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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *June 2023*

JUDICIAL

Federal

Ninth Circuit Holds that Explicit Music in the Workplace Can Form Basis for Harassment Claim in *Sharp v. S&S Activewear, LLC*

One male and seven female former employees (collectively, "Plaintiffs") of S&S Activewear, LLC ("S&S") filed suit in federal court alleging, among other claims, sexual harassment in violation of Title VII. The suit alleged that S&S, by and through members of its management team, routinely played "sexually graphic, violently misogynistic" music in the company's warehouse during work hours.

Relevant facts were not in dispute, as S&S conceded that music was played in a manner and at volume that was audible to all in the warehouse. S&S filed a motion to dismiss for failure to state a claim, which was granted by the trial court, based on the court's analysis that the music was audible to all and was equally offensive to men and women. Plaintiffs appealed.

The Ninth Circuit Court of Appeals disagreed, remanding the matter for further consideration on two grounds. First, the appellate court held that harassment, whether verbal or visual, need not be targeted at a particular plaintiff (or, by extension, gender) to rise to a level sufficient to support a claim for harassment under Title VII. Second, the fact that the subject allegedly harassing conduct was equally offensive to multiple genders was insufficient to bar a claim.

While the *Sharp* ruling is technically only applicable to California employers insofar as it relates to federal law, it should still serve as a cautionary tale. Even where allegedly harassing conduct was not directed toward any particular group/individual, nor did its allegedly harassing nature focus on a single protected characteristic, its offensive nature was still sufficient to give rise to a potential claim. California employers should take heed of the ruling by ensuring that potentially harassing conduct is eliminated in the workplace, while noting that the avoidance of liability on technicalities of broad applicability will be unlikely.

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California

California Court of Appeal Affirms Motion for Summary Judgment as It Delves into Physical Disability Discrimination

In *Hodges v. Cedars-Sinai Medical Center,* Deanna Hodges ("Plaintiff") sued her long-time employer, Cedars-Sinai Medical Center ("Cedars") for (1) disability discrimination under the Fair Employment and Housing Act ("FEHA"); (2) failure to engage in the interactive process; (3) failure to make a reasonable accommodation; and (4) retaliation. Cedars filed a motion for summary judgment arguing that Plaintiff failed to prove that she had a disability as defined under the law. The trial court agreed and granted a motion for summary judgment. Plaintiff appealed, and the California Court of Appeal affirmed.

In 2017, Cedars implemented a new policy that aligned with the guidelines of the United States Department of Health and Human Services Centers for Disease Control and Prevention ("CDC") requiring all employees to receive the flu vaccine to prevent transmission of the flu (the "Flu Vaccine Policy"). Only employees with a valid religious or medical exemption would be exempted. Pursuant to the Flu Vaccine Policy, an employee qualified for a medical exemption if the employee had one of two medical contraindications recognized by the CDC (and confirmed by employee's physician): (1) history of life-threatening allergic reactions to the flu vaccine or (2) history of Guillain-Barre Syndrome within six weeks of previous doses of any flu vaccine.

Plaintiff applied for the medical exemption indicating that she qualified for another medical exemption – her prior cancer diagnosis. Plaintiff's request was denied, Plaintiff was placed on unpaid administrative leave. After unsuccessful conversations encouraging Plaintiff get vaccinated, Cedars terminated Plaintiff's employment. Plaintiff contended that, because Cedars discharged her immediately after she refused to be vaccinated, Cedars discriminated against her for her alleged disability.

The California Court of Appeal applied the *McDonnell Douglas* burden shifting framework to determine whether Plaintiff was discriminated against, but, as a threshold issue, it first had to determine whether Plaintiff had a physical disability. The appellate court held that Plaintiff did not provide enough evidence to prove that she had a physical disability. A physical disability is defined as a physiological condition that limits a major life activity. Plaintiff agreed that her history of cancer and neuropathy had no effect on her job in 2017. Nor did Plaintiff's evidence elaborate on the potential severe risks Plaintiff could have been exposed to as a result of getting her flu vaccine due to her cancer history. Therefore, as a threshold issue, Plaintiff could not establish the existence of a physical disability.

The California Court of Appeal also opined that, even if Plaintiff made a prima facie case for disability discrimination, Cedars had a legitimate, nondiscriminatory reason to discharge her. As Plaintiff concedes, Cedars terminated Plaintiff's employment because she did not receive the flu vaccine. As proven, Cedars did not terminate Plaintiff's employment because of her own subjective belief that she had a disability. Cedars never perceived her to have a

physical disability. Instead, Plaintiff was discharged for failing to get the vaccine after not having a valid medical exemption. This is a legitimate, nondiscriminatory reason. Because Plaintiff did not have a disability or Cedars did not perceive her to have one, the rest of Plaintiff's claims failed as a matter of law. The California Court of Appeal therefore affirmed the motion for summary judgment.

