The Best and Worst Employment Cases of 2015

By Andrew H. Friedman

Andrew H. Friedman is a partner with Helmer Friedman LLP in Culver City, where he primarily represents employees in all areas of employment law. Mr. Friedman is the author of a leading employment law practice guide—*Litigating Employment Discrimination Cases* (James Publishing, 2007).

2015 continued a remarkable recent trend in which the California state and federal courts issued, on an almost daily basis, a deluge of employment decisions. Buried in this torrent of opinions are some cases—the "best" and the "worst" (depending on your perspective)—of which the employment practitioner must be aware. Before highlighting those cases, however, it is necessary to summarize several decisions from the U.S. and California Supreme Courts in 2015 that directly affect employers and employees.

U.S. Supreme Court

In 2015, the Supreme Court issued a quintet of opinions impacting employment law.

Interestingly, the most important of these decisions occurred in a non-employment case—*Obergefell v. Hodges*.[1] In a divided 5-4 decision authored by Justice Kennedy (and issued on June 26th—the second and twelfth anniversaries, respectively, of Justice Kennedy's decisions in *United States v. Windsor*[2] and *Lawrence v. Texas*[3]), the Court held that the right to marry is a fundamental right that cannot be denied to same-sex couples. This case will have profound implications in many areas, including EEO employment (given that many state and local employment anti-discrimination laws define "marital status" as a protected class), family and medical leaves, and employee benefits such as health insurance and COBRA rights.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*,[4] the Supreme Court held that Title VII of the Civil Rights Act of 1964[5] prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could otherwise accommodate without undue hardship, regardless of whether the applicant expressly informed the prospective employer of the need for such an accommodation. Under this decision, for example, if an employer decides not to hire an orthodox Jewish applicant because the employer believes (but is not certain) that the applicant may observe the Sabbath and thus be unavailable to work on Saturdays, the employer violates Title VII.

Mach Mining, LLC v. EEOC[6] concerned whether and how the courts could review the conciliation efforts of the Equal Employment Opportunity Commission (EEOC) under Title VII. Resolving a split between the circuits, the Court held that, although the courts may review whether the EEOC satisfied its statutory obligation to conciliate in good faith before filing suit, the scope of review is quite narrow and a sworn affidavit from the EEOC in which it states that it has performed its obligations but that its efforts have failed will usually suffice. However, if the employer proffers credible evidence that the EEOC did not properly satisfy its conciliation obligation, a court must conduct a fact-finding hearing. Should the court find in favor of the employer, the court must stay the underlying action and order the EEOC to fulfill its conciliation obligation.

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In *Young v. UPS*,[7] the Supreme Court determined the meaning of the second clause of the Pregnancy Discrimination Act (PDA),[8] which states:

> women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.

Peggy Young, a driver for UPS, argued that the company violated the second clause of the PDA by refusing to accommodate medical restrictions resulting from her pregnancy (she was precluded from lifting more than 20 pounds). Young alleged that UPS accommodated other drivers who were similar to her in their "inability to work." She therefore argued that UPS was required to accommodate her as well. UPS argued that the "other persons" who it accommodated were: (1) drivers who became disabled on the job; (2) drivers who lost their Department of Transportation certifications; and (3) those who suffered from a disability under the Americans with Disabilities Act of 1990.[9] UPS claimed that because Young did not fall within any of those categories, it did not discriminate against her on the basis of pregnancy, but rather treated her as it treated all "other" *relevant* "persons." Justice Scalia sensibly and properly concluded that the second clause of the PDA could have two—and only two—possible interpretations: the one offered by Young and the one offered by UPS. In Scalia's view, UPS offered the more convincing interpretation. Justice Scalia, however, wrote the dissent. The majority, in an opinion authored by Justice Breyer, opted for a *third* interpretation. This prompted at least one observer to quote Wolfgang Ernst Pauli, the Nobel Prize-winning, Austrian-born Swiss theoretical physicist, who commented on a colleague's erroneous interpretation: "Das ist nicht nur nicht richtig, es ist nicht einmal falsch!" ("That is not only not right, it is not even wrong!") The majority's interpretation was so absurd that it induced a scathing dissent from Justice Scalia.[10]

