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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2020

The best and worst employment case law developments of 2019

A BRIEF OVERVIEW OF THE MOST IMPORTANT CASE LAW DEVELOPMENTS THAT SHAPED THE YEAR IN EMPLOYMENT LAW (WITH A BIT OF COLOR COMMENTARY)

The United States of America has become, under more than three years of corrupt tyrannical-like rule by President Donald John Trump, "skew-jee, awry, distorted and altogether perverse."

Although President Woodrow Wilson's Secretary of the Interior, Franklin Knight Lane, used those words to describe a different time, they are equally applicable today as President Trump, aided and abetted by the GOP-controlled Senate, has attacked whistleblowers, the media, his political rivals (and, sometimes, his political allies), consumers, employees, and everyone else whom he deems to have failed to provide unconditional support for him and for his policies.

The President has also attacked our hitherto independent judicial system both from without and from within. From without, he assaults the courts and juries — the bulwarks of our Constitution and laws — by undermining their legitimacy, usually in strikingly personal terms, when-ever they issue rulings/verdicts with which he disagrees and/or to cow them into making opinions/verdicts that he considers favorable.

From within, he (along with Senator Mitch McConnell) are in a mad frenzy to fill the federal courts with an unprecedented number of ultraconservative judges; such is the rush that Trump has nominated more individuals deemed unanimously unqualified by the American Bar Association than those similarly rated by the last six presidents (Obama, G.W. Bush, Clinton, G.H.W. Bush, Reagan, and Carter) *combined*! And, Trump is filling the federal courts at an unprecedented rate. These Trump judges (comprising the least diverse class of judicial nominees in modern history), are almost uniformly hostile not only to the rights of employees and consumers but also to anything that jeopardizes the unfettered power of President Trump. For now, employees and consumers in California have only the California State courts to protect them and, unfortunately, even some of these supposedly liberal courts sometimes place corporate interests ahead of the rights of individual employees and consumers.

What follows is a summary of cases decided before the upcoming tsunami of employment law decisions by Trump judges which will undoubtedly curtail individual/employee rights in favor of corporate interests.

A clarion call for civility and the elimination of bias in the practice of law

President Trump's worst behaviors (incivility, sexism, bias, aggression, anger, bullying, dishonesty, greed, narcissism, and negativity) have infected the bar in California just like a bad case of the novel coronavirus (COVID-19). And, in a series of three cases, the California Courts of

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Appeal have attempted to prevent the tide of incivility/bias from spreading any further by issuing a clarion call for civility and the elimination of bias in the practice of law.

Lasalle v. Vogel (2019) 36 Cal.App.5th 127, a non-employment case, is one of the most significant cases of 2019 because it addresses a dire emergency in the legal profession – loss of civility. *Lasalle* is ostensibly a legal-malpractice action in which the plaintiff, Angele Lasalle, was suing her former attorney, Joanna T. Vogel. Thirty-six days after Lasalle served Vogel with the summons and complaint, Lasalle's lawyer sent Vogel a letter and an email, informing Vogel that her default would be entered if no response was filed the very next day, a Friday. No response was filed. On Monday, Lasalle filed a request for entry of default which was granted. A week later, Vogel filed a motion to set aside the default. The Superior Court denied Vogel's set-aside motion and a default judgment was entered against Vogel for $1 million. Vogel then appealed. The Court of Appeal determined that, because "[d]ignity, courtesy, and integrity were conspicuously lacking" in the litigation, reversal was appropriate.

The most important part of the terrific opinion written by Justice William W. Bedsworth is the Court of Appeal's lengthy lament about the declining state of the legal profession, excerpted here in part as follows:

> Here is what Code of Civil Procedure section 583.130 says: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition." That is not complicated language. No jury instruction defining any of its terms would be necessary if we were submitting it to a panel of non-lawyers. The policy of the state is that the parties to a lawsuit "shall cooperate." Period. Full stop.
>
> Yet the principle the section dictates has somehow become the Marie Celeste of California law – a ghost ship reported by a few hardy souls but doubted by most people familiar with the area in which it's been reported. The section's adjuration to civility and cooperation "is a custom, More honor'd in the breach than the observance." In this case, we deal here with more evidence that our profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130, and – in keeping with what has become an unfortunate tradition in California appellate law – we urge a return to the professionalism it represents.

