



BEST BEST & KRIEGER ^{LLP}
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Labor & Employment Litigation Update

LOCC Annual Conference

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PRESENTED BY

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Agenda

- Wage & Hour
- Discrimination/Harassment/Retaliation
- Disability/Medical Leave
- General Public Agency Employment Issues
(Discipline, POBR, PERB)

Wage & Hour

Arias v. Raimondo

860 F.3d 1185 (9th Cir. 2017)

- Arias worked as a milker for Angelo Dairy
- Sued for several wage and hour violations; employer's counsel worked with U.S. ICE to leverage a settlement
- Arias then sued the Dairy, the Angelos, and their lawyer (Raimondo) for FLSA violations including retaliation

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

- Raimondo's 12(b)(6) motion granted - he was not the "employer"
- 9th Circuit reversed – unlike the wage & hour provisions themselves, the FLSA retaliation provisions apply to "any person" not just an "employer"

Discrimination/Harassment/ Retaliation

Guido v. Mount Lemmon Fire Dist.

859 F.3d 1168 (9th Cir. 2017)

- Two fire captains – ages 46 and 54 – sued for age discrimination after being terminated
- MSJ granted for the District on ADEA claim - had fewer than 20 employees
- Reversed: a political subdivision of the State is an ADEA “employer” regardless of number of employees

Husman v. Toyota Motor Credit Corp.

12 Cal. App. 5th 1168 (2017)

- Openly gay executive promoted to new role
- His new supervisors knew him, knew he was gay, and expressed no concern about his promotion
- Received complaints that Husman made several offensive comments; also chastised him for attendance issues and “lax management” in new role.

Husman v. Toyota Motor Credit Corp.

12 Cal. App. 5th 1168 (2017)

- Husman later fired for insubordination and performance issues – same executive who fired him had promoted him
- Husman sued; MSJ for Toyota at trial court
- “Same actor” defense undermined by “cat’s paw” evidence regarding manager who made negative comments and ridiculed him for essentially being “too gay”

Fuller v. Idaho Dep't of Corrections

853 F.3d 1154 (9th Cir. 2017)

- Fuller assaulted off duty by co-worker/boyfriend (Cruz)
- Supervisors made statements to Fuller and other staff supportive of Cruz and told staff to “feel free” to give him encouragement
- Fuller went on medical leave/anxiety issue; request for paid admin leave was denied

Fuller v. Idaho Dep't of Corrections

853 F.3d 1154 (9th Cir. 2017)

- Ultimately Fuller resigned, sued under Title VII for harassment and discrimination
- MSJ for department reverse as to hostile work environment claim

Merrick v. Hilton Worldwide, Inc.

2017 WL 3496030 (9th Cir. 8/16/17)

- Hilton undertook cuts due to declining revenues; issued “RIF” guidelines
- Merrick (2nd oldest management employee) had position eliminated
- Sued for wrongful termination, age discrimination (FEHA)

Merrick v. Hilton Worldwide, Inc.

2017 WL 3496030 (9th Cir. 8/16/17)

- MSJ for hotel affirmed on appeal
- Merrick failed to produce evidence of pretext (i.e., that actual motive was discriminatory)

Aviles-Rodrigues v. LACCD

14 Cal. App. 5th __ (2017 WL 3712199)

- Voted to deny professor tenure Nov. 21, 2013); grievance filed (denied May 21, 2014)
- Formal notice of negative vote given to him March 5, 2014
- Employment ended June 30, 2014 (the last day of the semester)

Aviles-Rodrigues v. LACCD

14 Cal. App. 5th __ (2017 WL 3712199)

- Complaint for race discrimination filed with DFEH June 29, 2015, followed by suit against the District
- Demurrer sustained on statute of limitations grounds
- Reversed: one-year limitation period “from the date upon which the unlawful practice occurred” means from last day of employment, not from vote or notification

Disability/Medical Leave

Alamillo v. BNSF Railway Co.

2017 WL 3648514 (9th Cir. 8/25/17)

- Alamillo worked as “extra board” locomotive engineer
- Missed calls on ten dates in 2012
 - Additional training for first 3
 - Two suspensions for the next 4 - manager told him to get a pager or a landline to avoid further misses
 - Fired after the last 3

Alamillo v. BNSF Railway Co.

2017 WL 3648514 (9th Cir. 8/25/17)

- After last miss, he told manager he would seek medical evaluation for possible sleep disorder – during disciplinary proceedings for termination disclosed doctor's report of condition
- MSJ for employer granted by trial court and affirmed on appeal

Alamillo v. BNSF Railway Co.

2017 WL 3648514 (9th Cir. 8/25/17)

- Misconduct occurred prior to diagnosis or disclosure of disability (and before accommodation ever requested)
- No pretext – a “second chance” to control disability in the future is not a reasonable accommodation excusing past misconduct

Light v. California Dep't of Parks & Rec.