Department of Homeland Sec. v. MacLean[11] serves as an absolutely stunning reminder that, in this author's opinion, while the U.S. Supreme Court is generally hostile to employment claims, it has a soft spot in its otherwise hard heart for employment retaliation claims. Indeed, plaintiff employees have now prevailed in 10 of the last 11 retaliation cases decided by the Supreme Court since 2005. The Whistleblower Protection Act of 1989 (WPA) generally provides whistleblower protections to federal employees who disclose information revealing "any violation of any law, rule, or regulation," or "a substantial and specific danger to public health or safety."[12] An exception exists, however, for disclosures that are "specifically prohibited by law." In *Maclean*, a federal air marshal who publicly disclosed that the Transportation Security Administration (TSA) decided to cut costs by removing air marshals from certain long-distance flights thought by the Department of Homeland Security to be at high risk for a terrorist attack, sued the TSA, claiming that he was fired for blowing the whistle on the TSA's decision. The TSA argued that Maclean could not seek whistleblower protection because regulations prohibited the unauthorized disclosure of "sensitive security information." The Supreme Court held that Maclean could proceed with his lawsuit because, although his disclosure violated TSA's regulations, it was not "specifically prohibited by law." In other words, the Court found that to lose the protections of the WPA, Maclean's disclosure must have been "prohibited by a statute rather than by a regulation."

California Supreme Court

In 2015, the California Supreme Court issued a trinity of employment cases—two of which were highly favorable to employees.

First, in *Williams v. Chino Valley Indep. Fire Dist.*,[13] the Court held that the Fair Employment and Housing Act (FEHA)[14] governs cost awards in FEHA actions (as opposed to Code of Civil Procedure section 1032), thereby allowing trial courts discretion to award both attorney fees and costs to prevailing employee-plaintiffs under FEHA, subject to the rule of *Christiansburg*.[15] Consequently, an unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought, or continued litigating, the action without an objective basis for believing it had potential merit.

Second, in *Mendiola v. CPS Sec. Solutions, Inc.*,[16] the court decided whether the California wage order[17] covering security guards required their employer to pay them for two types of time spent at their assigned worksites: (1) on-call time, and (2) sleep time. Regarding on-call time, the employer argued that because the guards had the freedom to engage in personal activities—including sleeping, showering, eating, reading, watching television, and browsing the Internet—they were not under the employer's control and were therefore not entitled to compensation. As to sleep time, the employer argued that all industry-specific wage orders implicitly incorporated a federal regulation that permits the exclusion of eight hours of sleep time from employees' 24-hour shifts. Recognizing that an employer may hire an employee to do nothing or to wait to do something, the California Supreme Court rejected the employer's arguments when it held that guards were entitled to compensation for both on-call time and sleep time, despite the fact that they signed an agreement to the contrary.

In stark contrast to the pro-employee decisions in *Williams* and *Mendiola*, the California Supreme Court issued a pro-employer decision in *Richey v. AutoNation, Inc.*[18] that left more issues unresolved than it answered. Avery Richey worked for AutoNation, which had a policy that precluded outside employment of any kind (including self-employment) while on an approved leave. During his non-work time, Richey began plans to open a seafood restaurant. Richey hurt himself moving furniture at his home and took medical leave under the California Family Right Act (CFRA).[19] During his leave, his supervisor reiterated that outside employment of any kind, including self-employment, while on an approved leave was not allowed.

AutoNation, not trusting Richey, dispatched an employee to spy on him. The employee purportedly witnessed Richey working at the restaurant. AutoNation fired Richey for engaging in outside employment while on a leave of absence, in violation of company policy. Richey sued AutoNation for violating the CFRA. AutoNation's motion to compel arbitration was granted. The arbitrator found that regardless of whether Richey actually violated the no-outside-employment-while-on-leave policy, AutoNation had an "honest belief" that Richey violated the policy and therefore was not liable. The trial court confirmed the arbitrator's award. The Second Appellate District vacated the award, finding that California does not recognize the "honest belief" defense. The California Supreme Court concluded that although the arbitrator may have committed error in approving the "honest belief" defense—a defense that it described as untested in the California courts and the validity of which it refused to weigh—it found that any error that may have occurred did not deprive the employee of an unwaivable statutory right, because Richey violated the policy prohibiting outside employment while he was on medical leave. Bizarrely, the supreme court indicated in a footnote that it was expressing no opinion as to whether AutoNation's policy was an illegal restraint on Richey's CFRA leave because he supposedly forfeited that argument when he failed to make it to the trial court.