((2019) 36 Cal.App.5th 127, 130 (footnotes and citations omitted).)

In *Martinez v. O'Hara* (2019) 32 Cal.App.5th 853, the Court of Appeal held that a gender-biased statement made in court papers violates ethical rules and may be reported to the state bar by the court. Fernando Martinez appealed the trial court's denial of his motion for attorneys' fees and costs following an $8,080 jury verdict on his sexual harassment claim. Instead of using the Judicial Council notice of appeal form, his counsel submitted his own notice of appeal which stated in pertinent part: "The ruling's succubustic adoption of the defense position, and resulting validation of the defendant's pseudohermaphroditic misconduct, prompt one to entertain reverse peristalsis unto its four corners." (*Id.* at p. 847.)

Noting that Webster's Third New International Dictionary defined the term "succubus" as "1: a demon assuming female form to have sexual intercourse with men in their sleep – compare incubus 2: demon, fiend 3: strumpet, whore," the Court of Appeal held that the "reference [in the notice of appeal] to the ruling of the female judicial officer, from which plaintiff appealed, as 'succubustic' constitutes a demonstration 'by words or conduct, bias, prejudice, or harassment based upon... gender' and thus qualifies as reportable misconduct." The Court of Appeal then commented: "We publish this portion of the opinion to make the point that gender bias by an attorney appearing before us will not be tolerated, period."

Finally, in *Briganti v. Chow* (2019) 42 Cal.App.5th 504, the Court of Appeal added a "A Note on Civility, Sexism, and Persuasive Brief Writing" at the end of its opinion to address a reply brief filed in the case that contained "a highly inappropriate assessment of certain personal characteristics of the trial judge, including her appearance."

The offending paragraph stated: "Briganti ... claims that ... Chow defamed her by claiming she was 'indicted' for criminal conduct, which is the remaining charge [in the case] after the [trial judge] ... an attractive, hard-working, brilliant, young, politically well-connected judge on a fast track for the California Supreme Court or Federal Bench, ruled for Chow granting his anti-SLAPP Motion to Strike Respondent's Second Cause of Action but against Chow denying his anti-SLAPP Motion against the First Cause of Action .... With due respect, every so often, an attractive, hard-working, brilliant, young, politically well-connected judge can err! Let's review the errors!" (*Id.* at p. 511.)

The Court of Appeal then explained that gender bias and disrespect for the judicial system was intolerable even if framed in a supposedly complimentary fashion:

> When questioned at oral argument, Chow's counsel stated he intended to compliment the trial judge. Nevertheless, we conclude the brief's opening paragraph reflects gender bias and disrespect for the judicial system.
>
> . . . .
>
> Calling a woman judge – now an Associate Justice of this court – "attractive," as Chow does twice at the outset of his reply brief, is inappropriate because it is both irrelevant and sexist. This is true whether intended as a compliment or not. Such comments would not likely have been made about a male judge . . . Objectifying or demeaning a member of the profession, especially when based on gender, race, sexual

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> preference, gender identity, or other such characteristics, is uncivil and unacceptable. Moreover, the comments in the brief demean the serious business of this court. We review judgments and judicial rulings, not physical or other supposed personal characteristics of superior court judges.

(*Ibid.*)

These three cases should serve as the impetus not only for all attorneys to double-down on their efforts to be professional, civil, and courteous in their dealings with opposing counsel and to refrain from bias in all aspects of the practice of law, but also for law schools and the bar to re-emphasize the importance of civility and for Superior Courts to take swift and vigorous action against incivility.

A quartet of very disappointing decisions and a single wonderful opinion

Typically, the California Supreme Court issues pro-employee decisions. This past year, however, save one pro-employee exception, saw the Court repeatedly side with big business over employees.

