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The best and worst employment-case-law developments of 2020

THE MOST IMPORTANT CASES THAT SHAPED THE YEAR IN EMPLOYMENT LAW (WITH A BIT OF COLOR COMMENTARY)

On January 20, 2017, popular-vote loser Donald John Trump entered the presidency of the United States of America as a sore winner. On January 20, 2021, two-time popular-vote loser (and *twice* impeached) Donald John Trump exited the presidency as a sore loser.

In between January 20, 2017, and January 20, 2021, Trump and his Republican allies took affirmative actions to not only weaken statutory and regulatory employment-law protections for the American worker but also to ensure that the federal bench was filled with judges who are hostile to the rights of employees and consumers. What follows is a summary of cases mostly decided before the full impact of the Trump judges will be felt with respect to curtailing individual/employee rights in favor of corporate interests.

U.S. Supreme Court hands wins and losses to employees while setting the stage for a possible broadscale curtailment of employee rights vis-à-vis discrimination in the name of religion

The overwhelmingly conservative U.S. Supreme Court expanded some protections for workers in 2020, but set the stage for a possible future broadscale curtailment of those gains through an expansion of the so-called "ministerial exemption" that is so broad that it threatens to swallow the rule.

First, in a historic win for LGBTQ workers, the Supreme Court, in an opinion authored by Justice Neil M. Gorsuch in *Bostock v. Clayton Cty., Georgia* (2020) 140 S.Ct. 1731, held that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity.

The Court, however, expressly declined to address the application of Title VII to four key issues: (1) sex-segregated bathrooms and locker rooms; (2) employer dress codes; (3) claims against religious organizations; and (4) claims concerning the employment relationship between religious institutions and their "ministers." Additionally, the court suggested that the Religious Freedom Restoration Act of 1993, which prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest, might supersede Title VII's anti-discrimination provisions in certain cases.

After *Bostock* was issued, President Trump immediately acted to limit the reach of the decision by ordering all federal agencies to take the position that *Bostock* only applied to Title VII, and that discrimination and harassment against people on the basis of sexual orientation and transgender status were perfectly legal under federal rules regarding housing, education, immigration, health care, and credit. On January 20, 2021, within hours of assuming the presidency, President Biden issued an Executive Order directing all federal agencies that enforce federal laws prohibiting sex discrimination to include discrimination based on sexual orientation and gender identity, consistent with the *Bostock* decision.

In *Our Lady of Guadalupe Sch. v. Morrissey-Berru/Biel v. St James Sch* (2020) 140 S.Ct. 2049, the Supreme Court expanded the First Amendment's purported "ministerial exemption" to exclude two teachers employed by Catholic schools (even though the teachers had no ministerial titles, no formal religious training, and minimal ministerial job duties) from the protections of two federal anti-discrimination laws: the Americans with Disabilities Act and the Age Discrimination in Employment Act of 1967. In these consolidated cases, the Supreme Court extended to religious employers broad discretion over who they consider to hold a ministerial position, and, therefore, who they are free to discriminate against with no fear of liability.

Given the Supreme Court's absolutely absurd decision in *Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. 682, effectively holding that corporations can somehow claim to have a religion, some commentators worry that some businesses will use *Burwell*, *Bostock*, and *Our Lady of Guadalupe Sch.* to argue that a company's purported religious beliefs justify its discrimination against individuals otherwise protected against discrimination by federal anti-discrimination laws.

In *Babb v. Wilkie* (2020) 140 S.Ct. 1168, the Supreme Court gave partial wins to both federal employees and employers regarding age discrimination. The court held that federal employees can prove age discrimination if age was merely a "motivating factor" in the employer's implementation of an adverse employment action, whereas some appellate courts had held that federal employees needed to show it was the "but-for" cause. However, the court also held

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that if the employee could not prove age was the "but-for" cause of the adverse action, most forms of relief were unavailable to the plaintiff, including back pay, compensatory damages, and reinstatement.

California federal and state courts give workers wins in harassment and pay-equity claims, but imposed some higher hurdles in discrimination cases

Christian v. Umpqua Bank (9th Cir. 2020) 984 F.3d 801, is a terrific sexual-harassment summary-judgment decision from the Ninth Circuit that addresses many issues that frequently arise in harassment cases. Jennifer Christian, a former employee of Umpqua Bank, alleged she was sexually harassed by one of the bank's customers. The district court held that Christian's harassment claims failed as a matter of law because no reasonable juror could conclude the customer's conduct was severe or pervasive enough to create a hostile work environment.

