THE TOP CASES OF 2020

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INTRODUCTION

2020 has been a year like no other. Despite the pandemic, and civil trials grinding to a halt, the appellate courts have continued to hand down significant new decisions. It has been a mixed bag for both employers and employees.

UNITED STATES SUPREME COURT

The Supreme Court offered one major victory to employees and one to employers, while also effectively providing a split-decision in a third. In *Bostock v. Clayton Cnty.*,[1] a historic 6-3 decision authored by Justice Gorsuch and released during Pride Month, the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity. The court declared: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[2] In essence, it is impossible to discriminate against a person for being LGBT+ without discriminating against that individual based on sex. Left unresolved for another day: (1) issues surrounding sex-segregated bathrooms, locker rooms, dress codes, and so on, and (2) circumstances in which Title VII's requirements may clash with some employers' religious convictions under the Religious Freedom Restoration Act of 1993 (RFRA).

Our Lady of Guadalupe Sch. v. Morrissey-Berru,[3] consolidated with *Kristen Biel v. St. James Sch.*, explored the ministerial exception, a court-created doctrine that recognizes a First Amendment bar to employment discrimination claims by certain employees of religious entities. Kristen Biel was a Catholic elementary school teacher who sued for violations of the Americans with Disabilities Act when her contract was not renewed after she informed the school of her breast cancer and need for time off. Agnes Morrissey-Berru was a Catholic elementary school teacher who sued her school for violations of the Age Discrimination in Employment Act of 1967 (ADEA), alleging that she was demoted and her contract was not renewed so that she could be replaced by a younger teacher. In both cases, the district court granted summary judgment, and the Ninth Circuit reversed. In this 7-2 opinion, the Supreme Court held that the ministerial exemption applied in both cases, despite the fact that both teachers primarily taught secular subjects, did not have ministerial titles, and had no significant formal religious training. "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[4] This decision gives religious institutions broad discretion to determine whom they deem to hold ministerial roles, and leaves many more employees of religious institutions without recourse for discrimination.

In *Babb v. Wilkie*,[5] an 8-to-1 decision written by Justice Samuel A. Alito, Jr., the Supreme Court eased the burden for federal employees to prove age discrimination. The Court rejected a "but for" test and, instead, held that the federal government could be liable for age discrimination if it considered an employee's age when implementing an adverse

employment action even if such consideration was merely a "motivating factor" in the decision. However, the Court also held that if the plaintiff is unable to prove that age was the but-for cause of the adverse employment decision, some forms of relief, including back pay, compensatory damages, and reinstatement are not available.

WAGE AND HOUR DECISIONS

Once again, this was a bumper year for new wage and hour opinions, with many victories for employees.

Kim v. Reins Int'l Cal., Inc.[6] addressed the question of whether an employee who settles individual wage and hour claims can remain an "aggrieved employee" with standing to seek penalties for the state under the Private Attorneys General Act of 2004 (PAGA). The California Supreme Court held that the employee could still pursue PAGA penalties even after settling their individual claims. The court reasoned that, under PAGA, the plaintiff is acting on behalf of the state, and is working to "'remediate present violations and deter future ones,' not to redress employees' injuries."[7]

This stands in contrast to class actions, in which a "representative plaintiff [who] voluntarily settles her claim [] no longer has an interest in the class action and may lose the ability to represent the class."[8] Indeed, that was the conclusion of the Ninth Circuit in *Brady v. AutoZone Stores*.[9] It held that a class representative who settled his individual claims could not continue to represent the class, even where his settlement agreement provided that it was "not intended to settle or resolve [his] Class Claims," because he did not explicitly retain a financial stake in the outcome of the class claims.[10] "Absent such a stake, a class representative's voluntary settlement of individual claims renders class claims moot."[11]

Barriga v. 99 Cents Only Stores LLC[12] addressed the trial court's duty to scrutinize employers' use of declarations by putative class members and other employees in class certification opposition efforts. The plaintiff in the case alleged that employees were locked into the store at closing time, were not paid for the time they waited to be let out, and were denied full meal breaks when waiting to be let out. The defendant submitted 174 declarations from current and former nonexempt employees to negate these contentions. Some of the declarants, when deposed, testified that they had no idea what the lawsuit was about or why they were called to testify; most were summoned during working hours into an office by human resources and presented with a declaration for signature. The plaintiff moved to strike all 174 declarations. The trial court denied the motion to strike, concluding that it lacked statutory authority to do so. In the alternative, the trial court reasoned that there was no coercion of putative class members and it lacked the authority to review for coercion of nonputative class members. It denied the class certification motion. On appeal, the court held that "the trial court had the duty and authority to exercise control over precertification communications between parties and putative class members," that it must "carefully scrutinize the declarations . . . for coercion and abuse," and that it "misunderstood the scope of its discretion to strike or discount the evidentiary weight to be given to those declarations if it found evidence of coercion and abuse."[13] The court therefore reversed the orders denying the plaintiff's motion to strike the declarations and the class certification motion.