In *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, the California Supreme Court was presented with the opportunity to decide whether the State's anti-SLAPP statute could be used to screen claims alleging discriminatory or retaliatory employment actions. California's anti-SLAPP statute was, of course, enacted at the strong and repeated urging of then-California State Senator Bill Lockyer (Chair of the California Senate Judiciary Committee), "out of concern over 'a disturbing increase' in civil suits 'aimed at preventing *citizens* from exercising their political rights or punishing those who have done so.'" (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 830 reversed, in part, *by Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871 quoting *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (emphasis added).)

Senator Lockyer commented that the anti-SLAPP legislation was needed to protect "*ordinary citizens* who are sued by well-heeled special interests." (See George W. Pring & Penelope Canan, *SLAPPs: Getting Sued For Speaking Out*, (Temple Univ. Press 1996) at pp. 1-2, 196 quoting *Deukmejian Vetoes Limits on SLAPP Suits*, San Francisco Daily Journal, Sept. 27, 1990, at p. 8 (emphasis added).)

Unfortunately, but not unexpectedly, deep-pocketed corporations and other economic powerhouses have attempted to corrupt the anti-SLAPP statute and turn what was supposed to be the "cure" into a "disease," to be used by those powerhouses against ordinary citizens (consumers and employees) in an effort to silence them. (See *Nam v. Regents of the Univ. of Cal.* (2016) 1 Cal.App.5th 1176, 1179 ["The cure has become the disease – SLAPP motions are now just the latest form of abusive litigation"], quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 96 [dissenting opinion of Brown, J.].)

Sadly, in *Wilson*, the California Supreme Court turned the intent of the anti-SLAPP statute upside down to protect a behemoth media corporation from an ordinary citizen merely attempting to exercise his constitutionally protected petitioning right of suing that corporation for discrimination. The Supreme Court held that CNN could use the anti-SLAPP act against a discrimination claim because it found that the First Amendment protects a news organization's right to choose who reports the news on its behalf. Discrimination and retaliation cases, which involve issues of intent and motive, are difficult enough to prove even with full and intensive discovery. To subject those cases to the heighted scrutiny erected by the anti-SLAPP act is to effectively provide media corporations with a free pass to engage in unlawful discrimination and retaliation.

Next, in *Voris v. Lampert* (2019) 7 Cal.5th 1141, the California Supreme Court held that employees cannot sue employers for the tort of conversion. Justice Mariano-Florentino Cuéllar (joined by Justice Goodwin H. Liu) issued a cogent dissent summarized by a single paragraph: "Unlike the majority, I wouldn't close the courthouse door when a worker invokes the conversion tort to recover earned but unpaid wages. In California, unpaid wages are the employee's property once they are earned and payable… Which is why an action for unpaid wages is not, as the majority suggests, merely an "action[ ] for a particular amount of money owed in exchange for contractual performance." The doctrinal basis for invoking conversion here is as solid as California's longstanding concern about wage theft. Indeed, nothing in the legislative scheme or public policy more generally justifies limiting the tort in the manner the majority proposes. So with respect, I dissent."

In *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, the California Supreme Court held that a payroll company could not be liable to an employee of one of its clients for negligence or breach of contract holding that: (1) ADP owed no common law duty of care to Altour's employees and thus could not be liable for alleged negligence; and (2) Altour's employees were not parties to nor third-party beneficiaries of the contract between Altour and ADP, and thus could not be liable for breach of contract.

In *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, the California Supreme Court held that private litigants may not recover unpaid wages under the Labor Code Private Attorneys General Act ("PAGA"). Unfortunately, the Supreme Court held that "[d]eeming … unpaid wages … to be a civil penalty … cannot be squared with the understanding of that term under the PAGA."

Finally, in the one pro-employee exception to its slate of unfavorable pro-business decisions, the California Supreme Court held, in *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, that the time during which employers required their employees to spend on the employer's premises waiting for, and undergoing, mandatory exit searches was employer-controlled activity, and therefore that time was compensable as "hours worked"

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within meaning of California's wage and hour laws.

Unlike President Trump and his Senate enablers, the California Courts of Appeal still protect whistleblowers

In the age of Trump, the importance of whistleblowers cannot be overstated as both federal and state governments (and employers) need the checks and balances that whistleblowers represent to ensure that illegal activities are brought to light.

