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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *August 2019*

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November 14, 2019

13th Annual Employment Law Symposium

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LEGISLATIVE

California

California Extends Paid Family Leave Benefits

Governor Newsom has signed into law SB 83, which will extend the maximum duration of Paid Family Leave ("PFL") benefits from six to eight weeks beginning on July 1, 2020. Employees can obtain and use PFL benefits, which provide partial wage replacement, to care for a seriously ill child, parent, grandparent, spouse, grandchild, sibling or domestic partner; or to bond with a minor child within one year of the birth or placement of the child through foster care or adoption.

JUDICIAL

Federal

Ninth Circuit Asks California Supreme Court to Weigh in On Retroactivity of *Dynamex*

On July 22, 2019, the Ninth Circuit Court of Appeals withdrew its recent decision in *Vazquez v. Jan-Pro Franchising International, Inc.*, and ordered that it would ask the California Supreme Court to answer this question: does the worker classification test regarding independent contractors articulated in *Dynamex Operations West v. Superior Court* apply retroactively?

In *Dynamex*, the California Supreme Court implemented the ABC Test for independent contractor misclassification claims arising under California's Wage Orders. Under this three-factor test, a worker is properly considered an independent contractor under California's Wage Orders only if the following three factors are met: (A) the worker is free from control and direction from the hirer; (B) the worker performs work outside the usual course of the hirer's business; and (C) the worker is engaged in an independently established trade, occupation, or business.

In the withdrawn *Vazquez* opinion, the Ninth Circuit held that the ABC Test applied retroactively. This meant that federal courts could apply the ABC Test to misclassification claims reaching as far back as four years. This dramatically increased the liability exposure for those businesses who engage or had engaged hiring independent contractors.

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It is unclear, however, when the California Supreme Court will answer the question posed by the Ninth Circuit regarding the ABC Test's retroactive application. While the California Supreme Court considers the question, employers should proactively work to reduce liability by closely analyzing any independent contractor relationships under the ABC Test.

California

Court of Appeal Clarifies Employers' Reimbursement Obligations for Required Apparel

In *Townley v. BJ's Restaurants, Inc.*, a California Court of Appeal affirmed an order granting BJ's Restaurants' ("BJ's") motion for summary judgment in connection with BJ's alleged failure to reimburse employees for the cost of slip-resistant shoes.

Plaintiff Krista Townley ("Plaintiff") worked as a server for BJ's and purchased canvas shoes to comply with a company safety policy requiring employees wear black, slip-resistant, closed-toed shoes. BJ's did not provide employees compliant, cost-free shoes or reimburse employees for purchasing compliant shoes. However, the company did not demand that employees purchase a specific design, style, or brand of shoes, and did not prohibit employees from wearing said shoes outside of work.

Plaintiff initially filed suit against BJ's in April 2014 and later amended her complaint to include a representative Private Attorneys General Act ("PAGA") claim. She alleged that BJ's employees were entitled to reimbursement for the shoes under Labor Code section 2802 ("section 2802"), which requires employers to reimburse employees "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer."

BJ's filed a motion for summary judgment, arguing that California law does not require employers to provide or pay for non-uniform work clothing. The company relied on the Industrial Welfare Commission Wage Order No. 5-2001 for the proposition that protective apparel regulated by the Occupational Safety and Health Standards Board is not equivalent to uniform apparel of a specific design and color that a restaurant employer must provide. Plaintiff argued that section 2802 imposes a duty independent of Cal-OSHA and the Wage Order. The trial court agreed with BJ's that non-specialty, slip-resistant shoes were nearly ordinary clothing in nature, and that the specific OSHA regulation language that an "employer is not required to pay for non-specialty safety-toe protective footwear including steel-toe shoes or steel-toes boots…, provided that the employer permits such items to be worn off the job-site," superseded section 2802's more general reimbursement language.

The Court of Appeal upheld the trial court's decision, holding that Labor Code section 2802 does not require restaurant employers to reimburse the cost of its employees' slip-resistant footwear as a "necessary expenditure." The court declined to assess the applicability of OSHA or Cal-OSHA and instead interpreted

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Transportation

Wage Order No. 5 to only require restaurant employers pay for employee clothing if the clothing is a uniform or qualifies as particular protective apparel under Cal-OSHA or OSHA. Black, slip-resistant shoes did not qualify as uniform, as the California Division of Labor Standards Enforcement had previously opined that employers are permitted to specify basic wardrobe items which are of an unspecified design and are generally usable in the occupation (e.g. white shirts, dark pants, belts, and black shoes).

