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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *November 2019*

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A Lesson in Stylistics for Employers' Arbitration Agreements and Candor for Attorneys

In *Donald Davis et al. v. TWC Dealer Group, Inc. et al.*, a California Court of Appeal affirmed an order denying employer Defendant TWC Dealer Group, Inc.'s ("TWC") petition to compel arbitration against three former employees ("Plaintiffs") and awarded costs to Plaintiffs.

TWC operated a Toyota dealership and had Plaintiffs sign three separate agreements in connection with their employment, each having Plaintiffs agree to arbitration (collectively the "Agreements"). After TWC hired a new general manager, Plaintiffs allegedly became subject to ageist and racist comments. They attempted to address the issue with TWC, but ultimately resigned and filed suit in February 2018 against TWC, the general manager, and owner (collectively, "Defendants"). The complaint consisted of wage and hour claims, negligent hiring, supervision and/or retention, and causes of action derivative of race and age discrimination, retaliation, and wrongful termination. In response, Defendants filed a petition to compel arbitration and stay trial proceedings on March 26, 2018 (the "Petition"). Defendants attached the Agreements with arbitration clauses to the Petition.

The trial court found the Agreements troubling both procedurally and substantively. The Agreements on their face represented Plaintiffs were agreeing to some form of binding arbitration, but included small text, long paragraphs (67 lines long), legalise language, vague and irrelevant references to legal codes, and lengthy sentences (12-15 lines long) that made it strenuous to interpret. The substantive language surrounding the portions about binding arbitration in each agreement were arguably contradictory and referenced different codes, which made it difficult to discern what rights and restrictions of the Agreements would be controlling.

Defendants' Petition was heard by the trial court on May 10, 2018. It issued a denial in both its tentative ruling and order. The language of the Agreements was found to be unconscionable given the inconsistency of the terms across the Agreements and that some portions were substantively dubious. Such terms made the Agreements procedurally unconscionable because they conveyed take-it-or-leave-it pressure that granted TWC superior bargaining power and

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substantively unconscionable because the terms unfairly benefited TWC. TWC proceeded to file a notice of appeal on August 8, 2018.

The Court of Appeal expressly affirmed the trial court's decision. The use of small font, dense paragraphs, multiple sentences extending 12 lines long, and legalistic language made the Agreements procedurally unconscionable, holding such aspects thwarted rather than promoted understanding. TWC's supporting declaration further stated that no employees were excused from agreeing to dispute resolution provisions, which require binding, individual arbitration of disputes arising out of employment. This demonstrated to the court that agreeing to an arbitration agreement seemingly stood in the way of employment, a-take-it-or-leave-it tactic. The Court of Appeal further agreed that the Agreements were substantively unconscionable, finding three different and contradicting Agreements confusing; TWC's unilateral right to amend the Agreements, without notice, and without even signing the Agreements to confer an unfair benefit; and that various broad language could be read to preclude PAGA actions in violation of public policy.

Dynamex Applies Retroactively and to Any Labor Code Claim Seeking to Enforce Wage Order Protections

In *Dynamex Operations West, Inc. v. Superior Court*, the California Supreme Court adopted the "ABC Test" for determining whether a worker is properly classified as an independent contractor versus an employee. According to the ABC Test, when examining a worker's classification, a court must consider: (A) whether the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) whether the worker performs work that is outside the usual course of the hiring entity's business; and (C) whether the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. Because the Supreme Court in *Dynamex* only considered claims arising under the applicable Wage Order, employers were left to wonder whether the ABC Test applies to wage claims that do not arise under the Wage Orders.[1] The Court also left open the question of whether the ABC Test applies retroactively to litigation that was pending before the *Dynamex* decision was issued in April 2018 – since the ABC Test marked a departure from existing California wage and hour standards, employers have argued that the ABC Test should only be applied prospectively.

In *Gonzales v. San Gabriel Transit, Inc.*, a California Court of Appeal provided definitive answers to both questions. Francisco Gonzales ("Gonzales") sued San Gabriel Transit alleging that he and a class of other drivers were misclassified as independent contractors. While an appeal in the *Gonzales* case was pending, the California Supreme Court issued its ruling in *Dynamex*. The Court of Appeal was thus forced to determine whether the new standard applied to existing litigation. Generally, where a court opinion articulates a new standard or

[1] The Wage Orders are quasi-legislative promulgations from the Industrial Welfare Commission, a state agency empowered to regulate wages, hours, and working conditions in California. The Wage Orders typically outline an employer's obligations regarding minimum wage, overtime, meal and rest breaks, recordkeeping, paystubs, and other wage and hour matters.

rule of law, principles of fairness and public policy dictate that the opinion be applied to new claims, not to those already being litigated. In *Gonzales*, the Court of Appeal concluded that *Dynamex* applied retroactively because it did not apply a new legal standard, but rather "clarified and streamlined" the existing Wage Order analysis.