Several court decisions addressed whether certain types of time were compensable as "hours worked." In *Frlekin v. Apple Inc.*,[14] the California Supreme Court answered in the affirmative a question certified to it by the Ninth Circuit: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of Wage Order 7?" The California Supreme Court determined that time spent during bag or security checks was time subject to the employer's control because: (1) the employer made employees find and flag down a security guard to conduct the search and confined employees to the premises during the search; and (2) although the bag search was not "required" because employees could choose not to bring a bag, the search was required as a practical matter because employees routinely brought personal belongings to work, including (of course) their phones. The Ninth Circuit then reversed the district court's grant of summary judgment and remanded with instructions to: (1) grant the plaintiffs' motion for summary judgment as to the compensability of time spent waiting for and undergoing exit searches; and (2) determine the remedy to be afforded to individual class members.[15]

In *Herrera v. Zumiez, Inc.*,[16] the Ninth Circuit addressed the issue of reporting time pay for

"call-in shifts." The putative class action involved workers who were required to call in 30 to 60 minutes before their shift, and to make themselves available to work if so requested. The employer did not pay employees for their time calling in or for shifts where they were not needed. The Ninth Circuit held that, based upon the California court of appeal's recent ruling in *Ward v. Tilly's, Inc.*,[17] an employee need not physically report to work to be eligible for reporting-time pay. Further, the employees could seek compensation for time spent calling in, and could seek indemnification for the phone expenses incurred in calling in.[18]

Oliver v. Konica Minolta Bus. Solutions U.S.A., Inc.[19] held that employees who are required to transport employer-provided tools and parts in their personal vehicles are sufficiently subject to the employer's control during their commute to and from work, if such requirement prevents the employees from using their commute time for personal pursuits. Under such circumstances, commute time would constitute "hours worked" for which wages must be paid and for which mileage reimbursement would be required.

McPherson v. EF Intercultural Found., Inc.[20] addressed "unlimited vacation" policies and found that such policies could, under some circumstances, lead to accrued vacation time. The vacation policy at issue was described as providing "unlimited vacation," but in practice, the plaintiffs were allowed only a fixed amount of time with an implied limit of two to four weeks. Under these circumstances, employees could accrue vacation time to be paid out upon their departures. The determination is fact-specific: "[w]e by no means hold that all unlimited paid time off policies give rise to an obligation to pay 'unused' vacation when an employee leaves."[21]

DISCRIMINATION

Anthony v. TRAX Int'l Corp.[22] held that after-acquired evidence could be used to defeat a claim under the Americans with Disabilities Act (ADA). The plaintiff in the case worked in a technical writer position that required a college degree under the company's government contract; discovery revealed that she misrepresented having one in her employment application. Generally speaking, after-acquired evidence can serve to limit *damages* in a case, but does not affect liability.[23] The Ninth Circuit held, however, that because an ADA claim requires that the plaintiff establish that she is a "qualified individual," after-acquired evidence that negates that element can be used to defeat the claim.

Wood v. Superior Court[24] held that a plaintiff who filed a gender identity discrimination claim under the Unruh Civil Rights Act with the California Department of Fair Employment and Housing (DFEH) had no attorney-client relationship with the DFEH's attorneys, and could therefore be compelled to turn over an email she sent to the DFEH during its investigations of her claims. Likening the DFEH's role to that of a prosecutor, the court of appeal reasoned that the DFEH does not represent the complainant during its investigations or litigation; instead, the agency represents the Department.

Arnold v. Dignity Health[25] involved an employee who, after being terminated from her position as a medical assistant, sued for violations of the FEHA, alleging that she was discriminated against, harassed, and retaliated against based upon her age and her association with Black coworkers. The trial court granted summary judgment to her employer, and the court of appeal affirmed, holding that alleged comments about her age from other employees who were not materially involved in her termination did not raise a triable issue of fact; nor did an employee expressing surprise that she was "that old" around the time of her birthday show discriminatory animus. As for her associational discrimination claim, the court found no evidence that the supervisor to whom she complained about alleged mistreatment of a Black coworker was involved in her termination. Finally, the fact that the employer allegedly failed to follow its own disciplinary process did not create a triable issue of fact regarding her claims.