In *Hawkins v. City of Los Angeles* (2019) 40 Cal.App.5th 384, two government employees – Todd Hawkins and Hyung Kim – blew the whistle on an illegal practice allegedly taking place within the City of Los Angeles' Department of Transportation ("DOT"). Hawkins and Kim were DOT hearing examiners. They reviewed parking violations and made determinations as to whether the individuals contesting their violations were liable.

Both men complained internally that their supervisor was pressuring them to change decisions from "not liable" to "liable" – in essence cheating individuals out of the refunds of the fines they had paid. Both men were then fired. They sued for whistleblower retaliation under Labor Code section 1102.5 and violations of the Bane Act. A jury found in their favor, awarding Hawkins $238,531 and Kim $188,631 in damages. The trial court then assessed a $20,000 PAGA penalty, and subsequently awarded them $1,054,286.88 in attorneys' fees. The City appealed.

The Court of Appeal affirmed as to the Labor Code section 1102.5 claim. It further affirmed the award of attorney's fees, which were warranted under PAGA and under Code of Civil Procedure section 1021.5. As to the latter, the court determined that Hawkins and Kim had conferred a significant benefit on the public through the litigation, as the City had been denying the public of independent, impartial hearings and instead undermined the process to generate revenue.

In *Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, Christopher Ross, a former Deputy District Attorney, sued the County of Riverside for retaliating against him in violation of Labor Code section 1102.5 because he repeatedly complained to his supervisors that the County needed to cease the prosecution of a man for whom there was not probable cause to continue prosecuting (among other things, DNA evidence exculpated the man; and another person admitted, in recorded phone calls, to being the actual killer).

Ross based his recommendation on his belief continued prosecution would violate the defendant's due process rights as well as a prosecutor's ethical obligations under state law. The trial court granted the County's motion for summary judgment on the ground that Ross failed to allege that he complained about a violation of the law. The Court of Appeal reversed, explaining:

If credited by a trier of fact, the evidence shows Ross engaged in protected activity because he disclosed information to a governmental or law enforcement agency and to people with authority over him which he reasonably believed disclosed a violation of, or noncompliance with federal and state law applicable to criminal prosecutions and prosecutors. Although Ross did not expressly state in his disclosures that he believed the County was violating or not complying with a specific state or federal law, Labor Code section 1102.5, subdivision (b), does not require such an express statement. It requires only that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity. (Lab. Code, § 1102.5, subd. (b).)

Moreover, the particular information disclosed in this case, that evidence developed during Ross's handling of the case undermined the district attorney's office's basis for continuing to prosecute the case, should have raised the same constitutional, statutory, and ethical concerns to Ross's superiors as they did to Ross because Ross's superiors were also prosecutors subject to the same legal and ethical constraints as Ross." (*Id.* at pp. 592-93.)

In *Siri v. Sutter Home Winery, Inc.* (2019) 31 Cal.App.5th 598, the court held that an accountant could proceed with a whistleblower lawsuit even though the documents underlying her claims were privileged. Siri repeatedly complained to her supervisors that the company was not complying with California sales and use tax laws. She alleged that the company retaliated against her by scrutinizing her, taking away job duties, giving an office promised to her to someone else, ostracizing her, and ultimately firing her.

Siri sued, alleging violations of Labor Code section 1102.5 and wrongful termination in violation of public policy. The company moved for summary judgment claiming that Siri would need to rely on the company's confidential tax returns to prove her claim, and that those were not discoverable because of the taxpayer privilege. The trial court granted summary judgment and Siri appealed. The Court of Appeal reversed. It held that the company failed to show that Siri could not prove her case without using the actual tax returns: "Prosecution of plaintiff's claim does not require the forced production of defendant's returns or of the content of its returns. Plaintiff's right to recover turns only on whether she was discharged for communicating her reasonable belief that defendant was not properly reporting its use tax obligation." (*Id.* at p. 605.) Thus, "Plaintiff is entitled to attempt to prove her claim without disclosing any information that is subject to the privilege." (*Id.* at p. 606.)

