LABOR AND EMPLOYMENT LAW UPDATE

League of California Cities
September 2017
Sacramento, California

Stacey N. Sheston

BB&K | BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

TABLE OF CONTENTS

Page

WAGE & HOUR

FLSA RETALIATION PROHIBITION APPLIES TO "ANY PERSON" AND NOT JUST TO AN EMPLOYER

Arias v. Raimondo, 860 F.3d 1185 (9th Cir. 2017)

Plaintiff Arias began working as a milker for Angelo Dairy, a small, family owned and operated company, in 1995. When they hired plaintiff, they did not complete or file the required I-9 form regarding his employment eligibility in the U.S. Instead, the Angelos allegedly used the threat of reporting his non-compliant immigration status as a sort of "weapon" to cause him to forego other employment and stay with them. Plaintiff sued in 2006 for a variety of workplace violations, including failure to provide overtime pay, rest breaks or meal periods, as well as for unfair competition violations of Business & Professions Code section 17200. Following an extended period of procedural machinations, the case was set for trial in state court in August 2011. But on June 1, 2011, the Angelos attorney (Raimondo) "set in motion an underhanded plan to derail Arias' lawsuit." Emails with a Homeland Security Employee show that Raimondo contacted U.S. Immigration and Customs Enforcement to encourage them to take Arias into custody and deport him, and he sought to block California Rural Legal Assistance attorneys from representing Arias. The threat of deportation (his own and his family's) apparently motivated Arias to settle his claims against the Angelos a month prior to trial.

In May 2013, Arias sued Angelo Dairy, the Angelos, and Raimondo in federal court alleging violations of the Fair Labor Standards Act. His claim against Raimondo was framed as retaliation in violation of 29 U.S.C. 215(a)(3). The district court granted Raimondo's 12(b)6) motion to dismiss because there were no allegations that Raimondo exercised any control over Arias' employment relationship, and thus Raimondo was not an "employer" subject to the retaliation prohibition of the Fair Labor Standards Act (FLSA).

The Ninth Circuit reversed. The panel held that, unlike the FLSA's wage and hour provisions, its retaliation provisions apply to "any person" and do not require that a defendant be the plaintiff's employer. The panel remanded the case to the district court for further proceedings.

DISCRIMINATION/HARASSMENT

ADEA APPLIES TO SUBDIVISIONS OF A STATE EVEN IF THEY HAVE FEWER THAN 20 EMPLOYEES

Guido v. Mount Lemmon Fire Dist., 859 F.3d 1168 (9th Cir. 2017)

Two fire captains – Guido and Rankin – were the two oldest fulltime employees of the Mount Lemmon Fire District. Both were fired; they were 46 and 54, respectively, at the time of their terminations. Both received favorable rulings from the Equal Employment Opportunity Commission, which found reasonable cause to believe the district violated the Age Discrimination in Employment Act (ADEA). They sued for age discrimination, and the trial court granted the district's motion for summary judgment, concluding that the district was not an "employer" within the meaning of the ADEA because it did not have twenty or more employees.

On appeal, the Ninth Circuit reversed. It held, contrary to decisions of other circuits, that while a "person engaged in an industry affecting commerce" must have twenty or more employees to be subject to the ADEA (*see* 29 U.S.C. section 630), a political subdivision of a State does not. The panel remanded the case for further proceedings.

EXECUTIVE'S STEREOTYPICAL VIEW OF GAY MEN AND HIS STRONG GENDER IDENTITY EXPRESSION OPINIONS CREATED DISPUTED ISSUE OF FACT AS TO WHETHER PLAINTIFF WAS VIEWED AS "TOO GAY" AND THUS WHETHER DISCRIMINATORY BIAS WAS A SUBSTANTIAL MOTIVATING FACTOR IN HIS TERMINATION

Husman v. Toyota Motor Credit Corp., 12 Cal App. 5th 1168 (2017)

Husman was an out, gay male who was a 14-year employee of various Toyota divisions at its southern California Torrance campus. He ran the Company's diversity and inclusion program and reputedly excellent at the important components of the job (Toyota won a number of diversity awards), receiving "very good" ratings on his annual performance reviews from his supervisor, Borst. Borst promoted Husman to an executive-level position as the manager of corporate social responsibility, a position encompassing diversity and inclusion, as well as corporate philanthropy. His new supervisors – Bybee and Pelliccioni - had known him for over a decade, knew he identified as gay, and did not express any concern about his promotion into the new position with them. Bybee became concerned a few months later about Husman's frequent absences from the office and "lax management" of his team, and she counseled him to be in the office more. Soon after, Bybee learned of several complaints about comments Husman had allegedly made to his coworkers (touching on gender, pregnancy, and political affiliation issues).

