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Labor & Employment Litigation Update

LOCC Annual Conference
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PRESENTED BY

Stacey N. Sheston
Partner

Agenda

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

Wage & Hour

Morales v. 22nd Dist. Agricultural Ass'n

1 Cal. App. 5th 504 (2018)

- Plaintiff and other seasonal employees at Del Mar Fairgrounds/Horse Park filed class action seeking overtime pay under FLSA and CA Labor Code 510
- DAA (public agency) successfully demurred to section 510; jury found for DAA on FLSA claims; plaintiffs appealed ruling on demurrer

Morales v. 22nd Dist. Agricultural Ass'n

1 Cal. App. 5th 504 (2018)

- Affirmed:
  - CA public agencies not subject to state overtime provisions
  - Joint employer status with a private entity doesn't change that result

Dynamex Operations West, Inc. v. Superior Court

4 Cal. 5th 903 (2018)

- Courier drivers brought class action claiming wage and hour violations (minimum wage, overtime, meal and rest period issues) under CA Labor Code and IWC wage order
- Dynamex argued drivers were independent contractors not entitled to those employee protections

Dynamex Operations West, Inc. v. Superior Court

4 Cal. 5th 903 (2018)

- Dynamex unsuccessfully moved to decertify the class; sought writ review
- Court of appeal rejected Dynamex claim; California Supreme Court unanimously affirmed; adopted broad new "ABC Test" – worker must meet all 3 to be deemed an independent contractor

Dynamex Operations West, Inc. v. Superior Court

4 Cal. 5th 903 (2018)

- A – worker is free from control and direction of the hirer as to performing the work (both under agreement and in fact), AND
- B – worker performs work outside the usual course of the hiring entity's business, AND
- C – worker is customarily engaged in an independently established trade or business of same nature performed for the hiring entity

Dynamex Operations West, Inc. v. Superior Court

4 Cal. 5th 903 (2018)

- Does this matter to California public agencies??? Not directly—
  - Not subject to the particular provisions of the CA Labor Code/Wage Orders at issue in *Dynamex*
  - CalPERS still using IRS multi-factor/common law test
- But beware:
  - Not completely exempt from Wage Orders (e.g. minimum wage)
  - Beware misclassification (and *Dynamex* expansion)

Discrimination/Harassment/ Retaliation

Wassmann v. South Orange County Comm. College Dist.

24 Cal. App. 5th 825 (2018)

- District terminated Wassmann's employment for cause in April 2011
- 5-day hearing conducted before ALJ who issued 20-page decision August 2013 finding cause and upholding the termination
- Wassmann filed a writ petition claiming ALJ's decision wasn't supported by weight of evidence

Wassmann v. South Orange County Comm. College Dist.

24 Cal. App. 5th 825 (2018)

- Trial court denied the writ petition
- December 2013 Wassmann filed DFEH charge of race and age discrimination and harassment; sued District and several supervisors for FEHA violations and infliction of emotional distress
- Trial court granted defendants' motions for summary judgment on grounds (among others) of res judicata/collateral estoppel and statute of limitations

Wassmann v. South Orange County Comm. College Dist.

24 Cal. App. 5th 825 (2018)

- Appellate court affirmed
  - Administrative proceedings under the Education Code provide robust platform and evidentiary hearing to challenge adverse employment actions, and judicial review is available
  - Where admin hearing possesses the requisite judicial character, the decision is binding in a later civil court action

Meeks v. AutoZone, Inc.

24 Cal. App. 5th 855 (2018)

- Long-time employee Meeks worked her way up from customer sales representative to store manager
- 2009 she reported sexual harassment over several years by Fajardo (who had similarly worked up to store manager)
- District mgr (Ledesma) told her Fajardo said it was all a joke and misunderstanding, so Meeks should "just squash it" and tell HR investigator it was all taken care of

Meeks v. AutoZone, Inc.

24 Cal. App. 5th 855 (2018)

- Meeks testified Ledesma later threatened to fire Meeks (and her husband) if she took the complaints higher
- Meeks sued AutoZone and Fajardo for sexual harassment and retaliation
- Trial court granted MSA on retaliation; jury returned defense verdict. Meeks appealed both determinations.

