

JUDICIAL

Federal

Ninth Circuit Court of Appeals Confirms Enforceability of Arbitration Agreement in *Franklin v. Community Regional Medical Center*

In *Franklin v. Community Regional Medical Center*, the Ninth Circuit Court of Appeals considered whether a staffing agency employee assigned to work for a third-party client could avoid enforcement of her employer's arbitration agreement by suing the third-party client. On appeal, the employee argued that, because the third-party client was not a party or signatory to the agreement, the agreement could not be enforced against her. The employee relied on the notion that a non-party to an arbitration agreement typically cannot be forced to arbitrate under its terms. However, applying the contractual tenet of equitable estoppel, the Court held that, in the interest of fairness and justice, the third party *could* invoke arbitration under the agreement to which it was not a party.

Plaintiff employee Franklin ("Franklin") signed two arbitration agreements with her staffing agency employer. The first was part of a contract covering the general terms of employment with the staffing agency, and required arbitration of all disputes arising out of, or related to, her employment. The second was part of a contract covering specific terms of her assignment to work for the third-party client. The latter "Assignment Contract" included terms that would be integral to Franklin's eventual wage and hour claims, such as her hourly rate, overtime rate, and shift length. It particularly required arbitration of "any controversy or claim arising under federal, state, and local statutory or common or contract law" between Franklin and the staffing agency involving "construction or application of any of the terms, provisions, or conditions" of the Assignment Contract. Franklin's assignment involved an arrangement in which the third-party client paid the staffing agency for her services, but the staffing agency remained responsible for setting and paying her wages. Employees used the client's timekeeping system, but the staffing agency was allowed to review the timekeeping records for discrepancies. Franklin's wage and hour claims against the client therefore relied on the terms of her contracts and relationship with the staffing agency.

The trial court initially granted the third-party client's motion to compel arbitration and dismissed Franklin's claims, holding that arbitration was appropriate because, although the third party client was a non-signatory, the claims

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against it were “intimately founded in and intertwined with” Franklin’s contracts with the staffing agency.

On appeal, the Ninth Circuit relied on the United States Supreme Court’s 2009 decision in *Arthur Andersen LLP v. Carlisle*. There, the Supreme Court held that a non-party to an arbitration agreement could invoke arbitration under the Federal Arbitration Act if permitted under the applicable state’s contract law. Here, applying California contract law, the Ninth Circuit held that Franklin was equitably estopped from attempting to avoid her agreement to arbitrate by simply suing a non-party for wage and hour claims that were “based on the same facts” and “inherently inseparable” from claims she would otherwise be forced to arbitrate under the agreement. Although Franklin’s claims arose out of alleged statutory violations under the Labor Code, the Court held that contract law still applies to determine whether the agreement could be enforced to compel arbitration of her claims. Here, because Franklin’s claims were “intimately founded in and intertwined with” her employment, which included agreements to arbitrate such claims, the non-signatory client could enforce the agreements and compel Franklin to arbitrate her claims.

California

Appellate Court in *Salazar v. See’s Candy Shops Incorporated et al.* Affirms Trial Court Ruling Denying Proposed Class of Workers Allegedly Denied a Second Meal Break

In *Salazar v. See’s Candy Shops Incorporated et al.*, the California Court of Appeal upheld a trial court ruling denying certification of a proposed class of See’s Candy Shops Incorporated (“See’s Candy”) employees allegedly denied a second meal break for shifts lasting longer than 10 hours. In doing so, it affirmed the trial court’s findings that: (1) individual issues would predominate as to whether See’s Candy “consistently applied a practice of failing to offer second meal breaks;” and (2) the plaintiff’s proposed trial plan failed to adequately address the individualized issues.

Plaintiff Debbie Salazar (“Salazar”) asserted claims for unpaid overtime and minimum wages, failure to provide rest and meal periods, failure to provide wage statements and to maintain payroll records, failure to timely pay wages on termination, and unfair and unlawful business practices. Salazar then sought certification of two classes: (1) a “single staffing class” (i.e., employees who worked alone in a store and were thus allegedly not able to take breaks); and (2) a “meal break class.” The trial court denied certification of both classes, and Salazar appealed denial only as to the “meal break class.” The Court of Appeal affirmed the denial of class certification as to the meal break class based on lack of commonality and lack of manageability.