This case confirms that restaurant employers may lawfully require employees to purchase and wear certain attire without having to provide or reimburse employees for the entirety of their work wardrobe. However, employers need to be cautious not to require the wearing of particular designs or wardrobe items that are not common and typically usable in the workplace. Best practices include limiting non-reimbursable work clothes to white shirts, dark pants, belts, and black shoes, as expressly identified by the court.

Court of Appeal Affirms Denial of Class Certification in an Independent Contractor Misclassification Lawsuit

In *McCleery v. Allstate Ins. Co.*, a California Court of Appeal affirmed the denial of class certification in a wage and hour class action alleging misclassification of independent contractors.

Property inspectors Timothy McCleery, Yvonne Beckner, Terry Quimby and April Boyles Jackson ("Plaintiffs") filed a lawsuit on behalf of themselves and similarly situated persons, alleging defendants Allstate Insurance Company and Farmers Group, insurers for whom the plaintiffs provided property inspection services, and CIS Group LLC/North American Compass Insurance Services Group, Advanced Field Services, Inc., and Capital Personnel Services, Inc. ("Defendants"), service companies contracting to provide inspection services, hired Plaintiffs as independent contractors while treating them as employees.

On the first appeal in this matter, the trial court denied class certification, summarily rejected a statistical sampling plan, and concluded that individualized determinations were required for each class member. The Court of Appeal reversed, directing the trial court to consider whether proposed sampling and statistical methods could render some or all of the individualized issues manageable. After additional briefing and an extensive survey, the trial court agreed that the survey was carefully crafted to maximize accuracy but still failed to address key individual issues.

However, the trial court found that Plaintiffs' statistical sampling alone did not render their claims manageable. It found that the expert's survey results failed to specify for which insurers inspections were performed, or to explain whether the inspectors' failure to take meal or rest breaks was due to preference or to the exigencies of the job. Also, the survey's anonymity foreclosed Defendants from cross-examining witnesses to verify responses or test them for accuracy or bias. As such, the trial court again denied certification and Plaintiffs again appealed.

While several issues were of concern to the appellate court, the inability of Defendants to examine any survey respondents (who were kept anonymous from

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the survey expert) was viewed as an impediment to Defendants' ability to cross-examine the actual class members who participated in the survey. The plan to rely, almost exclusively according to the Court of Appeal, on an anonymous, double-blind survey to prove liability was insufficient, no matter how scientifically the survey was crafted. Thus, the appellate court concluded that the trial court acted within its discretion when denying certification.

Court of Appeal Clarifies Standards for FEHA-Based Claims

In *Ortiz v. Dameron Hospital Association*, a California appellate court clarified the legal standard for constructive discharge, discrimination, and harassment claims under the Fair Employment and Housing Act ("FEHA").

Plaintiff Nancy Ortiz ("Ortiz") alleged that she was discriminated against and subjected to harassment by her former supervisor Doreen Alvarez ("Alvarez") based on her national origin (Filipino) and age. Specifically, Ortiz claimed that she was forced to resign because Alvarez wanted to get rid of older Filipino employees, who, according to Alvarez, "could not speak English," had "been there too long," and "[made] too much money." Ortiz further alleged that her former employer Dameron Hospital Association ("Dameron")[1] failed to prevent the discrimination and harassment in violation of the FEHA.

Defendants moved for summary judgment. The trial court granted Defendants' motion for summary judgement, finding that Ortiz could not make prima facie showing of discrimination or harassment because she could not show that she suffered an adverse employment action or that any of the complained of conduct was based on her national origin or age.

The appellate court reversed summary judgment, in part, because it found that Ortiz was not required to show that Dameron knew of Alvarez's conduct prior to Ortiz's resignation in order to establish that she was constructively discharged. The court held that Ortiz had presented evidence that Alvarez, a supervisory employee, intentionally created the working conditions at issue, and that a reasonable person faced with those conditions would have felt compelled to resign. Thus, a plaintiff can establish constructive discharge even if his or her employer was unaware of the supervisor's alleged conduct.

The appellate court further held that Ortiz was not required to show that Dameron acted with a discriminatory motive. It was sufficient that Ortiz had presented evidence that Alvarez acted with a discriminatory motive, and that there was a nexus between Ortiz's protected status and Alvarez's actions. Therefore, where the adverse action is a constructive discharge that is alleged to have resulted from the acts of a supervisory employee, it is the discriminatory intent of the supervisory employee that is at issue.