Meeks v. AutoZone, Inc.

24 Cal. App. 5th 855 (2018)

- Appeals court reversed on harassment claims and remanded for new trial

- Affirmed ruling on retaliation – no "adverse action"
  - Not just big ticket actions – e.g., firing, demotion, failure to promote – but whole spectrum of employment actions reasonably likely to adversely and materially affect job performance or opportunity for advancement

  - Meeks continued to work there, no loss of pay/benefits/status, never denied a promotion. Although Meeks said Ledesma threatened to fire her, no evidence that threat was acted upon

Abed v. Western Dental Servs.

23 Cal. App. 5th 726 (2018)

- Abed externed at Western Dental in Napa while in school; hoped to land permanent position as dental assistant
- Co-workers learned during externship that Abed was pregnant
- Supervisor later told Abed there were no open positions in Napa, but one existed in Vacaville. Abed did not apply for position at either location

Abed v. Western Dental Servs.

23 Cal. App. 5th 726 (2018)

- Another extern started 3 weeks after Abed's externship ended, and the new extern was offered a permanent position less than a month later
- Abed sued that fall for FEHA pregnancy discrimination, and Western Dental won summary judgment at the trial court due to Abed's failure to apply for a position. Abed appealed.

Abed v. Western Dental Servs.

23 Cal. App. 5th 726 (2018)

- Reversed —
  - Typically plaintiff in "failure to hire" case must show plaintiff applied for position as part of *prima facie* case
  - However, Abed was not required to do so due to Western Dental falsely telling her no position was available (and thus causing her not to apply)

General Public Agency and Labor

Janus v. AFSME

585 U.S. __, 138 S.Ct. 2448 (2018)

- State employee Janus challenged Illinois statute requiring payment of "agency fee" on First Amendment grounds

- Trial court granted motion to dismiss and 7th Circuit affirmed, holding permissible agency fee could be charged to cover union expenditures attributable to collective bargaining duties, but not political or ideological projects (*Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977))

Janus v. AFSME

585 U.S. __, 138 S.Ct. 2448 (2018)

- SCOTUS reversed, holding that employees cannot be forced to support speech they oppose
- Positions advanced by unions in bargaining setting often relate to issues of public concern within scope of First Amendment
- Public sector employees cannot be required to pay agency fees without their consent*

(**But See*: SB 866)

Napa Valley Comm. Coll. Dist.

PERB Dec. No. 2563-E (May 2018)

- Faculty Ass'n President's email to all faculty about upcoming meeting drew "reply all" about part-time instructor salaries being balanced against those of full time staff
- Email dispute ensued between part-time instructor Eric Moberg, another faculty member, and administration
- Ass'n President emailed cancelling meeting and stating use of employer's system was not sanctioned by the union and wouldn't be considered work of the association

Napa Valley Comm. Coll. Dist.

PERB Dec. No. 2563-E (May 2018)

- Later Moberg's offer to teach spring term was revoked on grounds he lied on application
- Moberg filed Unfair Practice Charge alleging retaliation for using the college's email system; Charge dismissed (no protected activity)
- Board disagreed – adopted *Purple Communications* standard from NLRB

Napa Valley Comm. Coll. Dist.

PERB Dec. No. 2563-E (May 2018)

- Email "has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations"

- Holding: Employees who have rightful access to their employer's email system in the course of their work have right to use it for protected communications on non-work time

County of Los Angeles v. Los Angeles County Civil Serv.,

22 Cal. App. 5th 473 (2018)

- Long-time deputy Arellano became subject in special task force investigation into potential criminal activity while he worked in Narcotics Unit
- Task force obtained court ordered wiretap recordings, two of which were believed to involve and implicate Arellano
- On parallel path, Department's Internal Criminal Investigations Bureau (ICIB) began investigation of his conduct

County of Los Angeles v. Los Angeles County Civil Serv.,

22 Cal. App. 5th 473 (2018)

- A court approved disclosure of the wiretap recordings based on an application stating they were "relevant to an internal investigation by the LA County Sheriff's Dept" against Arellano

- ICIB closed its investigation

- The Dept's Internal Affairs Bureau began an investigation of policy violations, and it had access to the recordings. Based on its findings, Arellano was fired.