An investigation corroborated the allegations, and Bybee informed Husman he would receive a written warning, certain reduced performance ratings, and (as a result) a slightly lower bonus. Husman reacted badly and became increasingly uncooperative with Bybee, as well as Pelliccioni when Pelliccioni stood by the discipline and offered him executive coaching to assist in meeting their expectations. Husman complained that other Toyota executives had not been disciplined for comments he believed were far worse, and he was particularly critical of what he viewed as Toyota's insufficient support of Lesbian, Gay, Bisexual, and Transgender (LGBT) employees and events. Bybee became increasingly frustrated with Husman's insubordination and lack of progress on assigned projects, as well as his continued frequent absences from the office and avoiding meetings with her. In September 2011, Husman failed to attend two one-on-one meeting with her and resisted attending an executive conference that month, and he made comments critical of other executives who scored lower than he on a cultural literacy assessment given by a consultant Toyota had engaged. Bybee and Borst viewed this as the last straw, and Borst asked Pelliccioni to prepare a generous separation package to allow Husman to leave with dignity. Bybee told Husman he was being terminated for "excluding the majority" and focusing too much on LGBT issues. His corporate philanthropy duties were subsequently assigned to a straight male employee, while the diversity/inclusion tasks were staffed by a gay male employee. Husman sued for sexual orientation discrimination and retaliation under the Fair Employment Housing Act, and Toyota successfully moved for summary judgment on all claims.

The appellate court affirmed summary judgment for Toyota on the retaliation claim, holding that Husman had not demonstrated protected conduct in the two instances he alleged: (1) his complaint that Pelliccioni had refused to include AIDS Walk LA on the list of automatic payroll deductions (rejected because only national organizations were on the list); and (2) his complaint to the Diversity Advisory Board that while "Toyota's LGBT employees had made some progress, there was still work to be done" (deemed a mere exhortation to strive for additional improvement). However, the court reversed summary judgment on the discrimination claims, holding that Husman had proffered evidence that discrimination was a substantial motivating factor for his discharge, and he had not waived his "mixed motive" theory by not arguing it in the motion for summary judgement papers below. The court rejected Toyota's reliance on the "same actor" defense (Borst being the same actor that promoted and later terminated Husman) in light of the "cat's paw" evidence of Pelliccioni's participation in the termination decision. Pelliccioni had stated Husman made "a very clear statement" about his sexual orientation and ridiculed him for wearing a scarf as an accessory when it was not cold outside. Husman argued this evidence created a triable issue of fact that Pelliccioni viewed him as "too gay" (even if a less obviously gay employee would be acceptable), and that anti-gay bias was at least a factor in the termination decision input Pelliccioni offered.

PUBLIC AGENCY

General

INDEPENDENT CONTRACTORS AND CONSULTANTS CAN BE CONSIDERED "EMPLOYEES" SUBJECT TO THE CONFLICT OF INTEREST PROVISIONS OF GOVERNMENT CODE 1090

People v. Superior Court (Sahlolbei), 3 Cal. 5th 230 (2017).

Hossain Sahlolbei was retained as a surgeon on an independent contractor basis by Palo Verde Hospital in Blythe, Calif., a public hospital district. In addition, he served as co-director of surgery and on the hospital's medical executive committee, composed of members of the medical staff, which was independent of the hospital, but advised the board on operations and physician hiring. He also served as chief and assistant chief of staff with considerable influence over board decisions in those roles.

Sahlolbei recruited an anesthesiologist (Barth) and negotiated a contract with Barth for Barth to receive $36,000 per month from the hospital and a one-time payment of $10,000 for relocation expenses. Sahlolbei pressured the board to approve the contract, but told the board the rate of pay was $48,000 per month, with a one-time payment of $40,000 for relocation expenses. It was alleged that Sahlolbei threatened to have the medical staff stop admitting patients if the board did not approve the contract. Sahlolbei convinced Barth to have all payments from the hospital deposited into Sahlolbei's account and Sahlolbei then paid Barth the agreed upon $36,000 per month and $10,000 relocation payment and retained the balance. The Riverside County District Attorney charged Sahlolbei with grand theft and violations of Government Code section 1090, which prohibits a government official, officer or employee from having a financial interest in a contract made by them in an official capacity. The trial court dismissed the section 1090 charges, finding that as an independent contractor, Sahlolbei was not an "employee" under the statute,

applying the tort law definition of "employee." The District Attorney's office appealed and, in a 2-1 decision, the Fourth District Court of Appeal agreed with the trial court. Prosecutors then took the case to the California Supreme Court.