The district court declined to consider much of the evidence of harassment because seven months elapsed between the harassment occurring in February 2014 and that occurring in September 2014, and because many of the incidents did not involve "direct, personal interactions" between the customer and Christian (e.g., the customer left letters and notes meant for Christian with Christian's co-workers and the customer made persistent inquiries about Christian with Christian's colleagues). Thus, the district court accepted only one incident as actionable harassment – the customer's visit to the bank in September 2014 – and concluded that that single incident was not sufficient to constitute a hostile workplace.

The Ninth Circuit reversed, holding that the district court erred in: (1) isolating the harassing incidents of September 2014 from those of February 2014: (2) declining to consider incidents in which the customer did not have any direct, personal interactions with Christian, such as when the customer wrote Christian a letter describing her as his "soulmate," sent her flowers, and watched her in the bank lobby; and (3) neglecting to consider evidence of interactions between the customer and third persons, such as the customer's repeated visits to the branch to badger Christian's colleagues about how he was going to get a date with Christian.

After concluding that a trier of fact could find that the harassment altered the conditions of Christian's employment and created an abusive working environment, the Ninth Circuit turned to the question of Umpqua's liability. The Ninth Circuit held that a trier of fact reasonably could find that Umpqua's glacial response to Christian's complaints – more than half a year after the stalking began – was too little too late.

Blue Fountain Pools & Spas Inc. v. Superior Court (2020) 53 Cal.App.5th 239, is another wonderful sexual-harassment summary judgment decision, this time from the California Court of Appeal. Daisy Arias alleged she was sexually harassed during most of her employment with Blue Fountain, dating back to 2006. But Arias did not file an administrative complaint with the California Department of Fair Employment and Housing until after her employment ended in 2017. Blue Fountain filed a motion for summary adjudication seeking dismissal of the hostile work-environment claim on the ground the claim was barred by the statute of limitations. Blue Fountain also argued that, to the extent Arias's claims were based on events occurring more than one year before she filed her DFEH Complaint, those claims weren't saved by the continuing-violations doctrine because a reasonable employee in Arias' position would have long ago understood from Blue Fountain's actions that any further efforts to resolve her complaints and end the harassment were futile.

The trial court denied the motion for summary adjudication. Blue Fountain filed a petition for writ of mandate in the Court of Appeal, seeking an order compelling the trial court to grant defendant's motion. The Court of Appeal denied the petition, holding that Arias's claims were not barred by the statute of limitations because: (1) several incidents of harassment occurred during the one-year period preceding the filing of her DFEH Complaint; (2) a new owner took over the business in 2015, thus, even if the conduct of prior management made further complaining futile and thus commenced the running of the statute of limitations, the arrival of new management created a new opportunity to seek help; and (3) there was a triable issue of fact as to whether a reasonable employee would have concluded complaining more was futile.

In *Rizo v. Yovino* (9th Cir. 2020) 950 F.3d 1217, *cert. den.* 141 S.Ct. 189 (2020), the Ninth Circuit issued an *en banc* decision affirming its prior decision that prior pay history is not a job-related "factor other than sex" as a defense to an Equal Pay Act claim, after the Supreme Court vacated its earlier decision because the Ninth Circuit had counted a deceased judge (Judge Stephen Reinhart) to reach its majority.

In *Arnold v. Dignity Health* (2020) 53 Cal.App.5th 412, the Court of Appeal affirmed a trial court's grant of summary judgment for a medical-clinic employer on a terminated employee's age-discrimination and associational race-discrimination claims. The Court of Appeal held that age-related comments made by the clinic's executive director and by the employee's former supervisor did not prove animus because the employee did not show they were materially involved in her termination decision, and they were not in her direct chain of command. On her associational-discrimination claim, the court found no evidence that the supervisor to whom she complained about alleged mistreatment of a Black coworker was involved in her termination. Finally, the fact that the employer allegedly failed to follow its own "for-cause termination" policies did not create a triable issue of fact.

In *Wood v. Superior Court* (2020) 46 Cal.App.5th 562, the Court of Appeal

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ruled that a plaintiff had no attorney-client relationship with DFEH attorneys who investigated her claims, and therefore could be compelled to produce her communications with the DFEH in her claim for gender identity discrimination. This decision is at odds with almost all federal court decisions which find that communications between employee complainants and the EEOC are protected from discovery by respondent employers, though they sometimes differ in their rationales.