County of Los Angeles v. Los Angeles County Civil Serv.,

22 Cal. App. 5th 473 (2018)

- On appeal, the hearing officer granted Arellano's motion to suppress the recordings on grounds that the order did not authorize their use in administrative proceedings. He reduced the discipline to suspension.

- The County unsuccessfully sought a writ of mandate.

- The appellate court affirmed because the court order did not authorize disclosure or use of the wiretap evidence in an administrative proceeding (*see* Penal Code sections 629.78, 629.82(b)).

Ochoa v. County of Kern

22 Cal. App. 5th 235 (2018)

- 3/22/2013 – deputy hears harassment complaint against Ochoa and submits memo to Sgt Bittle (Ochoa's superior)
- 3/25/2013 – Sgt. Bittle receives the memo and "started an investigation" to determine the nature of the complaint
- 4/8/2013 – Bittle details a conversation with the complainant and her brother in memo to superior
- 4/9/2013 – a criminal investigation begins into Ochoa's conduct

Ochoa v. County of Kern

22 Cal. App. 5th 235 (2018)

- 5/6/2013 – Chief Deputy Zimmerman signs "personnel complaint" authorizing IA into harassment claim

- DA ultimately decides not to charge Ochoa by 7/7/2014

- 8/11/2014 – Dept served Notice of Proposed Termination (effective 10/7/2014 after a *Skelly*)

Ochoa v. County of Kern

22 Cal. App. 5th 235 (2018)

- Ochoa challenged the action as violating the 1-year statute of limitations in Gov't Code 3304(d)(1) — trial court denied his writ petition

- Affirmed:
  - Published – sergeant was a "person authorized to initiate an investigation" even though he couldn't start an IA, so limitations period began 3/25/2013
  - Unpublished – pending criminal investigation tolled the limitations period

Daugherty v. City & County of SF

24 Cal. App. 5th 928 (2018)

- US Atty's Office criminal corruption investigation of SFPD officers began in 2011. USAO was assisted by select members of the criminal unit of the SFPD Internal Affairs Division
- Search warrants were issued for cellphone records of subject employees - Dec 2012 yielded racist, sexist, homophobic and anti-Semitic texts among a sgt and 9 officers. Various criminal convictions followed.
- USAO released the text messages to SFPD Internal Affairs Division on Dec 8, 2014

Daugherty v. City & County of SF

24 Cal. App. 5th 928 (2018)

- IA resulted in April 2015 discipline against a number of officers include Daugherty, who successfully challenged the discipline via writ petition on grounds discipline was untimely

- Court of Appeal reversed – one-year limitations period began when the messages were released by USAO to the IA division. That's when they were discovered by "person[s] authorized to initiate an investigation" for purposes of Section 3304(d)

Blue v. California Office of Inspector General

23 Cal. App. 5th 138 (2018)

- CA Senate Rules Committee requested OIG investigation into High Desert State Prison use of force issues
- OIG interviewed several former prison staff members
  - Concern about willingness of current staff to speak/be candid
  - Wanted to steer clear of parallel IA investigation by CDCR
- OIG told former employees they were not subject witnesses & wouldn't be asked about ongoing investigations

Blue v. California Office of Inspector General

23 Cal. App. 5th 138 (2018)

- OIG issued report summarizing review and making policy recommendations for training and support services – no statements about misconduct, and no names of those interviewed

- CCPOA & several of those interviewed sued OIG alleging POBR violations (Section 3303)

- Trial court denied OIG's anti-SLAPP motion, finding plaintiffs showed likelihood of success on the merits

Blue v. California Office of Inspector General

23 Cal. App. 5th 138 (2018)

- Appellate court reversed as to likelihood of success, holding that:
  - None of former employees interviewed were "under investigation" for anything, much less something that could lead to "punitive action"
  - Interviews were not "interrogations" and not subject to 3303 protections

Thank you for attending.

Stacey Sheston

Partner

Best Best & Krieger LLP

Phone: (916) 551-2099

Email: stacey.sheston@bbklaw.com