In *Gupta v. Trustees of the Cal. State Univ.* (2019) 40 Cal.App.5th 510, the Court of Appeal affirmed a $378,421 jury verdict in favor of a professor alleging that she was denied tenure and fired because she and several other women of color in the University's School of Social Work complained about alleged "abuse of power and authority, excessive micromanagement, bullying, and the creation of a hostile environment." (*Id.* at p. 513.) In order to prove her retaliation claim, Professor Gupta compared herself to another professor who had not

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complained but had been granted tenure. The University appealed, arguing that Professor Gupta should not have been allowed to use the comparator evidence because she failed to show that she was "clearly superior" to the "comparator professor." The Court of Appeal disagreed, holding that a plaintiff "is not required to show his or her qualifications are clearly superior in order to defeat summary judgment." (*Id.* at p. 521.)

One of the few exceptions to the 2019 triumphs of whistleblowers and those alleging retaliation occurred in *Doe v. Department of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721. In *Doe*, the Court of Appeal affirmed summary judgment in favor of the Department of Corrections holding that the plaintiff failed to demonstrate that he had been subjected to an actionable adverse employment action where all he alleged was that he was retaliated against by his employer criticizing his work during an interrogation-like meeting, ordering a wellness check on him when he was out sick, suspecting him of bringing a cell phone into work, and assigning him to be the primary crisis person on the same day as a union meeting. The Court of Appeal held that the alleged behavior fell squarely into the nonactionable category of relatively minor conduct that cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment.

A slew of terrific discrimination and wrongful-termination opinions

In *Fort Bend County, Texas v. Davis* (2019) 139 S.Ct. 1843, the Supreme Court held that the filing of an EEOC charge is not a "jurisdictional" requirement to initiating a Title VII lawsuit. Although this decision technically allows one to bypass that pesky EEOC filing requirement and proceed directly to court, such a decision would be highly foolish, as Justice Ginsburg warns in her decision, because the defendant could simply file a motion to discuss on that basis: "And recognizing that the charge-filing requirement is nonjurisdictional gives plaintiffs scant incentive to skirt the instruction. Defendants, after all, have good reason promptly to raise an objection that may rid them of the lawsuit filed against them. A Title VII complainant would be foolhardy consciously to take the risk that the employer would forgo a potentially dispositive defense." (*Id.* at pp. 1851-52.)

Ortiz v. Dameron Hosp. Ass'n (2019) 37 Cal.App.5th 568, stands for two important propositions. First, that "[d]iscrimination on the basis of an employee's foreign accent is a sufficient basis for finding national origin discrimination." (*Id.* at p. 580.) Second, that an employee can proceed on a constructive discharge claim by showing that a "supervisory employee, intentionally created the working conditions at issue in th[e] case, and that a reasonable person faced with those conditions would have felt compelled to resign." (*Id.* at p. 579.)

In *Glynn v. Superior Court* (2019) 42 Cal.App.5th 47, the Court of Appeal held that an employer that claims that it "mistakenly" fired an employee on disability leave may nonetheless be liable for discrimination.

In *Jimenez v. U.S. Continental Mktg., Inc.* (2019) 41 Cal.App.5th 189, the Court of Appeal held that an employer may have FEHA liability if it exercised direction/control over a temporary worker – "where a FEHA claimant presents substantial evidence of an employment relationship that is rebutted only by direction and control evidence outside the bounds of the contractual context (such as in a temporary-staffing situation where hiring, payment, benefits and time-tracking are handled by a temporary-staffing agency), the claimant has demonstrated an employment relationship for FEHA purposes." (*Id.* at p. 201.)

Of course, there were some exceptions to the pro-employee decisions. In *Williams v. Sacramento River Cats Baseball Club, LLC* (2019) 40 Cal. App.5th 280, for example, the Court of Appeal held that only an employee (as distinguished from an applicant) may bring a common-law claim for discrimination against an employer. In other words, the plaintiff, an African American was not allowed to sue a potential employer on a claim for failure to hire due to his race in violation of public policy; rather, he was restricted to bringing such a claim under FEHA.