Both the Ninth Circuit and California issue rulings against employees on disability-discrimination claims

In *Anthony v. TRAX Int'l Corp.* (9th Cir. 2020) 955 F.3d 1123, the Ninth Circuit held that after-acquired evidence can not only limit damages but can also defeat liability on an ADA claim by negating the "qualified individual" element. In *Anthony*, the plaintiff misrepresented having a college degree in her application for a technical-writer position that required one; the Ninth Circuit held that this evidence negated the plaintiff's ability to show she was a qualified individual because she did not meet the job requirements.

In *Shirvanyan v. Los Angeles Community College District* (2020) 59 Cal.App.5th 82, the Court of Appeal held that an FEHA interactive-process claim requires a plaintiff to show that a reasonable accommodation existed at the time the employer should have begun the process. The plaintiff in this case had two separate injuries; she showed that accommodation for her carpal tunnel syndrome may have been possible, but she didn't show that there was any reasonable accommodation available after she later suffered a shoulder injury. Since the trial court had refused defendant's proposed instruction on plaintiff's burden of proving a reasonable accommodation existed, and since the jury verdict in plaintiff's favor did not distinguish between the wrist and the shoulder injuries, the judgment in plaintiff's favor had to be reversed for retrial solely regarding failure to accommodate the wrist injury.

Leave laws

The Ninth Circuit and California courts both weighed in on FMLA, CFRA, and vacation pay in the past year. In *Scalia v. Department of Transportation and Public Facilities* (9th Cir. 2021) 985 F.3d 742, the Ninth Circuit addressed the calculation of weeks of FMLA leave taken, for "rotational" employees – i.e., employees working a "one week on, one week off" schedule. For such employees on a "continuous" FMLA leave, the Ninth Circuit held that their regularly scheduled "one week off" is counted against their 12 weeks of FMLA leave, so that rotational employees who took 12 weeks of continuous leave could properly be required to return to work 12 weeks later, despite the Secretary of Labor's interpretation to the contrary.

In *McPherson v. EF Intercultural Found., Inc.* (2020) 47 Cal.App.5th 243, the California Court of Appeal made a fact-specific ruling that a company's unlimited vacation policy led to accrued vacation time owed as wages to employees on their departure from the company. The court's ruling was dependent on the company's practice of only allowing employees to take vacation at a fixed time, with an implied limit of two to four weeks.

Finally, the California legislature passed SB 1383, which greatly expanded California Family Rights Act (CFRA) protections. Effective January 1, 2021, CFRA applies to all California employers with five or more employees. Employees may also now take CFRA leave to care for previously excluded categories of family members, including grandparents, grandchildren, siblings, adult children and parents-in-law.

California simultaneously expands and retracts employee misclassification rules

In *Vazquez v. Jan-Pro Franchising International* (2021) 10 Cal.5th 944, the California Supreme Court held that *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, applies retroactively, answering a question posed by the Ninth Circuit.

Unfortunately, after Uber and Lyft spent more than $200 million in support of Proposition 22 (making it the most expensive ballot measure campaign in California history), California voters passed the ballot initiative exempting app-based ride share and food delivery companies from the scope of AB 5, allowing those business to treat their drivers as independent contractors, unless the company sets drivers' hours, requires acceptance of specific ride and delivery requests, or restricts their work for other companies.

Wage and hour developments

In *Herrera v. Zumiez* (9th Cir. 2020) 953 F.3d 1063, the Ninth Circuit held that an employer owed reporting time pay for "call-in shift" compensation for employees' time spent calling in, and indemnification for phone expenses employees incurred in calling in. In *Herrera*, putative class members were required to call in 30 to 60 minutes before their shifts and make themselves available to work at the request of their employer.

In *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, the California Supreme Court held that time spent during bag or security checks was subject to the employer's control, and therefore compensable as "hours worked" under Wage Order 7, answering a question certified to it by the Ninth Circuit, in *Frlekin v. Apple* (9th Cir. 2020) 979 F.3d 639.

In *Ward v. United Airlines* (2020) 9 Cal.5th 732, the California Supreme Court held that the Railway Labor Act exemption in a wage order did not bar a wage-statement claim brought in three putative class actions by airline pilots and flight attendants under the Labor Code. The Supreme Court also ruled that employees are covered under the wage statement statute if the employees' principal place of work is in California,

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established where employees perform the majority of their work in California, or if they are based for work purposes in California, meaning that California serves as the physical location where the worker presents himself or herself to begin work.