Rizo v. Yovino[26] was Judge Stephen Reinhardt's swan song, an *en banc* opinion he authored before his death that was issued 11 days after he died. It held that an employee's salary history was not a "factor other than sex" that could serve as a defense to an Equal Pay Act claim. The United States Supreme Court vacated the decision in 2019, holding that it was error to count a deceased judge in order to reach a majority.[27] On remand, the *en banc* panel (with a new judge added) once again held that prior pay history was not a job-related "factor other than sex" that could serve as a defense to an Equal Pay Act claim.[28]

TRADE SECRETS

In *Hooked Media Group, Inc. v. Apple Inc.*,[29] a startup company that Apple expressed interest in acquiring sued after Apple passed on the deal, but three of Hooked's most important employees (two engineers and

the Chief Technical Officer) left to work for Apple. Hooked sued for fraud, misappropriation of trade secrets, interference with contract, and related claims. The trial court granted summary judgment to Apple, and the court of appeal affirmed, holding that the fraud claim failed because the alleged misrepresentations by Apple all involved future events, not past or existing facts. "Broken promises regarding future conduct may be actionable as promissory fraud, but only if the promisor did not actually intend to perform at the time the promise was made."[30] As for the trade secrets claim, the court held that evidence that the former employees may have had protected information in their possession is not sufficient to establish that Apple improperly acquired or used it. Further, just because there was evidence suggesting that the former engineers "drew on knowledge and skills they gained from Hooked to develop a product for [Apple]" does not mean there was a misappropriation of trade secrets, citing California's rejection of the "inevitable disclosure" doctrine. Neither did Apple's production of Hooked's trade secret information in response to discovery requests show that Apple acquired trade secrets by improper means. Finally, the court held that "California's emphasis on employee mobility and freedom to compete counsels against a finding that the CTO's self-serving efforts to land a position with Apple were a breach of fiduciary duty."

Techno Lite, Inc. v. Emcod, LLC[31] confirmed that a promise not to compete with an employer while employed by that employer is not void under Business & Professions Code § 16600. "Section 16600 is not an invitation to employees to bite the hand that feeds them."[32] *Brown v. TGS Mgmt. Co., LLC*[33] is an important decision confirming that prohibitions on the use of "confidential information" can be unlawful as "de facto noncompete provisions." It is also the rare case where an arbitration award is vacated. As a condition of his employment with TGS, Brown signed an agreement that, among other things, included a non-compete provision, a strict definition of confidential information that could prevent him from working in the field, and an arbitration agreement. After he separated from the company, he sued TGS, seeking among other things declaratory and injunctive relief, including confirmation that he be able to work in the field and to compete with his prior employer without risking a claim for breach of contract, and the withholding of bonuses he alleged were earned but not paid after his separation. In arbitration, he later asserted wrongful termination and whistleblower-related causes of action. TGS in turn sued him for breach of contract and declaratory relief, seeking to claw back his bonus paid based on his violating his confidentiality obligations when he filed a copy of his draft separation agreement with the court. The arbitrator ruled against Brown and for TGS, ordering Brown to return his $652,243 bonus, and to pay TGS over $2,769,000 in fees, costs, and interest. Brown appealed after the trial court confirmed the arbitration award and entered judgment, arguing that the arbitrator exceeded his powers in issuing an award that violated California public policy and statutes. The court of appeal agreed. It held that the arbitrator should have declared the anticompetitive provisions of Brown's employment agreement void under Business & Professions Code § 16600. Given the extremely broad definition of confidential information in the employment agreement, the limitations on their use "operate as a de facto noncompete provision; they plainly bar Brown in perpetuity from doing any work in the securities field. . . ."[34] The court further held that the determination that Brown forfeited his bonus was also in error because it was based on the same provisions that violated § 16600. Thus, the court reversed the judgement and remanded for further proceedings.

ARBITRATION PROCEDURE

Davis v. Kozak[35] held that limitations on depositions and other discovery can serve as a basis to find arbitration agreements substantively unconscionable upon a showing by the plaintiff that "he has a factually complex case involving numerous percipient witnesses, executives, and investigators, and that the arbitration agreement's default limitations on discovery are almost certainly inadequate to permit his fair pursuit of these claims."