Finally, the appellate court held that the trial court erred in granting summary judgment on Ortiz's harassment cause of action. The court found that the allegations of Alvarez's conduct, including transferring Ortiz to a unit where she had little or no experience without providing her with any training and falsely

[1] Alvarez and Dameron are collectively referred to herein as "Defendants."

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accusing her of sleeping on the job (a terminable offense), were sufficient for a reasonable trier of fact to conclude that severe or pervasive harassment had occurred.

The ruling in *Ortiz* makes it easier for plaintiffs to establish constructive discharge based on the alleged conduct of a supervisory employee. In such situations, plaintiffs are not required to establish that their employers were aware of the supervisor's alleged conduct. Further, plaintiffs need not show that their employers acted with discriminatory motive; it is the discriminatory motive of the supervisory employee that is at issue.

Court of Appeal Finds Triable Issues of Fact Existed as to Claims of Discrimination and Harassment Based on Supervisor's Derogatory Comments to Employees

In *Galvan v. Dameron Hospital Association et al.*, a California Court of Appeal reversed a trial court's decision in part, finding that it erred in granting the defendant's motion for summary judgement with respect to the plaintiff's discrimination, harassment, and negligent supervision causes of action, but was correct in entering summary judgment with respect to the plaintiff's claim for punitive damages.

Plaintiff Shirley Galvan ("Employee") sued her former employer Dameron Hospital Association ("Employer") and former supervisor Doreen Alvarez ("Supervisor," collectively with Employer, "Defendants"), alleging that she was discriminated against and subjected to harassment based on her national origin (Filipino) and age (54), and that Employer failed to prevent such harassment in violation of the California Fair Employment and Housing Act ("FEHA"). Employee alleged that she was forced to take a medical leave of absence and ultimately was forced to resign due to intolerable working conditions created by Supervisor. Employee further alleged that Supervisor had a goal of discharging older Filipino employees like Employee because they "could not speak English," had "been there too long," and "ma[d]e too much money."

Defendants moved for summary judgment, or in the alternative summary adjudication. The trial court granted Defendants' motion for summary judgment, finding that Galvan could not make prima facie showing of discrimination because she could not establish that she suffered an adverse employment action or that Employer knew about Supervisor's actions and acted with a discriminatory motive (failed to remedy Supervisor's actions). The trial court also found that Employee could not make a prima facie case for harassment because she could not show that any of the complained of conduct was based on her national origin or age. Based on these findings, the trial court found Employee's remaining causes of action and claims could also not survive summary judgment.

Employee appealed, arguing there were triable issues of material fact as to each of her causes of action. The Court of Appeal agreed in part. First, the court determined that Employee presented evidence showing that a reasonable trier of fact could find that Employee was constructively discharged. Supervisor routinely accused employees with thick accents that they were unable to speak English and should go back to school and announced that she planned to discharge foreign-born

unit coordinators. Further, in the weeks prior to Employee's discharge, Supervisor told her that she was "one of the nurses that [Supervisor was] going to terminate," and three other nurses working under Supervisor had been discharged or left due to stress related to Supervisor. The court found the foregoing to be sufficient to establish triable issues of material fact regarding the working conditions at issue, namely that a reasonable person faced with these conditions could have felt compelled to leave, Supervisor's statements could have been made with a discriminatory motive, and there could have been a nexus between Supervisor's conduct and Employee's protected status.

The appellate court also found that Employee presented sufficient evidence that a reasonable trier of fact could find that Employer engaged in harassment. It applied the same evidence presented in connection with Employee's discrimination cause of action and found that Supervisor's conduct could have been motivated by Employee's national origin and age, and that Employee was subjected to severe and pervasive harassing treatment.

Based on the foregoing, the appellate court found that the trial court erred in granting summary judgment with respect to Employee's causes of action for discrimination, harassment, failure to take necessary steps to prevent discrimination and harassment, wrongful termination in violation of public policy, and her claims for declaratory relief (discrimination) and injunctive relief. It further found that summary judgment was properly entered on Employee' retaliation and negligent supervision causes of action and claims for declaratory relief (retaliation) and punitive damages.

This ruling serves as a reminder that even though a supervisor may not qualify as a "managing agent" for the purposes of an employer being subject to punitive damages, a supervisor's conduct may still be used to establish employer liability for discrimination and harassment.

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