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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2022*

JUDICIAL

Federal

Ninth Circuit Clarifies Application of Whistleblower Protections Under California Law in *Killgore v. SpecPro Professional Services, LLC*

In *Killgore v. SpecPro Professional Services, LLC*, the Ninth Circuit Court of Appeals reversed a district court's grant of summary judgment against Plaintiff Aaron Killgore ("Killgore"), holding that the California Whistleblower Protection Act applied to Killgore's claims of retaliation and wrongful termination.

While consulting on an environmental project for the United States Army Reserve Command (the "Army Reserve"), Killgore was instructed by the Army Reserve to prepare an environmental assessment in a manner that he believed to be in violation of federal law. Shortly after he reported his beliefs to his supervisor at SpecPro Professional Services, LLC ("SpecPro"), his employment was terminated. Killgore filed a lawsuit in Santa Clara County Superior Court, alleging state law claims of unlawful retaliation in violation of the California Whistleblower Protection Act (Cal. Lab. Code § 1102.5 ("section 1102.5")), as well as wrongful termination in violation of public policy, and failure to pay wages due upon termination. The case was later removed to federal court, at which point SpecPro obtained summary adjudication of Killgore's retaliation claim. Killgore appealed.

The issue addressed on appeal was whether Killgore's disclosure to his supervisor was actionable under section 1102.5. In its evaluation the appellate court examined the trial court's determination that Killgore's supervisor, a private citizen in the employ of a private environmental compliance firm, lacked the power to address the Army Reserve's alleged noncompliance, such that disclosure to his supervisor was "irrelevant under [section] 1102.5(b)." The district court "interpreted section 1102.5(b) to mean that a protected disclosure must be made 'to a person with authority over the employee' *who also* has the authority to 'investigate, discover, or correct' the violation."

The appellate court held that, under California's statutory interpretation, "the clause 'who has the authority to investigate, discover, or correct the violation or noncompliance' modifies only the immediately preceding phrase - 'another employee.' Therefore, [Plaintiff's] disclosures to his supervisor as a 'person with authority over the employee' provided an independent ground for asserting a whistleblower retaliation claim under section 1102.5(b)." The court reasoned that

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the interpretation was supported by the California Civil Jury Instructions, case law, and section 1102.5's broad public policy goal of encouraging workplace whistleblowers to report unlawful acts without fear of retaliation. The appellate court further clarified that, under section 1102.5, a whistleblower's disclosures are protected "regardless of whether disclosing the information is part of the employee's job duties." Consequently, there was a genuine dispute of material fact as to whether SpecPro retaliated against Killgore for engaging in protected whistleblower activity.

The appellate court also confirmed that, under section 1102.5, the relevant inquiry is whether the plaintiff "*reasonably believed* that there was a violation of a statute, rule or regulation" at the time the conduct was reported. In doing so, the court rejected a reading of section 1102.5 that would allow an employer to discharge a potential whistleblower before completing the illegal activity. Considering all relevant evidence and applicable regulations, the appellate court held that there was, at a minimum, a question of fact as to whether Killgore reasonably believed a violation had occurred.

The *Killgore* decision should serve as a reminder of the broad reach of California's whistleblower protection statutes. Employers must be certain not to take adverse employment action against employees as a result of their engagement in protected activity, with an understanding that the scope of "protected activity" is quite broad.

Ninth Circuit Evaluates Scope of AB 5 Against First Amendment Considerations in *Mobilize the Message, LLC v. Bonta*

In *Mobilize the Message, LLC v. Bonta*, a group of litigants appealed a district court's denial of a preliminary injunction, seeking to restrain the California Attorney General from applying California's "ABC Test" (codified by, and often referred to as, Assembly Bill ("AB") 5), to classify doorknockers and signature gatherers as employees.

This matter was commenced by a collection of allied organizations: Mobilize the Message, LLC, a company that provides signature-gathering and door-knocking services to political campaigns across the country; Moving Oxnard Forward, Inc., a nonprofit organization that works to create and enact ballot measures in Oxnard, California; and the Starr Coalition for Moving Oxnard Forward, a local political committee (collectively, "Plaintiffs"). At the onset of litigation, Plaintiffs filed a request for preliminary injunction of AB 5 in the United States District Court for the Central District of California, on the grounds that the legislation violates the First Amendment because it discriminates against speech based on its content. Plaintiffs argued that, while direct salespersons, newspaper distributors, and newspaper carriers are exempted from AB 5 and the ABC Test, doorknockers and signature gatherers must still be classified as employees.