Next, the Court of Appeal considered the extent to which *Dynamex* applies to Labor Code claims that are not related to the Wage Orders. The court concluded that any Labor Code claims that are (1) rooted in one or more Wage Orders or (2) predicated on conduct alleged to have violated a Wage Order are subject to *Dynamex* and its ABC Test. According to the court, any Labor Code claims that fail to meet this standard remain subject to the multifactor test articulated in *S.G. Borello and Sons, Inc. v. Department of Industrial Relations* ("*Borello*"). In the context of the Gonzales case, that meant that the drivers' claims for minimum wages, overtime, meal and rest break penalties, paystub penalties, and expense reimbursement were subject to the ABC Test, as each such claim could be tied to specific language in the Wage Orders or was specifically alleged to have violated the Wage Orders.

In light of the *Gonzales* decision, employers are cautioned to carefully review their independent contractor classifications, as the scope of *Dynamex* continues to expand. Moreover, AB 5, which adds Labor Code section 2750.3 and expands the ABC Test beyond the Wage Orders takes effect on January 1, 2020. Finally, the California Supreme Court is currently deciding whether it will consider *Gonzales*.

California Court of Appeal Finds Direct Evidence of Discrimination Exists Based on the Discharge of an Employee Due to a Mistaken Belief as to His Disability Status

In *Glynn v. The Superior Court of Los Angeles*, the California Court of Appeal for the Second Appellate District (Division Four) revived the claims of a former employee of Allergan, Inc. and Allergan USA (collectively, "Allergan") including his allegations that he was mistreated after taking a leave of absence for a serious eye condition. In reaching its decision, the court ruled that employers can be held liable for disability discrimination if an otherwise legitimate policy is wrongly applied.

Plaintiff John Glynn ("Glynn") worked for Allergan as a pharmaceutical sales representative. In January 2016, he requested a medical leave of absence for an eye condition he developed, myopic macular degeneration. His doctor provided him a medical note that stated that he could not safely drive, which was a requirement for his position. While on medical leave, Glynn requested a reassignment and applied for other positions with Allergan that did not require driving but was denied. In July 2016, a temporary Allergan benefits department staffer informed Glynn that his employment had terminated because he had been approved for Long Term Disability ("LTD") benefits. This arose from the staffer's mistaken application of an Allergan policy authorizing the discharge of employees after they had been approved Long Term Disability ("LTD") benefits (the policy was seen as lawful on the premise that eligibility for such benefits required a showing that the employee could not work, even with an accommodation). Glynn

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immediately informed Allergan that he had not applied for LTD and protested his discharge, but he was not reinstated. Glynn thereafter sued Allergan for disability discrimination and wrongful termination, among other claims. During the course of the litigation, the trial court awarded summary adjudication to Allergan on six out of eight of Glynn's causes of action. Seeking to revive those six claims, Glynn filed a petition for a writ of mandate.

The Court of Appeal issued a peremptory writ of mandate that revived Glynn's causes of action for disability discrimination, retaliation, failure to prevent discrimination, and wrongful termination claims, but allowed the rulings on the other causes of action to remain undisturbed. In reaching its decision, the Court of Appeal determined that Glynn had provided direct evidence of disability discrimination – Allergan terminated him because the staffer mistakenly believed he was totally disabled and unable to work. In its ruling, the court observed that that "California law does not require an employee with an actual or perceived disability to prove that the employer's adverse employment action was motivated by animosity or ill will against the employee. Instead, California's statutory scheme protects employees from an employer's erroneous or mistaken beliefs about the employee's physical condition." The court pointed out that even though neither party contended on appeal that Glynn could be categorized as disabled and unable to perform any job at Allergan with or without accommodation, he had been categorized that way by Allergan in advance of his discharge. The court also explained that even assuming the benefits staffer's mistake was made in good faith, the absence of hostility does not preclude liability for a disability discrimination claim.

As to Glynn's retaliation claim, the court concluded that a series of emails he sent to Allergan sufficiently communicated that he believed the way he was being treated was discriminatory (i.e., ignored and not accommodated for his disability). Additionally, a disputed issue of fact existed as to whether Allergan had tried to find Glynn another position in the company in good faith, since Allergan did not offer to reinstate him for nine months – by which time he had already filed his lawsuit – even though it was immediately aware of the staffer's error. Those factors necessitated a vacating of the trial court's summary adjudication ruling.

The court's decision shows how important it is for employers to remain in compliance with their policies and to ensure proper adherence to the law before making termination decisions. Moreover, a thoughtful application of those policies is essential, and mechanical enforcement of procedures without closely examining the pertinent facts is to be avoided.