In *Aixtron, Inc. v. Veeco Instruments Inc.*,[36] an employer pursuing an arbitration proceeding against a former employee for breach of contract, breach of the duty of loyalty, and data theft sought to compel prehearing discovery from the employee's new employer, Aixtron, Inc. (namely, access to Aixtron's computers for forensic examination). After the arbitrator ordered compliance, Aixtron filed a special proceeding in superior court seeking review of the arbitrator's order. The trial court denied the petition and Aixtron appealed. The court

of appeal held that, under the California Arbitration Act, parties to an arbitration agreement could not obtain prehearing discovery from nonparties when their arbitration agreement did not explicitly provide for it and where the arbitration association (JAMS) rules did not authorize prehearing discovery. Given that *Armendariz v. Foundation Health Psychcare Servs., Inc.* requires that arbitration agreements provide for adequate discovery,[37] the authors suspect that *Aixtron's* holding will serve as a basis to challenge arbitration agreements in circumstances where third-party witnesses or discovery are essential to the outcome of a case (*e.g.*, in cases where there are "me too" witnesses no longer at the company).

TRIALS

In *King v. U.S. Bank Nat'l Ass'n*,[38] a jury awarded the plaintiff nearly $24.3 million in his suit against his former employer—$6 million on a defamation claim, about $2.5 million on a wrongful termination claim, and $200,000 on an implied covenant claim, with an additional $15.6 million in punitive damages stemming from the first two claims. King had been terminated following an investigation into complaints of sex discrimination and harassment made against him by a subordinate employee about whom he had performance concerns. The jury found that bank employees made false statements about King and that he was terminated in part to avoid paying him his bonus. The trial court conditionally granted the bank's new trial motion subject to King's accepting a remittitur, which would have reduced the judgment to $5.4 million; King accepted the remittitur. The bank then appealed, and King cross-appealed. The court of appeal reversed the trial court's orders, and after conducting its own review, found the claims supported by substantial evidence, including evidence of Human Resources' failure to properly investigate and its reliance on sources known to be unreliable or biased against King. Further, the court found substantial evidence that the bank wanted to terminate King to deprive him of his annual bonus. The court concluded that King was entitled to the compensatory damages awarded as well as a one-to-one ratio of punitive to compensatory damages on the defamation and wrongful termination claims, leading to a total judgment of about $17.2 million.

In *Pinter-Brown v. The Regents of the Univ. of Cal.*,[39] a jury awarded a UCLA Professor of Medicine over $13 million in her gender discrimination lawsuit against her employer. The court of appeal determined that "the trial court committed a series of grave errors that significantly prejudiced The Regents' right to a fair trial by an impartial judge."[40] "First, the court delivered a presentation to the jury highlighting major figures in the civil rights movement, and told jurors their duty was to stand in the shoes of Dr. Martin Luther King and bend the arc of the moral universe toward justice. Second, the court allowed the jury to hear about and view a long list of discrimination complaints from across the entire University of California system that were not properly connected to Dr. Pinter-Brown's circumstances or her theory of the case. Third, the court allowed the jury to learn of the contents and conclusions of the Moreno Report, which documented racial discrimination occurring throughout the entire UCLA campus. Finally, the court allowed Dr. Pinter-Brown to resurrect a retaliation claim after the close of evidence despite having summarily adjudicated that very claim prior to trial."[41] These errors were deemed "cumulative and highly prejudicial" such that they "created the impression that the court was partial to Dr. Pinter-Brown's claims," necessitating reversal.[42]

In *Schmidt v. Superior Court*,[43] two court employees sued for sexual harassment and other FEHA violations based on alleged inappropriate screenings by a court security guard. Following a bench trial, in which over 32 witnesses testified and video footage was presented, the trial court found that the plaintiffs had failed to prove their claims by a preponderance of the evidence. The court of appeal affirmed, holding that substantial evidence existed to support the verdict, and rejecting contentions that the judge was biased.

ANTI-SLAPP

In *Patel v. Chavez*,[44] a former employer and related entities sued an employee who was awarded $235,000 in unpaid wages, penalties, and interest against them in a hearing before the Labor Commissioner. The plaintiff employers claimed that the defendant employee gave false testimony during the hearing, and sued for a violation of 42 U.S.C. § 1983; they also sued two Labor Commissioner officials. The trial court granted the employee's anti-SLAPP motion and dismissed the complaint on the ground that it arose from testimony that was absolutely privileged under the statutory litigation privilege (Cal. Civ. Code § 47(b)).

The trial court also dismissed the claims against the two Labor Commissioner officials. The court of appeal affirmed, holding that the anti-SLAPP procedure can be applied to a federal claim filed in state court.

