

EMPLOYMENT LAW UPDATE

Relationship-Driven Results

February 2018

LEGISLATIVE

California

Bills That Would Impact California Employers and Employees Are Pending in the Legislature, Including:

SB 224 (Jackson): This bill would amend the Unruh Civil Rights Act to include investors, elected officials, lobbyists, directors, and producers among other professionals who may be liable to a plaintiff for sexual harassment if the elements are proven. The bill passed the Senate and is currently in the state Assembly.

AB 281 (Salas): AB 281 would increase the amount of time businesses have to address alleged Labor Code violations before defending a lawsuit filed under the Private Attorneys General Act (“PAGA”). Present law provides employers 33 days to cure PAGA violations. AB 281 would provide 65 calendar days.

JUDICIAL

California

Court of Appeal Finds That an Employee Who Settled His Individual Claims is Not an “Aggrieved Employee” Under PAGA

A California Court of Appeal held that a former employee who settled his individual claims against his employer lacked standing to pursue civil penalties pursuant to the Private Attorneys General Act of 2004 (“PAGA”) in *Kim v. Reins International California, Inc.* Plaintiff Justin Kim (“Kim”) worked as a “training manager” for one of the restaurants operated by Reins International California, Inc. (“Reins”). Kim was classified as an exempt employee.

Kim sued Reins in a putative class action with a PAGA cause of action on behalf of training managers on the ground that they were misclassified as exempt employees. Based on the arbitration agreement that Kim had signed at the outset of his employment, Reins moved to compel arbitration of Kim’s individual claims, dismiss the class claims, and stay the PAGA cause of action until arbitration was complete. The trial court granted the motion to compel arbitration, reserved the issue of class arbitrability for the arbitrator, and stayed litigation on the PAGA claim.

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While arbitration was pending, Kim settled his individual claims against Reins. The trial court lifted the stay on the PAGA cause of action and set a date for trial. Reins filed a motion for summary adjudication of Kim’s PAGA cause of action on the ground that Kim was not an “aggrieved employee” under the PAGA. The trial court granted summary adjudication and dismissed Kim’s PAGA claim.

The appellate court agreed with the trial court, reasoning that PAGA imposes a standing requirement and an individual must have suffered harm to bring an action. The clear language of the statute permits an “aggrieved employee” to bring an action on behalf of himself and others. “Aggrieved employee” is defined as “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.” After an examination of the legislative history regarding the creation of this definition, the appellate court found that the PAGA was not intended to allow an action to be prosecuted by any person who did not have a grievance against his employer for Labor Code violations. Following the voluntary dismissal of Kim’s individual claims with prejudice, he had no viable claims against Reins and no standing to pursue his PAGA cause of action. Accordingly, the appellate court held that where an employee has settled and dismissed individual Labor Code causes of action against the employer defendant, the employee is no longer an “aggrieved employee” as that term is defined in the PAGA, and therefore lacks standing to maintain an action under the PAGA.

This case is instructive for employers for several reasons. Resolution of an employee’s individual claims also resolves his or her PAGA claim due to a lack of standing. However, while the employee who settled his disputes lacks standing to bring a PAGA claim, any other current or former co-worker retains his or her right to pursue a PAGA claim on behalf of himself or herself and other current and former employees. This case also highlights the potential benefits of mandatory arbitration agreements. Employers are advised to have their arbitration agreements reviewed by counsel to help ensure their enforceability.

California Court of Appeal Upholds Jury Verdict in Favor of Employer Accused of Religious Discrimination and Wage & Hour Violations

In *Arave v. Merrill Lynch, et al.*, a California Court of Appeal affirmed a jury verdict in favor of an employer charged with religious discrimination, harassment, and failure to pay earned but unused vacation. Although the appeal focused largely on procedural matters at trial and the potential recovery of costs and fees by the defense, the case provides a useful model for the handling of complaints and the importance of addressing employee concerns in a thoughtful and circumspect manner.