Victories for employees in wage-and-hour cases

Many employers seek to take advantage of their employees by, among other things, making them work without pay, refusing to pay them legally required overtime, or otherwise simply not complying with the wage and hour laws that are designed to protect employees. The courts issued a number of significant victories for employees in these cases.

In *Rizo v. Yovino* (9th Cir. 2020) 950 F.3d 1217, an *en banc* panel of the Ninth Circuit addressed the question of whether an applicant's prior rate of pay is a "factor other than sex" as defined in the Fair Labor Standards Act, 29 U.S.C. section 206(d)(1)(iv), that allows an employer to pay her less than male employees who perform the same work. The Ninth Circuit held that because "[t]he express purpose of the [FLSA] was to eradicate the practice of paying women less simply because they are women" "[a]llowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate" and, accordingly, "an employee's prior pay cannot serve as an affirmative defense to a prima facie showing of an EPA violation."

In *Ridgeway v. Walmart Inc.* (9th Cir. 2020) 946 F.3d 1066, the Ninth Circuit affirmed a $54.6 million verdict in favor of a class of Wal-Mart truckers who alleged that they were illegally not paid for layovers, rest breaks and inspections. The district court determined and the Ninth Circuit affirmed that the time drivers spent on layovers is compensable if Wal-Mart exercised control over the drivers during those breaks – "Wal-Mart's layover policy imposed constraints on employee

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movement such that employees could not travel freely and avail themselves of the full privileges of a break." (*Id.* at p. 1080.)

In order to pass along the costs of doing business to its employees, some employers force their employees to perform work, without compensation, before they clock in or after they clock out. These employers justify their failure to compensate their employees for performing this work by citing the federal "de minimis doctrine," which precludes the recovery of otherwise compensable amounts of time that the employer deems to be small, irregular or administratively difficult to record.

In *Rodriguez v. Nike Retail Servs.* (9th Cir. 2019) 928 F.3d 810, Nike required its retail employees to undergo "off the clock" exit inspections every time they leave the store. One of Nike's employees, Isaac Rodriguez, filed a class action on behalf of a class of similarly situated employees who went through these exit inspections – which usually lasted between one and two minutes or less per employee. The district court dismissed the case based upon the federal de minimis doctrine. On appeal, the Ninth Circuit reversed and reinstated the lawsuit due to the subsequently issued California Supreme Court opinion in *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829. In *Troester*, the California Supreme Court rejected the application of the federal de minimis doctrine to wage and hour claims brought under California law.

In *Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, the courts struck a blow for employees who are placed "on call," i.e., required to both leave their day open in case they get called into work and check with the employer several hours before their shift is scheduled to begin to see if they are told to come into work (in which case they are paid for the hours they work) or are told that they will not be needed at work that day (in which case they receive no compensation). The Court of Appeal held that, in such situations, employers are required to pay the employees who are not called into work "reporting time" pay as required by California's IWC Wage Orders.

In *Furry v. East Bay Pub'g, LLC* (2019) 30 Cal.App.5th 1072, the Court of Appeal addressed a common situation – an employer that fails to keep track of its employees' overtime and then argues, when sued for that uncompensated time, that the employee should not be able to recover anything for the overtime work performed because the employee's testimony about the time worked is "uncertain, speculative, vague and unclear." In *Furry*, the trial court bought just such an argument and found in favor of the employer because "even a rough approximation of said hours would be pure guess work and unreasonable speculation on the court's part." (*Id.* at p. 1078.) The Court of Appeal reversed the judgment as to the overtime claims, finding that because the employer failed to keep proper records, "the imprecise nature of Furry's testimony was not a bar to relief." (*Ibid.*)

For many years, some employers made it difficult for employees to sue them for wage-and-hour violation by failing to provide employees with their legal names and then, when sued, arguing that the employees' lawsuits should be dismissed because the employees had failed to sue the correct entity. In response to this situation, California enacted Labor Code section 226(a), which required employers to, among other things, list the "name of the legal entity that is the employer" on employee wage statements.