The Best Employment Cases of 2015 for Employees

Emerging from the heated and ongoing arbitration wars (in which more decisions may be issued in California than all other states combined[20]) is, perhaps, the best decision of 2015 for employees—*Sakkab v. Luxottica Retail N. Am., Inc.*[21] In *Sakkab*, the Ninth Circuit considered an issue of first impression regarding the scope of Federal Arbitration Act (FAA)[22] preemption and the meaning of the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[23]— i.e., whether the FAA preempts the rule in *Iskanian v. CLS Transportation Los Angeles, LLC*[24] that bars the waiver of representative claims under California's Private Attorneys General Act of 2004 (PAGA).[25] To the dismay of the employment defense bar, and the delight of the plaintiff bar, the Ninth Circuit concluded that the *Iskanian* rule "does not stand as an obstacle to the accomplishment of the FAA's objectives, and is not preempted."[26] This decision, unless overturned by the U.S. Supreme Court, will allow employees to vindicate employer Labor Code violations that would otherwise go unpunished, not only because bringing such claims in arbitration on an individual basis does not make economic sense but also because the vast majority of employees would never learn about the violations. *See also Garrido v. Air Liquide Indus. U.S. LP*[27] (holding in a putative class action case that, although the arbitration agreement between the employee and his employer, which also prohibited class actions, stated that the FAA applied, the FAA did not apply because the employee truck driver transported goods across state lines; therefore, application of the factors in *Gentry v. Superior Court*[28] precluded arbitration of employee's individual claim).

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Rivaling *Sakkab* for the best employment case of 2015 for employees is *Nigro v. Sears, Roebuck & Co.*[29] In *Nigro*, the district court granted the defendant employer's motion for summary judgment in a disability discrimination case. The district court held that the plaintiff employee could not use his own declaration to create genuine issues of material fact precluding summary judgment. The Ninth Circuit reversed, holding that a plaintiff can, in fact, use her own declaration—even if uncorroborated and "self-serving"—to create genuine issues of material fact, thereby defeating summary judgment. In so doing, the Ninth Circuit reiterated that "it should not take much for plaintiff in a discrimination case to overcome a summary judgment motion."[30] The Ninth Circuit also held that later start times and finite medical leaves may be reasonable accommodations.

Another delightful (and long overdue) decision comes from the EEOC—*Baldwin v. Department of Transp.*[31] In *Baldwin*, the EEOC ruled that Title VII forbids discrimination on the basis of sexual orientation. Similarly marvelous is a case involving the "after-acquired" (or "after-manufactured") evidence defense—*Horne v. District of Council 16 Int'l Union of Painters and Allied Trades.*[32] In *Horne*, an applicant for a union organizer position brought a FEHA action against his union for alleged racial discrimination. The union prevailed on summary judgment, arguing that evidence it obtained in discovery—an admission that the plaintiff was a convicted felon—meant that the plaintiff was legally barred from holding the organizer position under the federal Labor-Management Reporting and Disclosure Act.[33] The court of appeal reversed, finding that under *Salas v. Sierra Chem. Co.*,[34] "after-acquired evidence cannot be used as an absolute bar to a worker's FEHA claims."[35] Rather, after-acquired evidence could only be used during the damages portion of the trial.

