheel Group Holdings—as a judgment debtor, alter ego of or successor to CWG.

CWG appealed, arguing that the punitive damages award was constitutionally excessive because its conduct was not particularly reprehensible and the punitive damages were 33.3 times the amount of the $15,057 economic damages award. The Court of Appeal rejected CWG's argument, finding that the punitive damages award was only 3.5 times higher than Lopez's actual harm (which was in the $115,057 to $165,057 range), even if most of that harm was non-compensable due to the operation of Cal. Code of Civil Procedure section 377.34. In so ruling, the Court of Appeal held that "[e]vidence that an employer offered a pretextual explanation to justify its wrongful termination may support a finding of malice or oppression."

EARNINGS FROM SUBSTITUTE EMPLOYMENT CAN OFFSET LOST EARNINGS AWARD EVEN IF INFERIOR

Martinez v. Rite Aid Corporation, 63 Cal. App. 5th 958 (2021)

Maria Martinez sued her former employer, Rite Aid Corporation, and her former supervisor, Kien Chau, for wrongful termination in violation of public policy based on disability, age, a medical leave of absence, and a sexual harassment complaint; intentional infliction of emotional distress; and invasion of privacy. The third trial (Martinez won the first two) was limited to a determination of compensatory damages on Martinez's wrongful termination cause of action against Rite Aid and her IIED causes of action against Rite Aid and Chau. The jury awarded Martinez $2,012,258 on her wrongful termination cause of action against Rite Aid and $4 million on her intentional infliction of emotional distress causes of action against Rite Aid and Chau.

Rite Aid appealed arguing, among other things, that the trial court should have reduced the past economic damages award for wrongful termination by the amount of Martinez's post-termination earnings ($140,840). Relying on *Villacorta v. Cemex Cement, Inc.*, 221 Cal. App. 4th 1425 (2013), Martinez argued that because she earned those wages from jobs that were inferior and not substantially similar to her position at Rite Aid, no reduction was appropriate.

The Court of Appeal, rejecting *Villacorta*, held that "[a]lthough an employee may not be obliged to accept inferior employment, if an employee accepts employment and receives earnings, those actual earnings should be deducted from an award of past lost earnings." Accordingly, the Court of Appeal reduced the $464,258 award of past economic damages to Martinez for wrongful termination by $140,840 to $323,418. In all other respects, the Court of Appeal affirmed the judgment in favor of Martinez and awarded her costs on appeal.

CLAIMS BROUGHT UNDER ANTI-DISCRIMINATION PROVISION OF FEDERAL MINE SAFETY AND HEALTH ACT REQUIRES "BUT-FOR" CAUSATION

Thomas v. CalPortland Company, 993 F.3d 1204 (9th Cir. 2021)

Robert Thomas, a former dredge operator for CalPortland, sued challenging the decision of the Federal Mine Safety and Health Review Commission denying Thomas' discrimination claim under the Federal Mine Safety and Health Act. The Ninth Circuit, in a matter of first impression, held that a claim under the anti-discrimination provision of the Federal Mine Safety and Health Act required a showing of "but-for" causation, based on the "unambiguous" statutory language.

PRIVATE ARBITRATION AGREEMENT DOES NOT BIND SECRETARY OF LABOR WHEN BRINGING FLSA ACTION ON BEHALF OF EMPLOYEES WHO AGREED TO AGREEMENT

Walsh v. Arizona Logistics, Inc., __ F3d __, 2021 WL 1972613 (9th Cir. May 18, 2021)

The U.S. Department of Labor brought an enforcement action against Arizona Logistics Inc. The DOL alleged that Arizona Logistics violated the FLSA's minimum wage, overtime, record-keeping, and anti-retaliation requirements by misclassifying delivery drivers as independent contractors rather than employees. Arizona Logistics moved to compel arbitration of the Secretary's enforcement action based on arbitration agreements that the company had entered into with its delivery drivers. The district court denied the motion, concluding that the Secretary cannot be compelled to arbitrate based on the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The Ninth Circuit affirmed, holding "Because the Secretary, not the employees on whose behalf relief is sought, has authority to direct an FLSA enforcement action, the Secretary cannot be compelled to arbitrate, even if the employees have agreed to arbitration."