Notwithstanding this clear and easy-to-follow directive, some employers fail to comply. So, for example, in *Noori v. Countrywide Payroll & HR Solutions, Inc.* (2019) 43 Cal.App.5th 957, the defendant employer was sued for using an acronym for its unregistered fictitious business name – "CSSG" – on its employee wage statements. The trial court sustained Countrywide's demurrer, but the Court of Appeal reversed, in part, holding "CSSG is not Countrywide's registered name, nor is it a minor truncation. CSSG is a construct… which may or may not have meaning to Countrywide employees." (But see, *Savea v. YRC Inc.* (2019) 34 Cal.App.5th 173 [employer did not violate Labor Code section 226(a) by using its actual, recorded fictitious business name; employer had valid fictitious business name statement and renewal recorded in relevant counties].)

Pro-employee decisions involving procedural issues

In *Scott v. City of San Diego* (2019) 38 Cal.App.5th 228, the Court of Appeal held that, in a FEHA case, a prevailing-party employer could not recover its costs despite having made a successful CCP section 998 offer. Rather, the court explained that, because the FEHA contains its own discretionary costs provision, a prevailing defendant in a FEHA case must establish that the plaintiff's action was frivolous, unreasonable, or without foundation.

In *Mancini & Assocs. v. Schwetz* (2019) 39 Cal.App.5th 656, the Court of Appeal succinctly described the case as follows: "An attorney successfully prosecutes an action resulting in a substantial jury verdict in favor of his client. The retainer agreement between the attorney and his client provides that the attorney receive a percentage of the recovery and costs should his client prevail. Thereafter, without the attorney's knowledge or consent, the client and the defendant prepare a document releasing the defendant from the pending judgment, including attorney fees and costs. Does this release preclude the attorney from pursuing his costs and fees from the defendant? Of course not." (*Id.* at p. 657.)

In *Wu v. O'Gara Coach Co.* (2019) 38 Cal.App.5th 1069, the Court of Appeal reversed the trial court's decision to disqualify the plaintiff employee's attorney. The trial court found that the plaintiff's attorney, who had previously served as the former president and chief operating officer of the defendant employer, had significant responsibility in the formulation and implementation of the company's anti-discrimination and

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anti-harassment policies and that it was more likely than not that in those roles he consulted with outside counsel for the employer. In addition, the trial court ruled that it appeared highly probable that the plaintiff's attorney would be an important percipient witness at trial, not only on the issue of the promulgation and enforcement of the policies at issue in the lawsuit, but also as to whether plaintiff employee's complaints were made known to the plaintiff's attorney and what actions, if any, plaintiff's attorney took in response to those complaints.

The Court of Appeal reversed, finding that the employer failed to present evidence that the plaintiff's attorney possessed confidential attorney-client privileged information material to the dispute, that the plaintiff employee gave informed written consent to his attorney being called as a witness and that the attorney's firm (not the attorney himself) would represent the plaintiff employee at trial.

In *Doe v. Super. Ct. of San Diego County* (2019) 36 Cal.App.5th 199, the Court of Appeal held that an employee's lawyer was improperly disqualified after contacting a "me-too" co-employee witness: "We therefore hold that where a plaintiff-employee claiming harassment and/or a hostile work environment seeks to rely on evidence of similar misconduct provided by another alleged employee-victim, ex parte communication with that second employee does not concern an act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability." (*Id.* at p. 209.)

In *Mesa RHF Partners, L.P. v. City of Los Angeles*, (2019) 33 Cal.App.5th 913, the Court of Appeal explained that in order to ensure that a trial court is able to retain jurisdiction under CCP 664.6, the parties must either: (1) file a stipulation and proposed order signed by counsel that attaches a copy of the settlement agreement signed by the parties with an express request for retention of jurisdiction, or (2) file a stipulation and proposed order signed by the parties noting the settlement and expressly requesting that the court retain jurisdiction to enforce the settlement.

In *Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, the California Supreme Court held that the lawyers who approved a settlement agreement as to "form and content" may be bound by the agreement's confidentiality provisions.

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