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2012 The best and worst employment cases

A brief overview of the cases that shaped the year in employment law

As 2013 begins, we should reflect on some of the best and worst employment cases of 2012 and consider how they can help and/or hurt our clients during the coming year. Luckily, 2012 brought us more pro-employee cases than usual. Given that the courts are now deciding employment cases on a nearly daily basis, there were quite a few candidates for inclusion in this article. The cases highlighted here are neither necessarily the best nor the worst, but the ones that I believe would be of the most utility to the employment litigator. My screening process purged many deserving arbitration, class action, and Private Attorney General Act ("PAGA") cases because they have lately tended to have extremely short shelf-lives. Finally, I eliminated those cases that have received so much publicity that everyone is bound to know about them. (See e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (clarifying California meal and rest break requirements and, in an important concurrence by Justice Werdegar – possibly foreshadowing the outcome in *Duran v. U.S. Bank National Assn.*, (S200923) – opining that "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability [in wage and hour cases].")

The best

Rather than litigating fairly and winning or losing on the merits, some defense counsel prefer to win by hook or by crook. Unfortunately, some courts have been happy to oblige. No place is this more true than in employer efforts to force employees into binding arbitration while, at the same time, precluding them from bringing their claims as class/collective actions. Although 2012 brought a raft of cases on this subject, both pro-employee and anti-employee, I want to mention just two tiny rays of light on this front. First, the National Labor Relations Board ("NLRB") issued a fantastic decision – *D.R. Horton* (Jan. 3, 2012) 357 NLRB No. 184 – holding that the National Labor Relations Act ("NLRA") renders class-action waivers in employment contracts unenforceable. While the courts have split on whether or not to apply *D.R. Horton*, a nice book-end is *24 Hour Fitness, Inc. and Alton J. Sanders*, NLRB Case No. 20-CA-035419 (Nov. 6 2012). In *24 Hour Fitness*, an administrative law judge applied *D.R. Horton* and held that the company's arbitration agreement barring class actions was unlawful under NLRA in spite of a clause in the policy allowing employees to opt out of it if they did so within 30 days of hire. These decisions strongly suggest that most employment attorneys need to bone up on the NLRA and learn how to file unfair labor act charges with the NLRB.

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If you are unlucky enough to be stuck in arbitration, the massive odds against you improved a fraction last year with *Richey v. AutoNation, Inc.* (2012) 210 Cal.App.4th 1516. Avery Richey, a sales manager at Power Toyota of Cerritos, was fired four weeks before the expiration of his approved medical leave under the Moore-Brown-Roberti Family Rights Act ("CFRA"). Richey sued Power Toyota's parent company, AutoNation, Inc., alleging that his rights under CFRA had been violated. His claims were then submitted to arbitration under the terms of a mandatory arbitration agreement. AutoNation argued that it fired Richey because it believed that he was misusing his leave by working part time in a restaurant he owned. The arbitrator denied Richey's CFRA claim based on the so-called "honest belief" or "honest suspicion" defense. The trial court denied Richey's motion to vacate the arbitrator's decision and granted AutoNation's petition to confirm the award. The Court of Appeal eviscerated the absurd "honest belief" defense and reversed:

> The honest belief defense accepted by the arbitrator is incompatible with California statutes, regulations and case law and deprived Richey of his unwaivable statutory right to reinstatement . . . This clear legal error abridged Richey's statutory rights under CFRA – rights based on, and intended to further, an important public policy. Accordingly, under the principles set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* and *Pearson Dental Supplies, Inc. v. Superior Court*, the award must be vacated.

[*Editor's Note – Shortly after this article was written, the California Supreme Court granted review in* Richey, *which automatically depublishes the* Richey *opinion.*]

Assuming you can leap over the arbitration hurdle and make it to the courthouse, you have to hope that the doors have not already been slammed shut by the most pro-business U.S. Supreme Court since the 1930s (and, if you don't believe me, ask Erwin Chemerinsky, Dean of the University of California, Irvine School of Law (see http://www.ocregister.com/news/court-371253-chemerinsky-supreme.html).)

In this regard, the lower courts have been using the Supreme Court's "terrible twosome" – *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544 and *Ashcroft v. Iqbal* (2009) 556 U.S. 662 – to unfairly dismiss many meritorious cases at the pleading stage. The Ninth Circuit's decision in *Sheppard v. David Evans & Assoc.* (9th Cir. 2012) 694 F.3d 1045, however, should staunch some of the bleeding caused by *Iqbal/Twombly*. In *Sheppard*, the Ninth Circuit reversed the dismissal of an Age Discrimination in Employment Act ("ADEA") lawsuit for failure to state a claim under Federal Rule of Civil Procedure 8(a)(2). In doing so, the Ninth Circuit commented that "in many straightforward cases, it will not be any more difficult today for a plaintiff to meet [her] burden than it was before the [Supreme] Court's recent decisions [in *Iqbal* and *Twombly*]." (*Id.* at 1050 (internal quotations omitted.) Plaintiff's counsel confronting arguments that the complaint is not sufficient under *Iqbal/Twombly* should cite *Sheppard* for its approval of cursorily-pled employment claims.)