The trial court disagreed with Plaintiffs' position, finding that AB 5 did not impose content-based restrictions on speech. In doing so, it concluded that AB 5 was a "generally applicable law" regulating classifications of employment relationships by industry, not speech. As a result, it denied Plaintiffs' request for

preliminary injunction. Plaintiffs sought review by the Ninth Circuit Court of Appeals.

The appellate court commenced its analysis by accepting Plaintiffs' assertion that doorknockers and signature gatherers would likely be classified as employees under the ABC Test, and that such classification would impose costs that could in turn limit prospective clients from utilizing Plaintiffs' services. The panel went on to confirm, however, that AB 5's indirect impact on speech did not violate the First Amendment. In doing so, it agreed with the trial court, holding that codification of the ABC Test does not target certain types of speech, as the law applies uniformly across California's economy, unless an occupational exemption exists. If an exemption does exist, that exemption depends not on the communicative content conveyed by the workers, but rather on the particular occupation(s) at issue. As such, Plaintiffs "were not unfairly burdened by the application of the ABC test to their doorknockers and signature gatherers" and the trial court's denial of preliminary injunction was appropriate.

While the scope of this ruling is relatively narrow, it should serve as a reminder to California employers that courts continue to enforce the application of AB 5 and the ABC Test. Those employers that utilize the services of independent contractors should heed this warning and take it as yet another opportunity to confirm that contractors are appropriately classified.

California

Second District Court of Appeal Confirms Broad Standard for Equal Employment Act Claims in *Joyce Allen v. Staples, Inc. et al.*

In *Joyce Allen v. Staples, Inc. et al.,* the Second District Court of Appeal reversed in part a summary adjudication decision in favor of Staples, Inc. ("Staples"), which had previously held that plaintiff Joyce Allen's ("Allen") complaint for wrongful termination and violations of the Equal Pay Act ("EPA") and the Fair Employment and Housing Act ("FEHA") failed to raise an issue of triable fact. While the court's ruling addresses a number of ancillary issues, this analysis focuses predominantly on the grounds for that limited reversal, and its impact on EPA litigation.

Allen filed a claim asserting, generally, that Staples paid her a salary lower than that of equivalent male employees, and that her employment was improperly terminated. Staples moved for summary judgment, arguing (among other points ultimately affirmed by the appellate court) that female employees holding the area sales manager ("ASM") position were, in fact, paid *more* on average than their male counterparts, and that some male ASMs and field sales directors ("FSD") were paid *less* than Allen. Based predominantly on this purported evidence, the trial court granted summary judgment in Staples' favor.

Allen appealed to the Second District Court of Appeal, which reversed the trial court's ruling as it related to her EPA claim. In its analysis, the court found that the disparity between Allen's compensation and that of similarly situated employees was sufficient to make the requisite prima facie showing against Staples, as the requisite burden was simply that "a plaintiff must establish that,

based on gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions."

Despite Staples' proffered evidence of higher-than-average salaries for female ASMs, and Allen's higher salary than some ASMs and FSDs, the court noted that a female plaintiff need only offer evidence in support of a claim that she was paid differently than *one* male employee based on sex to make a requisite showing to survive summary adjudication. As Allen was paid $22,000 less than at least one ASM and $48,000 less than at least one FSD, her preliminary evidentiary burden was satisfied, and the burden therefore shifted to Staples to show that the disparity in pay was excused by one of the EPA's statutory exceptions (such as that the disparity was based on a factor other than sex).

While Staples did show that its general practice was to set salaries based on seniority, years of experience, and merit, it failed to establish the specific factors that determined the salary of other employees particularly cited by Allen. Absent the presentation of more specific evidence, Staples was unable to show that there was no triable issue of fact. The appellate court therefore concluded that the trial court erred in its grant of summary judgment.

Allen also asserted, among other arguments rejected by the appellate court, that her prima facie showing of pay disparity in support of her EPA claim was also sufficient to establish a triable issue of fact with regard to her gender discrimination claim. The appellate court held, however, that the mere indication of a prima facie violation of the EPA is not sufficient under FEHA to make a causal connection between alleged pay disparity and gender. Instead, the court held that Allen was still required to satisfy the elements of the *McDonell Douglas* burden shifting test and, considering the evidence in the appellate record, she had not made that showing.

In the wake of the *Allen* decision, California employers should take additional care to establish and support appropriate, justified, and non-sex-based reasons for implementing different salary rates for employees in the same or similar positions with the same or similar job duties. Employers that rely simply on "general" standards will be unable to pass defeat claims at the summary adjudication stage and will therefore be forced to bear the expense (and risk) of litigating cases through trial.

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Rio Schwarting, Christine Dixon, Jessica O'Malley, Rayne Brown, Nicole Allen, or Haley Murphy at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Rachel Albert, or Enoch Cheung at (310) 649-5772.