Hirst v. City of Oceanside[36] is an important opinion interpreting a provision within FEHA that prohibits employers from harassing a "person providing services pursuant to a contract."[37] In *Hirst*, the plaintiff, a phlebotomist, was an employee of a company that had a contract with the defendant city to provide phlebotomist services to its police department. The plaintiff sued the defendant city, alleging that a police officer sexually harassed her as she provided phlebotomist services. After the plaintiff prevailed at a jury trial, the city moved for a judgment notwithstanding the verdict on the ground that the plaintiff was not a "person providing services pursuant to a contract"; rather, the defendant city only had a contract with the plaintiff's employer—not her. The city lost on its JNOV motion and then again before the court of appeal, which concluded, "there is no basis in [FEHA] to preclude recovery for an individual who provided services under a contract merely because he or she is also employed by a separate entity with respect to the work performed."[38]

Finally, the last "best" case for employees—*Royal Pac. Funding Corp. v. Arneson*[39] —brings to mind an old Liberace saying: "Too much of a good thing is . . . wonderful." In *Arneson*, an employer, who appealed from a Labor Commissioner award for unpaid commissions, dismissed the appeal and paid the award after the employee retained counsel who engaged in "very effective saber-rattling by serving [the employer] notice that [the employee] was reserving the right to present claims beyond just unpaid commissions."[40] At issue was whether the employee's attorney was entitled to fees. The trial court concluded that because there was no award "on the merits," fees could not be awarded. Correctly recognizing such a ruling "incentivizes employers to file frivolous appeals and then withdraw them at the last minute so as to inflict gratuitous legal costs on an employee who has been otherwise successful at the Labor Commission level,"[41] the court of appeal reversed and awarded fees to the employee (both on the case below and the appeal itself).

The Worst Employment Cases of 2015 for Employees

The "worst" employment decisions of 2015 for employees were few and far between, and largely confined to the removal realm. Before addressing those cases, we highlight a few others.

In *Dickson v. Burke Williams, Inc.*,[42] the court of appeal addressed what the California Legislature meant when mandating that employers "shall take all reasonable steps to prevent harassment from occurring."[43] Relying on *Trujillo v. North Cnty. Transit Dist.*,[44] the court of appeal's interpretation rendered the provision effectively meaningless, as it reasoned there cannot be a valid claim for failure to take reasonable steps necessary to prevent sexual harassment if the jury finds that the conduct that occurred was not sufficiently severe or pervasive as to result in liability.

In *Cifuentes v. Costco Wholesale Corp*,[45] the plaintiff prevailed on a breach of employment contract claim and received a judgment in the amount of $325,692. Costco paid the judgment but withheld federal and state payroll taxes from the award. The plaintiff then claimed the judgment was not satisfied, citing *Lisec v. United Airlines, Inc.*[46] The court of appeal held that Costco properly withheld payroll taxes from the award of lost wages.

Just as Darth Vader was a frightening figure in Star Wars, *Bell Atlantic Corp. v. Twombly*[47] and *Ashcroft v. Iqbal*[48] are scary decisions for plaintiffs in litigation, because they can and do result in the dismissal of meritorious claims on the grounds that the courts do not believe those claims have been pled with sufficient factual specificity. *Landers v. Quality Commc'ns, Inc.*[49] illustrates the perils of *Iqbal/Twombly*. Greg Landers, a former employee of Quality Communications, brought an action on behalf of himself and other similarly situated employees against his former employer, alleging failure to pay minimum and overtime wages in violation of the Fair Labor Standards Act (FLSA). The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 8 and *Iqbal/Twombly* for failure to state a plausible claim, because the complaint did "not make any factual allegations providing an approximation of the overtime hours worked, plaintiff's hourly wage, or the amount of unpaid overtime wages." Landers appealed. The Ninth Circuit affirmed, holding that in order to survive a motion to dismiss, a plaintiff asserting a claim for overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek. This is an unreasonable holding for two reasons. First, if an employee sues for unpaid FLSA overtime, the employee obviously alleges she or he worked more than forty hours in a given workweek without being compensated for the overtime hours. Second,

with regard to precisely how many overtime hours were worked, that figure is something that should be in the possession of the employer and/or can be determined during discovery. There is no reason that that number should have to be pled in the complaint, in this author's opinion.