Brent Arave (“Arave”) served as a managing director in Southern California for Merrill Lynch and its parent company, Bank of America (“BOA”). Arave oversaw a staff of approximately 140 employees. Arave was open about his religious affiliation with the Church of Latter Day Saints, and many employees came to believe he favored Mormon employees and applicants. In August and September 2010, BOA conducted an employee satisfaction survey in Arave’s office. Many of the responses specifically identified Arave’s perceived bias in favor of Mormons as a problem. BOA’s management and Human Resources staff

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were concerned by the results, and believed that remedial action was necessary. During January 2011, Arave met with his supervisor, Regional Manager Joseph Holsinger, to discuss BOA's concerns. Holsinger advised Arave that as a managing director, he should initiate a dialogue with the staff to address their concerns and to take responsibility for improving the working environment and workplace communications. Arave was not ordered to apologize for his faith or to accept blame for any perceived discriminatory conduct. Despite this request, Arave refused to make any public statements about the survey and argued that the survey responses and BOA's handling of the situation constituted religious discrimination against him.

Arave's relationship with Holsinger and BOA rapidly deteriorated. By February 2011, Arave had retained an attorney and had assumed an adversarial posture toward BOA. In a phone call the following month, Arave reiterated his refusal to accept responsibility for the fact that the employees under his supervision believed he demonstrated bias in favor of Mormons. Holsinger responded that BOA had not asked Arave to admit to discriminatory conduct, but merely wanted him to acknowledge the employees' complaints and to engage in a dialogue to allay their concerns. Arave's counsel sent a letter alleging a pattern of religious discrimination and harassment against BOA and Holsinger, and demanding a substantial financial settlement. Arave resigned approximately two weeks later, citing his unwillingness to work with Holsinger.

Arave sued Merrill Lynch, BOA, and Holsinger, alleging religious discrimination, harassment, and failure to pay earned but unused vacation time. At trial, the jury found in favor of the defendants on all counts. The heart of the jury's decision was that BOA's response to reports of religious bias on the part of Arave was not inappropriate, and BOA's directives to Arave to acknowledge the concerns of the staff were reasonable. The jury rejected Arave's claim that the working conditions were so intolerable that he was compelled to resign, and concluded that his being denied a promotion he requested was not an adverse employment action. Based on the defense verdict, the defendants were awarded over \$100,000 in costs and fees. Arave appealed.

The Court of Appeal mainly upheld the jury's verdict, although it reversed with regard to the amount BOA could recover for fees and costs. The jury's conclusion that the conduct Arave experienced did not constitute discrimination and harassment was sufficiently supported by the evidence. Moreover, because BOA accurately tracked Arave's vacation time and demonstrated that no accrued time remained after his resignation, he could not establish a violation.

This lengthy decision highlights the need for employers to handle employee concerns in a thoughtful, deliberate, and proactive manner. BOA proactively solicited feedback from employees as to their satisfaction and concerns. When the responses indicated problems that needed to be remedied, BOA addressed the issue directly and tried to develop an improvement strategy. When the involved party became hostile and raised his own concerns, BOA treated him fairly and undertook a separate investigation to determine whether his own claims of discrimination were valid. At each step from the initial survey through Arave's resignation, BOA acted in a careful and fair manner—and documented its actions. As a result, when Arave brought his lawsuit, BOA could clearly demonstrate that it had acted

reasonably and in accordance with the law. Employers seeking guidance as to handling potentially problematic workplace issues are well-served reviewing the details of this case as a model for effective risk management.

Court of Appeal Rules *Harris v. City of Santa Monica* Does Not Automatically Entitle a FEHA Plaintiff to Attorneys’ Fees, Even When the Jury Finds the Discharge was Motivated by Discriminatory Animus

A California Court of Appeal recently confirmed that a plaintiff who ultimately loses on all of his claims under the Fair Employment and Housing Act (“FEHA”) is not automatically entitled to recover attorneys’ fees just because the jury also determined that the adverse employment action was motivated by discriminatory animus. In *Bustos v. Global P.E.T., Inc.*, Plaintiff William Bustos (“Bustos”) sued his former employer Global P.E.T., Inc. (“Global”) for disability discrimination. According to Bustos, he was fired because of Global’s discriminatory animus toward disabled employees. Global contended that Bustos was laid off as part of a reduction in force and because he failed one or more drug tests.