Oliver v. Konica Minolta Bus. Solutions U.S.A., Inc. (2020) 51 Cal.App.5th 1 held that commute time constitutes hours worked for employees required to transport employer-provided tools and parts in their personal vehicles, such that they were owed wages and mileage reimbursement for that commute time.

In an anti-employee ruling, *David v. Queen of the Valley Med. Ctr.* (2020) 51 Cal.App.5th 653, the Court of Appeal affirmed summary judgment for an employer hospital on a former nurse's meal and rest break claims. The Court of Appeal held that the plaintiff's supervisor walking into the break room and looking at the clock did not constitute a direction to prematurely terminate a break, and the supervisor's instruction to plaintiff to avoid overtime cannot reasonably be understood as an affirmative direction to work off the clock.

PAGA win for California workers

In a notable PAGA ruling, *Kim v. Reins Int'l Cal.* (2020) 9 Cal.5th 73, the California Supreme Court held that employees who settle their individual claims are still "aggrieved" and retain standing to bring PAGA claims. This is an excellent ruling that curtails the common defense tactic of picking off PAGA representatives through individual settlements with named plaintiffs, as those settlements would no longer moot pending or future PAGA claims.

Class-action updates

In direct contrast to *Kim v. Reins Int'l*, the Ninth Circuit held that in the class-action context, class representatives who settle their individual claims cannot continue to represent the class, even if the settlement agreement specifically provides that it was not intended to settle or resolve the class claims. (*Brady v. AutoZone Stores* (9th Cir. 2020) 960 F.3d 1172.)

In *Barriga v. 99 Cents Only Stores* (2020) 51 Cal.App.5th 299, the Court of Appeal held that in class certification, the trial court has a duty to exercise control over communications between parties and putative class members, and a duty to scrutinize declarations of putative class members for coercion and abuse. In *Barriga*, the defendant in a meal-break and wage case submitted 174 declarations from current and former nonexempt employees, several of whom testified in subsequent depositions that they had no idea what the lawsuit was about and had merely signed pre-drafted declarations at the behest of human resources. The trial court denied plaintiff's motion to strike all 174 declarations, stating that it lacked statutory authority to strike or review for coercion of nonputative class members. The Court of Appeal reversed the orders denying plaintiff's motion to strike and denying the class certification motion.

Arbitration, employment, and settlement agreements

The court in *Davis v. Kozak* (2020) 53 Cal.App.5th 897, ruled that an arbitration agreement's limitation on depositions or other discovery can make the agreement substantively unconscionable if the plaintiff shows "he has a factually complex case involving numerous percipient witnesses, executives, and investigators, and that the arbitration agreement's default limitations on discovery are almost certainly inadequate to permit his fair pursuit of these claims."

In a case that may prove useful in conjunction with *Davis*, the Court of Appeal, in *Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, ruled that under the California Arbitration Act, parties cannot obtain pre-hearing discovery from non-parties if the arbitration agreement didn't explicitly provide for it and the applicable arbitration association rules didn't authorize it. Following *Davis*, this ruling could be useful in challenging arbitration agreements where non-party discovery is essential to outcome and the other *Davis* factors are met.

Kec v. Superior Court (2020) 51 Cal.App.5th 972, nullified an entire arbitration agreement as unenforceable because it contained a non-severable invalid PAGA waiver.

In a matter of first impression, *Midwest Motor Supply Co. v. Superior Court* (2020) 56 Cal.App.5th 702, held that an employment contract's forum-selection clause designating a non-California forum was voidable and barred by Labor Code Section 925, when any provision of the contract was modified on or after the statute's effective date of January 1, 2017.

Finally, California enacted AB 2143, outlawing "No Rehire" provisions in employment dispute settlement agreements where the employee made any good-faith complaint against the employer (or any parent company, subsidiary, affiliate, division or contractor of the employer). The law provides for two exceptions, the first of which is vague enough that it will surely be litigated, and may end up taking the teeth out of the law: No-rehire provisions are still permissible if (1) "there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person;" or (2) the employer has made and documented a good faith determination, before the employee filed a complaint, that the employee engaged in sexual harassment, sexual assault, or any criminal conduct.