ATTORNEYS' FEES

Caldera v. Department of Corr. & Rehab.[45] held that the trial court should have allowed the successful FEHA plaintiff to recover prevailing-party attorneys' fees based upon the rates charged by his Los Angeles-based attorneys (who charged $650-$750 per hour) rather than the rate that is standard for San Bernardino-based attorneys ($450-$550), where the plaintiff had been unable to find a local attorney to prosecute his case. The trial court further abused its discretion by failing to apply a multiplier to the lodestar figure.

In *Cruz v. Fusion Buffet, Inc.*,[46] the plaintiff employee prevailed on seven of her ten wage-and-hour claims against her former employer, but did not prevail on her alter ego claims against the employer's officers/owners. The trial court awarded the plaintiff attorneys' fees and costs in the amount of $47,132.50 (less than half the amount requested), denied the defendants' motion to strike or tax her costs, denied the motion for fees and costs by the individual officers/owners, and granted the plaintiff's motion to strike the individual defendants' costs. The court of appeal affirmed. It held that even if costs could be denied to a plaintiff whose damages could have been recovered in a limited civil case, the trial court did not abuse its discretion in declining to deny fees under the statute. It further held that the claims for which attorneys' fees were not recoverable were inextricably intertwined with other wage claims where fees were recoverable, such that no apportionment was necessary. Finally, substantial evidence supported the fee award to plaintiff, and the decision not to award fees to the individual defendants, as the alter ego claims were not brought in bad faith.

ENDNOTES

1. 590 U.S. ___, 140 S. Ct. 1731 (2020).
2. *Id.* at 1737.
3. 590 U.S. ___, 140 S. Ct. 2049 (2020).
4. *Id.* at 2069.
5. 590 U.S. ___, 140 S. Ct. 1168 (2020).
6. 9 Cal. 5th 73 (2020).
7. *Id.* at 86 (quoting *Williams v. Superior Court*, 3 Cal. 5th 531, 546 (2017)).
8. *Id.* (quoting *Watkins v. Wachovia Corp.*, 172 Cal. App. 4th 1576, 1592 (2009)).
9. 960 F.3d 1172 (9th Cir. 2020).
10. *Id.* at 1173, 1175.
11. *Id.* at 1175.
12. 51 Cal. App. 5th 299 (2020).
13. *Id.* at 308, 323.
14. 8 Cal. 5th 1038 (2020).
15. *Frlekin v. Apple, Inc.*, 979 F.3d 639, 644 (9th Cir. 2020).
16. 953 F.3d 1063 (9th Cir. 2020).
17. 31 Cal. App. 5th 1167 (2019).
18. *Herrera*, 953 F.3d at 1076, 1078.
19. 51 Cal. App. 5th 1 (2020).
20. 47 Cal. App. 5th 243, 260.
21. *Id.* at 249.
22. 955 F.3d 1123 (9th Cir. 2020).
23. *See, e.g., McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360-61, 115 S. Ct. 879 (1995) (holding that after-acquired evidence in an ADEA case does not bar relief, but can limit damages awarded).
24. 46 Cal. App. 5th 562 (2020), *as modified* (Apr. 8, 2020), *review filed* (May 21, 2020).
25. 53 Cal. App. 5th 412 (2020).
26. 887 F.3d 453 (9th Cir. 2018), *cert. granted, judgment vacated*, 139 S. Ct. 706 (2019).
27. 139 S. Ct. 706 (2019).
28. 950 F.3d 1217 (9th Cir. 2020), *cert. denied*, No. 19-1176, 2020 WL 3578691 (U.S. July 2, 2020).
29. 55 Cal. App. 5th 323 (2020).
30. *Id.* at 412.
31. 44 Cal. App. 5th 462 (2020).
32. *Id.* at 474.
33. 57 Cal. App. 5th 303, *1 (2020), *as modified on denial of reh'g* (Nov. 12, 2020).
34. *Id.* at *10.
35. 53 Cal. App. 5th 897, 912-13 (2020).
36. 52 Cal. App. 5th 360 (2020).
37. 24 Cal. 4th 83, 104 (2000).
38. 53 Cal. App. 5th 675 (2020), *as modified on denial of reh'g* (Aug. 24, 2020), *review denied* (Nov. 10, 2020).
39. 48 Cal. App. 5th 55 (2020).
40. *Id.* at 59.
41. *Id.*
42. *Id.*
43. 44 Cal. App. 5th 570, 586 (2020), *as modified on denial of reh'g* (Feb. 14, 2020), *review denied* (Apr. 15, 2020).
44. 48 Cal. App. 5th 484 (2020), *reh'g denied* (May 15, 2020), *review denied* (Aug. 12, 2020).
45. 48 Cal. App. 5th 601 (2020).
46. 57 Cal. App. 5th 221 (2020).