At trial, the jury returned defense verdicts on all of Bustos’ claims. On the disability discrimination/wrongful termination special jury instruction, the jury selected “Yes” in response to the question: “Was [Bustos’s] physical condition or perceived physical condition a substantial motivating reason for [Global’s] decision to discharge [Bustos]?” However, the jury ultimately determined that Global’s conduct was not “a substantial motivating factor in causing harm to [Bustos].” In other words, the jury determined that Global discriminated against Bustos, but that the discriminatory conduct was not the substantial cause of Bustos’ damages.

After trial, Bustos requested an award of attorneys’ fees as the “prevailing party” in the litigation. Normally, the “prevailing party” in a FEHA action may be awarded reasonable attorneys’ fees. To determine whether a party is the “prevailing party” for such purposes, the trial court must evaluate whether the party prevailed on a practical level—specifically, the trial court must analyze the extent to which each party has realized its litigation objectives.

Bustos asserted that, because the jury found that his physical condition/perceived physical condition was a substantial motivating reason for his discharge, he was the “prevailing party.” The trial court disagreed, reasoning that Global had won on all claims and, even though the jury found that discriminatory animus motivated Global’s decision, the jury also found that the company’s conduct was not the substantial cause of Bustos’ harm. Thus, because Bustos “lost virtually everything...in terms of contested issues” and “got nothing from the verdict,” the trial court determined that Bustos should not be awarded attorneys’ fees as the “prevailing party.”

On appeal, Bustos argued that the trial court erred in denying his request for attorneys’ fees by ignoring the California Supreme Court’s seminal opinion in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203. In *Harris*, the Court held that “a plaintiff subject to an adverse employment decision in which discrimination was a substantial motivating factor may be eligible for reasonable attorneys’ fees and costs expended for the purpose of redressing, preventing, or deterring that

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discrimination.” In this case, the appellate court explained that the trial court properly applied *Harris* in declining to award Bustos attorneys’ fees. Per the Court of Appeal, *Harris* does not *require* an award of attorneys’ fees any time the plaintiff proves discrimination was a substantial motivating reason for termination—rather, such a plaintiff “*may be eligible*” to receive attorneys’ fees. The *Harris* opinion therefore implies that it is also possible that a plaintiff *may not be eligible* to win fees, for instance, when he or she is not the “prevailing party.” The Court of Appeal explained that “[i]t is not beyond reason to conclude that a plaintiff who obtains no relief at trial—either monetary or equitable—has not ‘realized [his] litigation objectives,’ regardless of whether one or more preliminary questions on a special verdict form were answered in his favor.” Therefore, the trial court did not err in denying Bustos’ request for attorneys’ fees.

Court of Appeal Refuses to Certify a Class of Outside Sales Employees

In *Duran v. U.S. Bank Association*, a California Court of Appeal refused to certify a class of outside sales employees who claimed they had been misclassified, finding that the benefits of certification would not outweigh the burdens.

Samuel Duran and Matt Fitzsimmons (collectively, “Plaintiffs”) were employed as business banking officers (“BBOs”) by U.S. Bank National Association (“Defendant”). As BBOs, Plaintiffs were tasked with performing sales-related activities on behalf of Defendant. While Defendant claimed that Plaintiffs (and similarly situated employees) spent the vast majority of their time engaging in sales outside the office, Plaintiffs disagreed.

California’s outside sales exemption applies to employees that spend more than 50 percent of their workday engaged in sales activities outside of their employer’s place of business. Convinced that Defendant’s BBOs did not meet this quantitative threshold, Plaintiffs filed a class action complaint on behalf of themselves and all similarly situated employees, alleging misclassification under California’s overtime exemption laws.