The California Supreme Court held the term "employee" in section 1090 does not have the tort law definition, as it is used in the broadly construed and sweeping conflict statute, meant to prevent corruption and divided loyalties in connection with government contracts. Thus, the form of employment is irrelevant. Making new law, the Court held that the standard to determine whether an independent contractor or consultant qualifies as an "employee" under the statute is to look to see if "they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." To determine if they are involved in "making" a contract in their official capacity under the statute, one looks to whether "their position afforded them 'the opportunity to influence execution [of the contracts] directly or indirectly to promote [their] personal interests' and they exploit those opportunities." Prior appellate decisions applied a higher standard whereby an independent contractor or consultant had to have had "considerable influence" over the contract formation and execution decisions of the public agency to come within the meaning of "employee" under the statute and to be considered to have participated in the "making" of the contract.

Peace Officers' Procedural Bill of Rights

WHERE MULTIPLE PUNITIVE ACTION STEPS ARE TAKEN AS PART OF A SINGLE DISCIPLINARY PROCESS AGAINST A POLICE OFFICER, AN OPPORTUNITY FOR ADMINISTRATIVE APPEAL MUST FOLLOW THE ULTIMATE DISCIPLINARY DECISION

Morgado v. City and County of San Francisco, 13 Cal. App. 5th 1 (2017).

A citizen filed a complaint against Officer Morgado with the City's Office of Citizen Complaints ("OCC") in March 2008. The OCC investigated the alleged misconduct and provided its findings to the Police Chief. Upon further inquiry by the Department's Internal Affairs division, the Chief filed a disciplinary complaint with the City's Police Commission against Morgado in August 2009. The Commission assigned one of its seven members to investigate on August 28, 2009, and after that commissioner stepped down, assigned another on June 8, 2010. An evidentiary hearing was held before that commissioner on August 2-3, 2010, and later a hearing before the full Commission was held in March 2011. The Commission sustained four of six counts against Morgado and decided to terminate his employment. Morgado sued seeking reinstatement via injunction and administrative writ of mandate. In discovery, the City admitted that the Commission's termination decision was the only punitive action taken against him, and that no administrative appeal had been provided regarding that action. The trial court ruled for Morgado and issued an order enjoining the Commission from taking punitive action against Morgado, vacating his termination, and directing it to provide him an opportunity for administrative appeal under Government Code section 3304(b). The City appealed, arguing that the Chief's complaint was really the punitive action, and that the full Commission hearing was the appeal contemplated by statute.

The appellate court disagreed with the City and affirmed the trial court, holding that even if the Chief's complaint constituted a "punitive action," the Commission's termination decision was also a punitive action triggering the opportunity to appeal. "We do not hold a municipality must provide multiple administrative appeals during a single disciplinary proceeding against an officer. We hold only that the provision of a hearing that could be considered an administrative appeal, in the middle of the disciplinary proceeding, does not excuse the municipality from providing the officer an opportunity to administratively appeal the ultimate disciplinary decision at the end of it."

Public Employment Relations Board

"BLACKLISTING" AN EMPLOYEE BY INTERFERING WITH POTENTIAL ALTERNATE EMPLOYMENT CAN CONSTITUTE RETALIATION FOR PROTECTED UNION ACTIVITY

Moberg v. Monterey Peninsula Unified School District, PERB Dec. No 2530 (2017).

Moberg was a probationary certificated employee at Monterey Peninsula Unified School District ("District") during the 2009-10 school year. In the middle of the year, the District began dismissal proceedings and determined not to select him an employee for the following year. He filed an unfair practice charge with the Public Employment Relations Board (PERB) alleging the District dismissed him due to his protected activities (e.g. filing grievances), but PERB dismissed the charge finding he failed to establish a nexus between his protected activities and the adverse action. He later worked at three other districts, but when he lost those jobs as well, he brought another unfair practice charge with PERB against the District. His theory was that the District had "blacklisted" him in retaliation for his protected activity and, through its employees and attorneys, had conspired with the other districts to cause his dismissal. On appeal, the full Board affirmed dismissal of his charge.

The initial procedural issue was whether, as a former employee, Moberg had standing to pursue his blacklisting allegations, and PERB held that he did. The Educational Employment Relations Act protects *applicants* for employment as well as employees (unlike the Meyers Milias Brown Act), and the law does not say unfair practice charges can be filed only against an employee's *current* employer.

Pointing to precedent under the National Labor Relations Act on the substantive issue, PERB held that "blacklisting" can be an actionable form of retaliation, but that Moberg hadn't alleged facts sufficient to support his claim. To show a violation, a charging party must show the respondent interfered in the employment process by causing or attempting to cause a potential employer not to hire the applicant because of the applicants protected activities. Examples of such interference include directly informing the potential employer of the applicant's protected activities, such as by describing the applicant as a "union agitator" or troublemaker. Moberg provided no such allegations or evidence beyond his own speculation.