Of course, when the Supreme Court hands you a pair of lemons, you should make lemonade. In this case, that means using that old adage "what's good for the goose is good for the gander" and asking the courts to apply the heightened "plausibility" pleading standard set forth in *Iqbal/Twombly* to the boilerplate affirmative defenses alleged by most defendants. And that is precisely what a pair of judges did in *Gonzalez v. Heritage Pac. Fin., LLC* (C.D. Cal. 2012) 2012 WL 3263749, and *O'Sullivan v. AMN Services, Inc.* (N.D. Cal. 2012) 2012 WL 2912061.

In *Gonzalez*, the Honorable Judge Otis D. Wright II explained that an FRCP 12(f) motion to strike affirmative defenses is both appropriate and warranted where defendants assert "boilerplate" affirmative defenses with no supporting facts. Similarly in granting an FRCP 12(f) motion in *O'Sullivan* to strike the affirmative defenses contained in a complaint that had been removed from state court, Magistrate Judge Joseph C. Spero of the Northern District of California explained that "boilerplate" affirmative defenses should be stricken not only because such defenses fail to comply with the Federal Rules of Civil Procedure but also because they will subject plaintiffs to expensive and potentially unnecessary and irrelevant discovery. As an aside, I also recommend that plaintiff employment attorneys challenge boilerplate affirmative defenses in state court by way of demurrer.

Another "bar the door" tactic used by defendants is to argue that court lacks jurisdiction to hear the lawsuit because the plaintiff failed to properly exhaust his/her administrative remedies. Ever since Phyllis Cheng became the Director of the California Department of Fair Employment and Housing ("DFEH"), she has attempted to implement common-sense, twenty-first century technological solutions (such as the Department's online automated right-to-sue system) to ease the administration exhaustion requirements of the Fair Employment and Housing Act ("FEHA").

Unfortunately, these technological solutions have provided fodder with which defense attorneys have argued that there was a failure to exhaust. In *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, CAALA member Carney Shegerian filed his client's DFEH complaint through the DFEH's online automated system. Paul Hastings, representing UPS, moved for summary judgment on the ground that Carney failed to properly verify Mr. Rickard's DFEH complaint. That is, Paul Hastings argued that Carney's electronic submission of his signature through the DFEH's automated right-to-sue system was insufficient. Apparently, Paul Hastings believed that Carney should have printed out the complaint generated by the DFEH's online automated system, taken a hand-cut goose quill pen, dipped it into his gold or silver inkwell, signed the complaint, and then had a white-gloved messenger in horse-drawn carriage personally deliver it to the DFEH. Although the trial judge was fooled by the defendant's chicanery, the Court of Appeal sensibly

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concluded that Carney had properly filed Mr. Rickard's complaint.

If an administrative exhaustion argument is futile, employers will argue that the plaintiffs' claims are precluded because they aren't technically "employees" and, therefore, they are not protected by any employment laws. Twenty-twelve was a good year for plaintiffs seeking to avert such arguments. For example, in *Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, the Court of Appeal held that non-employee partners may assert FEHA claims for retaliation for opposing the harassment of employees. Equally favorably to plaintiffs, in *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2002) 667 F.3d 1318, the Ninth Circuit held that California law (rather than the less employee-friendly laws of other states dictated by contractual choice-of-law provisions) must be applied when determining whether a plaintiff is an employee or an independent contractor.

A non-employment case – *Monarrez v. Automobile Club of Southern California* (2012) 211 Cal.App.4th 177 – helps explain why plaintiffs want California law to be used in employee versus independent contractor determinations. In *Monarrez*, the Court of Appeal enunciated multiple principles helpful to plaintiffs including: (1) the label placed on the relationship between the parties is *not* dispositive; (2) if one of the parties has the right to control and supervise the actions of another (even if that right to control is not exercised and there is no actual supervision), the relationship is one of employment rather than independent contractor; and, most importantly, (3) the right to terminate the relationship at any time is the single most important factor in showing that the relationship is that of employer-employee. [*Editor's Note. Sorry, the California Supreme Court has also granted review in* Monarrez.]