After engaging in extensive discovery, Plaintiffs filed a motion for class certification, arguing that Plaintiffs and similarly situated employees formed a cognizable group sufficient to warrant the case proceeding in its representative capacity. The trial court denied Plaintiffs’ motion, refusing to certify the class. Plaintiffs appealed.¹

Under California law, for a class to be certified, a moving party must demonstrate: 1) an ascertainable and sufficiently numerous class; (2) a well-defined community of interest; and (3) substantial benefits from certification that render proceeding as a class superior to the alternatives. To ascertain the existence of a “community of interest,” a court searches for predominant common questions of law or fact; class representatives with claims or defenses typical of the class; and class representatives who adequately represent the class.

¹ In fact, this case was previously appealed to the California Supreme Court and ultimately remanded to the trial court for further proceedings before being appealed into the present action. The California Court of Appeal’s most recent decision is the subject of this summary.

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The Court of Appeal applied this multi-faceted standard to affirm the ruling of the trial court. Specifically, it held that BBOs lacked a sufficient community of interest, as individualized issues abounded. The Court looked specifically at survey data gathered subsequent to a previous appeal in the same matter and held that, given the nature of the work performed by BBOs, the parties would be required to engage in significant individualized inquiry. As Plaintiffs were unable to demonstrate that the case was manageable as a representative action, it affirmed the trial court's decision denying Plaintiffs' motion for class certification.

The Court of Appeal's ruling in *Duran* is one that will serve as a valuable tool for California employers seeking to avoid class certification. The Court's willingness to look critically at the potential class and thoughtfully determine that class treatment would not be manageable is a notable win for employers. As a word of warning, however, the process to arrive at opposing a motion for class certification is an arduous (and expensive) one, so employers should still remain steadfast in their goal to avoid policies that could even potentially lead to class litigation.

Court of Appeal Reverses Trial Court's Order Denying Class Certification

ABM Industries, Inc. ("ABM") is a national janitorial services company with thousands of employees in California alone. The plaintiffs ("Plaintiffs") are present and former ABM employees who sued on behalf of themselves and others similarly situated Californians. They filed coordinating class action complaints in September 2007, alleging, among other issues, that ABM failed to properly record and compensate employees for time worked and failed to properly record and compensate employees for improper meal breaks.

In June 2010, Plaintiffs moved for class certification. In a verbal order, the trial court dismissed Plaintiffs' expert evidence and denied class certification. On September 1, 2011, the trial court issued a written order formally denying Plaintiffs' class certification motion. Plaintiffs appealed.

On appeal, the Court reviewed ABM's policies. In its December 2017 opinion, a California Court of Appeal noted ABM had a uniform payroll policy which compensated employees according to anticipated work schedules rather than for hours actually worked. Further, ABM's payroll system automatically deducted 30 minutes for meal periods. It did not track actual meal times or hours worked. ABM countered that its written policies allowed employees to alert ABM if work times were other than what was scheduled and if a conforming meal break was not provided.

Based on the uniform policies, an extensive discussion and finding that Plaintiffs' expert was wrongly excluded, and a finding that the trial court "fundamentally misapprehended the concept of ascertainability"—the concept that potential class members may be identified based on proposed class definitions—the appellate court reversed the trial court's decision and certified the classes proposed by Plaintiffs.

This case serves as an important reminder of a handful of class-action realities. First, it can be difficult to defeat class certification. California policy

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supports class action litigation and the courts will generally permit litigation to continue if possible. Second, if a company is going to defeat class certification—or win at trial—or have a reasonable settlement at mediation—good policies and implementation thereof are critical. Third, class action litigation can be lengthy and costly. In this case, after ten years of litigation, the parties now know only that the litigation can go forward as a class action. The plaintiffs must now attempt to prove the merits of their contentions on a class-wide basis.

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