Employee mobility and trade secrets

In *Whitewater West Industries, Ltd. v. Alleshouse* (Fed. Cir. 2020) 981 F.3d 1045, applying California law, the U.S. Court of Appeals for the Federal Circuit held that an employment agreement provision that assigned the employee's post-employment inventions to the employer, without being limited to subject matter based on the employer's confidential information, was invalid under California Business and Professions Code section 16600.

Hooked Media Group Inc v. Apple Inc. (2020) 55 Cal.App.5th 323, was a dispute

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arising out of a start-up company that Apple expressed interest in purchasing (Hooked Media Group); when Apple ultimately declined, three of Hooked's top employees left to work for Apple, and Hooked sued for fraud, misappropriation of trade secrets, interference with contract, and related claims.

The Court of Appeal affirmed the trial court's summary judgment for Apple. It found the fraud claim against Apple failed because the alleged misrepresentations by Apple all involved future events, and there was no evidence that Apple "did not actually intend to perform at the time the promise was made."

The trade-secrets claim failed because evidence that former employees may have had protected information in their possession is not sufficient to establish that Apple improperly acquired or used it. Because California does not recognize the "inevitable disclosure" doctrine, evidence suggesting that the former engineers "drew on knowledge and skills they gained from Hooked to develop a product for [Apple]" did not establish a misappropriation of trade secrets. Finally, the Court of Appeal found no breach of fiduciary duty by the executives who went to Apple, because "California's emphasis on employee mobility and freedom to compete counsels against a finding that the CTO's self-serving efforts to land a position with Apple were a breach of fiduciary duty."

Techno Lite, Inc. v. Emcod, LLC (2020) 44 Cal.App.5th 462, held that an employee's promise not to compete with an employer while employed by them is not void under California Business and Professions Code section 16600.

Brown v. TGS Mgmt Co., LLC (2020) 57 Cal.App.5th 303, held that an employment agreement containing prohibitions on the employee's use of "confidential information" after termination was unlawful as a "de facto noncompete provision," vacating an employer's arbitration award.

Anti-SLAPP

Galeotti v. International Union of Operating Eng'rs Local No. 3 (2020) 48 Cal.App.5th 850 found that union leaders' threat to terminate an employee if he did not make a donation to their political organization constituted extortion and supported a claim for wrongful termination in violation of public policy.

Attorney fees

In *Caldera v. Department of Corrections & Rehab.* (2020) 48 Cal.App.5th 601, the Court of Appeal held that a successful FEHA plaintiff should have received attorney fees based on the prevailing rate of Los Angeles-based attorneys, rather than the lower San Bernardino rates, where it was undisputed that he was unable to find a local attorney to take his case. The Court of Appeal also held that the trial court should have applied a multiplier to the lodestar figure based on *Ketchum* factors, rather than simply adjusting the lodestar figure.

2020 also brought great news for the plaintiffs' bar in the form of AB 1947. This bill provides attorney fees for successful Labor Code section 1102.5 claims, whereas previously such fees had to be sought via a difficult Code of Civil Procedure section 1021.5 argument. AB 1947 also extends the time period to file a complaint with the California Division of Labor Standards Enforcement from six months up to one year after the occurrence of the violation.

Notable jury verdicts affirmed on appeal

In *King v. U.S. Bank Nat'l Ass'n.* (2020) 52 Cal.App.5th 728, a jury awarded a plaintiff nearly $24.3 million in a wrongful termination, defamation, and breach-of-implied covenant case. The trial court denied the employer's motion for JNOV and partially granted its motion for new trial, conditioned on remittitur to just over $5 million, concluding that the award for defamation was duplicative of the wrongful-termination damages, and limited the punitive damages to a one-to-one ratio with the compensatory damages. The parties appealed and cross-appealed. The Court of Appeal ultimately awarded $17.2 million; it rejected the trial court's double-counting analysis and awarded $8.6 million in compensatory damages and $8.6 million in punitive damages.

In *Tilkey v. Allstate Ins. Co.* (2020) 56 Cal.App.5th 521, the Court of Appeal affirmed a $4.26 million jury award for "self-published defamation," where the employer reported plaintiff's termination on a FINRA Form U5 (a document informing FINRA of a change in status of the licensing of a licensed broker dealer), stating plaintiff was terminated after allegations of engaging in threatening behavior and/or acts of physical harm or violence. Plaintiff sued on the theory that he would be compelled to self-disclose the allegedly defamatory statement regarding his behavior as listed on the Form U5, when applying to future employers. The Court of Appeal affirmed the judgment finding defendant liable for defamation and awarded a 1.5 ratio of punitive damages.

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