14 Cal. App. 5th 75 (2017)

- Seasonal park aide promoted to intermittent Office Asst. job at Ocotillo Wells location; also worked temporarily in two higher out-of-class assignments
- Her lesbian co-worker and friend filed harassment complaint against their supervisor Seals; Light participated in investigation
- Seals told Light to lie/support Seals; badgered her afterwards to disclose what she had said

Light v. California Dep't of Parks & Rec.

14 Cal. App. 5th 75 (2017)

- Light filed her own complaint, went on medical leave (PTSD, anxiety)
- Requested return at higher level position or at old facility with “guarantee” of no further harassment or retaliation
- District offered old position at either old facility (supervisors were gone) or at new facility in San Diego (would pay moving costs)

Light v. California Dep't of Parks & Rec.

14 Cal. App. 5th 75 (2017)

- Light sued alleging various discrimination and retaliation theories including failure to accommodate; MSJ granted for District
- Affirmed as to disability claims - Light not entitled to a promotion nor to her preferred choice of accommodations so long as what is offered is reasonable.

General Public Agency and Labor

Moberg v. Monterey Peninsula Unified Sch. Dist.

PERB Dec. No. 2530 (2017)

- District initiated mid-year dismissal proceedings against probationary certified teacher, decided not to select him for employment the following year
- Moberg filed unfair practice charge alleging retaliation for protected union activities (filing grievances); PERB dismissed charge

Moberg v. Monterey Peninsula Unified Sch. Dist.

PERB Dec. No. 2530 (2017)

- Moberg got and lost three teaching jobs at other districts
- Filed another ULP charge against MPUSD for “blacklisting” him in retaliation for protected activity
- Issue: former employee’s standing to bring charge against former employer

Moberg v. Monterey Peninsula Unified Sch. Dist.

PERB Dec. No. 2530 (2017)

- PERB held former employees can bring such blacklisting claims – EERA protects *applicants* as well as employees (NOTE: MMBA, for now, does not)

Ass'n for LA Deputy Sheriffs v. Superior Court

13 Cal. App. 5th 413(2017)

- Dept. created a *Brady* list of deputies with sustained allegations in their personnel files
- Proposed to disclose the list to district attorney/prosecutorial agencies so they could file *Pitchess* motions and advise defense counsel
- Deputies' association sued, sought preliminary injunction

Ass'n for LA Deputy Sheriffs v. Superior Court

13 Cal. App. 5th 413(2017)

- Trial court granted injunction, but scoped to allow disclosure of deputies who were also potential witnesses in pending criminal prosecutions
- Appellate court ordered injunction modified to prohibit all disclosure of list/names absent *Pitchess* compliance and resulting court order

Santa Ana Police Officers' Ass'n v. City of Santa Ana
13 Cal. App. 5th 317 (2017)

- Raid on marijuana dispensary; secured building, processed evidence
- Officers unaware that business owner had hidden cameras recording their activities and discussions - released tapes to media
- Based on tapes, Dept started an IA and interviewed 2 officers

Santa Ana Police Officers' Ass'n v. City of Santa Ana
13 Cal. App. 5th 317 (2017)

- Dept got additional footage after search warrant was served; set up additional interviews with officers, but rejected their requests for the initial interview recordings
- Lawsuit raised claims under CA Violation of Privacy Act and POBR (section 3303(g))
- Defendants' demurrer sustained at trial court

Santa Ana Police Officers' Ass'n v. City of Santa Ana
13 Cal. App. 5th 317 (2017)

- Affirmed on appeal as to privacy claim
- Reversed as to POBR claim - officers entitled to tape/transcript of initial interview prior to being interrogated a second time

Morgado v. City & County of SF

13 Cal. App. 5th 1 (2017)

- Citizen complaint triggered investigation by City's Office of Citizen Complaints in March 2008; provided findings to Chief
- Further inquiry by Dept's IA division resulted in disciplinary complaint filed by Chief with City's Police Commission in August 2009
- Evidentiary hearing held before assigned member of Commission in August 2010 and before full Commission March 2011; voted to terminate

Morgado v. City & County of SF

13 Cal. App. 5th 1 (2017)

- Morgado filed writ action and sought injunction; granted by trial court – no punitive action permitted until he receives 3304(b) appeal hearing
- City argued Chief's complaint was really the "punitive action," and that full Commission hearing was the appeal called for by statute

Morgado v. City & County of SF

13 Cal. App. 5th 1 (2017)

- Court of appeals rejected that argument. Even if Chief's complaint was a "punitive action," the termination was also "punitive action"
- Need not hold multiple appeal hearings, but having one mid-stream doesn't eliminate obligation to provide one following the ultimate disciplinary decision.

Thank you for attending.

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