California Court of Appeal Declines to Enforce Arbitration Agreement on Carved-Out PAGA Claims in *Duran v. Employbridge Holding Company*

The California Court of Appeal for the Fifth Appellate District considered a trial court's denial of a motion to compel arbitration in *Duran v. Employbridge Holding Company,* affirming the trial court's ruling that an express carve-out of claims arising under the Private Attorneys General Act of 2004 ("PAGA") should be followed as written, and cannot be severed.

At the onset of his employment with Employbridge Holding Company ("Employbridge"), Griselda Duran ("Plaintiff") electronically signed an agreement to arbitrate disputes. The subject agreement specifically refers to wage and hour claims of the nature that she asserted after her employment ended. Based upon that language, in response to Plaintiff filing suit, Employbridge moved to compel arbitration.

The trial court denied Employbridge's request, noting that subject agreement specifically *excluded* PAGA claims from the scope of the agreement. In pertinent part, it stated: "[. . .] claims under PAGA [. . .] are not arbitrable under this Agreement." The final clause in the agreement also stated: "Should any term or provision, or portion of this Agreement, be declared void or unenforceable or deemed in contravention of law, it shall be severed and/or modified by the court, and the remainder of this Agreement shall be fully enforceable."

In affirming the ruling of the trial court, the Court of Appeal considered the plain language of the agreement, which clearly and unequivocally exempts PAGA claims from arbitration, while also considering the subject agreement's severability clause. The court noted that the express, stated purpose of the latter clause is to allow for the excision of portions *"*declared void or unenforceable or deemed in contravention of applicable law.*"* Under the current state of the law, the PAGA carve-out language is perfectly legal. As such, severing would not serve the purpose intended by the agreement.

While the current state of California law relating to arbitration agreements remains in a state of flux, particularly in anticipation of ruling in *Adolph v. Uber Technologies, Inc.*, PAGA carve-outs from arbitration agreements are presently neither illegal nor advised. Employers hoping to avoid PAGA litigation would therefore be well served to review applicable arbitration agreements and ensure compliance and consistency with the current state of the law. While that law may change in the near term, thereby necessitating yet another revision, employers should seek to obtain the greatest possible benefit of their intended bargain and can only do so through regular review of and revision to arbitration agreements.

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Arbitration Agreement Deemed Unconscionable and Unenforceable in *Alberto v. Cambrian Homecare*

At the onset of her employment with Cambrian Healthcare ("Cambrian"), Plaintiff Jennifer Playu Alberto ("Plaintiff") signed a written agreement to arbitrate employment-related disputes. After her employment ended, Plaintiff filed a lawsuit alleging various wage and hour violations. Cambrian responded by filing a motion to compel arbitration. The trial court ruled that, while Plaintiff and Cambrian had indeed formed an agreement, that agreement, when viewed in conjunction with a concurrently executed confidentiality agreement, was so permeated with unconscionability that improper terms could not be severed and the agreement to arbitrate could not be enforced.

Cambrian appealed, and the Second Appellate District of the Court of Appeal affirmed the trial court's decision. In its analysis, the appellate court noted that the agreement was to be considered as a whole and that, in the course of that application, the trial court had the discretion not to sever the unconscionable terms. It could instead simply choose not to enforce the agreement at all. The court focused on the fact that Plaintiff executed a confidentiality agreement concurrently with the arbitration agreement that included terms – most notably a requirement that Plaintiff consent to an immediate injunction in the event of unauthorized use of Cambrian's proprietary information – that were unconscionable, and contract law guides that the arbitration and confidentiality agreements must be considered together.

In arriving at its confirming decision, the court reasoned "[t]o hold otherwise would let Cambrian impose unconscionable arbitration terms, and then avoid a finding of unconscionability because it put the objectionable terms in a (formally) separate document." In other words, should the court rule differently, Cambrian could take the opportunity to seek to compel arbitration in one agreement, while simultaneously attempting to enforce unconscionable claims in another. To do so would be improper.

California employers should heed the warning tacitly offered by the *Alberto* decision. While employers typically (although not exclusively) utilize arbitration agreements that are designed to maximize the likelihood of enforceability, some attempt to foist more oppressive terms on employees in other agreements. The *Alberto* decision lays the groundwork for employees to prevent such conduct. If all agreements executed together are viewed in conjunction with one another, employers should avoid the temptation of forcing unconscionable language in one context while seeking to enforce a desirable (and otherwise permissible) agreement in another.

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 Clark, Jessica O'Malley, Nicole Allen, Haley Murphy, Noah Diamant, Celeste Leung, or Michelle Perez-Yanez at (858) 755-8500; or Enoch Cheung, Lisa Mallinson, or Andres Uriarte at (310) 649-5772.

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