Recent Appellate Court Ruling Reiterates the Distinction Between Using Comparator Evidence in Dispositive Motions Versus at Trial

In *Gupta v. Trustees of the California State University*, the California Court of Appeal, First Appellate District, affirmed the longstanding rule that a plaintiff does not need to establish her superior credentials before being allowed to present comparator evidence at trial. This is a lower showing than what is required when a Plaintiff tries to show pretext in opposing a dispositive motion. A plaintiff who alleges violations of the Fair Employment and Housing Act ("FEHA") can prove

his or her cases by presenting either direct evidence, such as statements or admissions, or circumstantial evidence, such as comparative or statistical evidence. However, direct evidence is rare, and most discrimination claims must usually be proved circumstantially. Comparative evidence is "evidence that [the plaintiff] was treated differently from others who were similarly situated" but are outside the plaintiff's protected class. As such, evidence that an employer treated "similarly situated" employees outside the plaintiff's protected class "more favorably" is probative of the employer's discriminatory or retaliatory intent.

Plaintiff Rashmi Gupta ("Plaintiff") is an American woman of Indian national origin and ancestry. In 2006, San Francisco State University ("SFSU") hired her as a "tenure track assistant professor" in the School of Social Work, College of Health and Social Sciences ("the School"). SFSU conducted annual reviews to decide whether to retain the professor for the following year. Typically, an assistant professor is hired for a six-year term, and during the sixth year, SFSU determines whether to promote the professor to associate professor and award lifetime tenure. During her first three semesters at SFSU, Plaintiff received Student Evaluation of Teaching Effectiveness ("SETE") scores lower than the department mean. However, Plaintiff made some adjustments to her teaching style, and in her third-year review, she received positive reviews from all three faculty members who conducted teaching performance evaluations. Thereafter, her SETE scores began to improve, and each year, SFSU retained her as an assistant professor.

On November 9, 2009, Plaintiff and several other minority SFSU employees wrote a letter to SFSU Provost, Dr. Sue Rosser to request a meeting with her and the Dean of Faculty Affairs, Dr. Wanda Lee ("Lee"), in order to discuss faculty concerns relating to "abus[e] of power and authority, excessive micromanagement, bullying, and the creation of a hostile work environment" in the School. The meeting was held and attended by the complainants, Lee, and the Dean of the School, Dr. Don Taylor. The parties discussed problems they were having with the Director of the School, Dr. Rita Takatashi ("Takatashi") and their concerns about discrimination against people of color. SFSU instructed them to work out their differences with Takahashi and to meet with Taylor if their efforts were unsuccessful. On January 5, 2010, Gupta received a fourth-year review that was critical of her performance in all three areas used to evaluate tenure (teaching effectiveness, professional achievement and growth, and contributions to campus and community). Gupta was criticized for supposed defects in her syllabi that turned out to be meritless. Taylor also disregarded the fact that her SETE scores were higher than the department mean, and that she had published enough articles to meet the requirements of tenure.

Shortly thereafter, Plaintiff sent emails to a colleague complaining that her workplace was hostile towards women of color and her belief that Taylor and Takahashi were responsible for creating a hostile work environment. In a faculty meeting led by Taylor in March 2010, Taylor told Plaintiff, "I know about [the emails]" and "I'm going to get even with you." He also stated that there are "consequences" to "those sorts of conversations." During the 2010-2011 academic year, Plaintiff's fifth year at SFSU, she was eligible to request early tenure and received support from her department and campus wide tenure committees. However, Taylor recommended denying her early tenure request and said she had not demonstrated "sustained progress" in her performance. Plaintiff filed a federal

lawsuit alleging that SFSU denied her early tenure as a result of discrimination and retaliation. The matter went to arbitration and SFSU was ordered to review her for tenure the following year, and she was reviewed for tenure during the 2011-2012 academic year. Despite positive reviews from students, the departmental tenure committee, and enthusiastic recommendation for her tenure by Dr. Levy, the Interim Director, Taylor told Dr. Levy that he was "not going to approve [plaintiff] for tenure" because he "didn't like [her] attitude" and "he really didn't want people in [the School] who were going to make the school look bad." In recommending against her tenure, he compared her SETE scores to the overall "college" mean rather than comparing it to the department mean, as he was required to do.

Importantly, the year after SFSU denied her tenure, it granted tenure to Dr. J.H. ("J.H."), *a professor who had not previously filed a complaint against SFSU*. Plaintiff's SETE scores were higher than J.H.'s, and she had more than double the minimum requirements for publication, while J.H. had not met the minimum required. Nevertheless, SFSU denied her tenure and terminated her employment on June 2, 2014. She filed the instant action on February 10, 2015 alleging that SFSU discriminated and retaliated against her in denying her tenure and terminating her employment. The matter went to trial and a jury found against her on her discrimination cause of action but found in her favor on the retaliation cause of action.

The court determined that for comparator evidence (in this case comparing Plaintiff to J.H.) to be probative, and therefore admissible at trial, the comparator only needs to be "similarly situated" to the plaintiff "in all relevant respects" and does not need to establish her superior credentials. However, in the context of a motion for summary judgment, evidence regarding academic qualifications, standing alone, is insufficient to prove pretext unless the plaintiff is "clearly superior" to her comparators. Therefore, this case highlights the notable distinction between the way comparator evidence is able to be used in summary judgment motions versus at trial.

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