Finally, 2015 saw the publication of an unusual number of important removal cases. These cases, taking their cue from, and following quickly on the heels of, the U.S. Supreme Court's end-of-the-2014-year decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*,[50] significantly expands the ability of defendants to remove cases from state court to federal court. In *Dart Cherokee*, the Supreme Court appreciably enhanced the ability of defendants to remove cases to federal court, holding not only that "a defendant's notice of removal in diversity cases need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold" but also that "[e]vidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation."[51] In *Ibarra v. Manheim Investments, Inc.*[52] and *LaCross v. Knight Transp. Inc.*,[53] the Ninth Circuit issued two opinions regarding the amount of proof that a defendant must allege to establish the $5 million amount-in-controversy requirement for removing a class action lawsuit under the Class Action [Un] Fairness Act of 2005 (CAFA).[54] Taken together, these cases clarify that while the defendant's burden to set forth factual allegations about the amount in controversy is a minimal one, and can even be based on guesswork or assumptions, the allegations must be based on *reasonable* assumptions. In *Jordan v. Nationstar Mortgage LLC*,[55] a non-employment case, the Ninth Circuit held that a case becomes removable under CAFA when the CAFA ground for removal is first disclosed, even if an earlier pleading, document, motion, order, or other paper revealed an alternative basis for federal jurisdiction. And, in *Reyes v. Dollar Tree Stores, Inc.*,[56] the Ninth Circuit held that a defendant who is unsuccessful in removing a putative class action to federal court because it did not meet the CAFA $5,000,000 amount-in-controversy requirement, may be allowed a "second bite at the apple," if it can demonstrate that a class certification order created a new occasion for removal. ⚖

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Endnotes

1. 135 S. Ct. 2584 (2015).
2. 133 S. Ct. 2675 (2013).
3. 539 U.S. 558 (2003).
4. 135 S. Ct. 2028 (2015).
5. 42 U.S.C. §§ 2000e et seq.
6. 135 S. Ct. 1645 (2015).
7. 135 S. Ct. 1338 (2015).
8. 42 U.S.C. § 2000e(k).
9. 42 U.S.C. §§ 12101 et seq.
10. 135 S. Ct. at 1361 (citation omitted).
11. 135 S.Ct. 913 (2015).
12. 5 U.S.C. § 2302(b)(8)(A).
13. 61 Cal. 4th 97 (2015).
14. Cal. Gov't Code § 12965(b).
15. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978).
16. 60 Cal. 4th 833 (2015).
17. IWC Wage Order 4.
18. 60 Cal. 4th 909 (2015).
19. Cal. Gov't Code §§ 12945.1–12945.2.
20. This "statistic" is based on the author's rough Westlaw search and anecdotal discussions with colleagues in other jurisdictions.
21. 803 F.3d 425 (9th Cir. 2015).
22. 9 U.S.C. §§ 2 *et seq.*
23. 563 U.S. 333 (2011).
24. 59 Cal. 4th 348 (2014).
25. Cal. Lab. Code §§ 2698 *et seq.*
26. *Sakkab*, *supra* n.21 at *3.
27. 241 Cal. App. 4th 833 (2015).
28. 42 Cal. 4th 443 (2007).
29. 784 F.3d 495 (9th Cir. 2015).
30. *Id*. at 499.
31. EEOC No. 0120133080, 2015 WL 4397641 (July 16, 2015), accessible at http://www.eeoc.gov/decisions/0120133080.pdf.
32. 234 Cal. App. 4th 524 (2015).
33. 29 U.S.C. § 504(a).
34. 59 Cal. 4th 407 (2014).
35. 234 Cal. App. 4th at 541.
36. 236 Cal. App. 4th 774 (2015).
37. Cal. Gov't Code § 12940(j)(1).
38. 236 Cal. App. 4th at 791.
39. 239 Cal. App. 4th 1275 (2015).
40. *Id*. at 1277.
41. *Id*. at 1280.
42. 234 Cal. App. 4th 1307 (2015).
43. Cal. Gov't Code § 12940(j)(1).
44. 63 Cal. App. 4th 280 (1998).
45. 238 Cal. App. 4th 65 (2015).
46. 10 Cal. App. 4th 1500 (1992).
47. 550 U.S. 544 (2007).
48. 556 U.S. 662 (2009).
49. 771 F.3d 638 (2015).
50. 135 S. Ct. 547 (2014).
51. *Id*. at 554.
52. 775 F.3d 1193 (9th Cir. 2015).
53. *Id*. at 1200.
54. 28 U.S.C. § 1332(d).
55. 781 F.3d 1178 (9th Cir. 2015).
56. *Id*. at 1185.