The Court of Appeal determined that substantial evidence supported the trial court’s conclusion that individual issues would predominate at trial. As an initial matter, Salazar conceded that See’s Candy’s official meal break policy complied with California law. Salazar, however, argued there was adequate “common evidence of a practice [by See’s Candy] to deny employees a second meal period during shifts exceeding 10 hours.” Salazar relied heavily on See’s

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Candy's scheduling forms as evidence of this practice, as the preprinted forms contained columns for scheduling an employee's meal and rest breaks but did not contain a column for a second meal break. See's Candy, on the other hand, argued it did not rely exclusively on the form to ensure breaks were offered, but also provided employees training on policies, and instructed shop managers to implement policies appropriately. See's Candy submitted 55 declarations from both managers and shop employees, intended to demonstrate that most employees were aware of their entitlement to second meal periods on shifts lasting longer than 10 hours. Almost all declarants who worked longer than 10 hour shifts testified they took second meal breaks during such shifts at least some of the time.

The Court of Appeal noted that since many employees did take their second meal break, such breaks must have been offered, leading to the reasonable inference that forms were not the sole means by which entitlement to breaks was provided. In light of the evidence presented, the Court of Appeal determined that individual testimony would be necessary to determine whether See's Candy consistently applied a practice of denying second meal breaks, eliminating the commonality necessary to certify the "meal break class."

The Court of Appeal also held that the trial court did not abuse its discretion in deciding that Salazar's trial plan was inadequate to manage individual issues. The Court of Appeal stated that Salazar "did not provide any means to prove that [See's Candy] consistently *applied* a practice of denying second meal breaks without individualized evidence." Moreover, while Salazar recognized the obligation to litigate See's Candy's affirmative defenses, Salazar "provided no means other than individual evidence to do so." In holding that Salazar's trial plan "lacked any specific procedural mechanisms to manage the individual issues," the Court of Appeal affirmed the lower court's denial of class certification as to the "meal break class."

Salazar serves as yet another reminder to California employers to maintain legally compliant meal and rest break policies and ensure managers and other employees in leadership roles are abiding by and enforcing applicable policies. By not only maintaining legally compliant policies but also developing and implementing procedures to ensure those policies are followed, employers faced with potential wage and hour class actions will be better equipped to present evidence necessary to defeat class certification.

Appellate Court Affirms Earnings from Substitute Employment Must Be Deducted from Lost Earnings Awards

In *Martinez v. Rite Aid Corp.*, California's Second District Court of Appeal modified a jury's award of \$464,258 in past economic damages to Maria Martinez ("Martinez") on a wrongful termination claim, holding that Martinez's \$140,840 in post-termination earnings should have been deducted from her past economic damages award.

In 2008, Martinez filed a lawsuit against her former employer, Rite Aid Corporation ("Rite Aid"), and her former supervisor, Kien Chau ("Chau"). The case went to trial in 2010, and a jury returned a verdict awarding Martinez \$3.4 million in compensatory damages and \$4.8 million in punitive damages. The Court

of Appeal reversed the judgment and remanded the case for a new trial on compensatory damages attributed to Martinez’s wrongful termination and intentional infliction of emotional distress claims.

At the 2014 retrial, the jury awarded Martinez \$321,000 on her wrongful termination claim against Rite Aid, \$0 on her intentional infliction of emotional distress claim against Rite Aid, and \$20,000 on her intentional infliction of emotional distress claim against Chau. Following an appeal by Martinez, the Court of Appeal reversed the judgment and remanded the case for yet another retrial on effectively the same issues. Acknowledging the case was set for its third trial, the Court of Appeal “offer[ed]...guidance to the trial court,” suggesting that the special verdict form ask the jury to apportion noneconomic damages for intentional infliction of emotional distress between Chau and other Rite Aid employees.

At the 2018 retrial, the jury awarded Martinez \$2,012,258 on her wrongful termination claim against Rite Aid and \$4 million on her intentional infliction of emotional distress claims against Rite Aid and Chau. Rite Aid appealed on two grounds.

Rite Aid first argued that the trial court erroneously instructed the jury regarding the damages that could be awarded for intentional infliction of emotional distress. The court disagreed, holding that the trial court’s decision to reject the appellate court’s guidance, “while perplexing,” did not require reversal of judgment because it did not prejudice Rite Aid. The court also held that the trial court’s instruction to include damages for Chau’s conduct in any damages awarded against Rite Aid did not result in duplicative damages, because the jury’s separate, specific awards illustrate that the jury understood the different types and categories of damages available, and made its subsequent decisions on the subject accordingly.

Rite Aid also argued that the trial court should have reduced the past economic damages award for wrongful termination by the amount of Martinez’s post-termination earnings. The court agreed, reasoning that, because actual damage in a wrongful termination case is the amount of money the plaintiff was out of pocket as a result of the (wrongful) discharge, and employees have a duty to mitigate their damages when pursuing remedies against their former employer, actual earnings from substitute employment should (and must) offset lost earnings awards. The court, therefore, reduced Martinez’s lost earnings award by the amount of her substitute employment earnings after termination.

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