Another helpful case on the employee versus independent contractor issue is the Court of Appeal's unpublished opinion in *Bradley v. Networkers Int'l, LLC* (2012) 2012 WL 6182473. You cannot cite it in State court, but you can borrow its analysis. *Bradley* is also helpful for class-certification issues; it holds not only that the question of independent contractor status is one that generally turns on common issues but also, importantly, that an employer's lack of a meal or rest-period policy can provide sufficient commonality for class certification.

When defendants are stuck with the fact that the plaintiff is an employee, they will often attempt to argue that employees can't bring certain claims. An example of this strategy occurred in *Ventura v. ABM Industries Incorporated* (2012) 2012 WL 6636255 (Cal. Ct. App. 2d Dist., Div. 5), where defendant ABM Industries argued that the plaintiff employee could not bring a Civil Code section 51.7 claim (providing individuals with the right to be free from violence or intimidation) because it was part of the Unruh Act and the California Supreme Court has held that the Unruh Act does not apply to employment cases. The Court of Appeal correctly held that the section 51.7 is *not* part of the Unruh Act. The Court of Appeal further held that the plaintiff could bring the claim in connection with her sexual harassment allegations even though the individual defendant harasser did not hate her (he "loved" her so much that he wanted to have unconsented sexual relations with her).

Unable to keep a plaintiff out of the courthouse, some defendants will attempt to scare the plaintiff into "voluntarily" leaving it by suing or threatening to sue. Better yet, some defendants will use their political influence to convince a U.S. Attorney to criminally prosecute the plaintiff (at the expense of U.S. taxpayers). Until the Ninth Circuit's *en banc* decision in *U.S. v. Nosal* (9th Cir. 2012) 676 F.3d 854, the easiest way to accomplish this goal was for an employer to allege that the employee violated the employer's so-called "use restrictions." "Use restrictions" in the employment context are essentially those policies that employers promulgate in their employee handbooks or electronic communications policies that prohibit the use of work computers, work e-mail, and/or the Internet for nonbusiness purposes. So, if an employee used a work computer for a non-work-related purpose, the employer could literally make a "federal offense" of it and have the employee criminally prosecuted under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 *et. seq.* Writing for a 9 to 2 *en banc* panel, Judge Kozinski, in one of his typical tour-de-force opinions, summarized the issue before the court thusly:

> Computers have become an indispensable part of our daily lives. We use them for work; we use them for play. Sometimes we use them for play at work. Many employers have adopted policies prohibiting the use of work computers for nonbusiness purposes. Does an employee who violates such a policy commit a federal crime? How about someone who violates the terms of service of a social networking website?

(676 F.3d at 856.)

Judge Kozinski, focusing on the potential for the overbroad and arbitrary application of the CFAA, held that the law did *not* criminalize the violation of "use restrictions":

> In the case of the CFAA, the broadest provision is subsection 1030(a)(2)(C), which makes it a crime to exceed authorized access of a computer connected to the Internet without any culpable intent. Were we to adopt the government's proposed interpretation, millions of unsuspecting individuals would find that they are engaging in criminal conduct. Minds have wandered since the beginning of time and the computer gives employees new ways to procrastinate, by g-chatting with friends, playing games, shopping or watching sports highlights. Such activities are routinely prohibited by many computer-use policies, although employees are seldom disciplined for occasional use of work computers for personal purposes. Nevertheless, under the broad interpretation of the CFAA, such minor dalliances would become federal crimes. While it's unlikely that you'll be prosecuted for watching Reason TV on your work computer, you *could* be.

(676 F.3d at 859-60 [emphasis in original]).

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If an employer can't prevent an employee from pursuing her claims, it undoubtedly will file a motion for summary judgment seeking to dispose of the case before a jury can ever hear it. Fortunately, several wonderful summary judgment cases came down in 2012. The first, *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, is an absolutely fantastic, hostile work-environment summary-judgment case. In it, the California Court of Appeal reiterated a rule of law that must be prominently featured in every hostile work-environment summary-judgment opposition: "Whether an employee was subjected to a hostile work environment is ordinarily one of fact." (*Id.* at 959.) Citing *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, the court also held that evidence of discrimination can be relevant toward proving a hostile workplace. The second helpful summary judgment case is *Shelley v. Geren* (9th Cir. 2012) 666 F.3d 599 which held that evidence of a plaintiff's superior qualifications, standing alone, may be sufficient to prove pretext.

Even if you lose at trial, don't give up hope. You may be able to get the verdict reversed on appeal. That's exactly what happened in *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, when the trial court gave the jury a number of erroneous instructions in a "whistleblower" retaliation case. The Court of Appeal held that:

- A "whistleblower" plaintiff's motivation is irrelevant to the consideration of whether his or her activity is protected. Indeed, whistleblowing may be prompted by an employee's dissatisfaction, resentment over unfair treatment, vindictiveness, or litigiousness as well as by honest efforts to ensure that the employer is following the law.
- Disclosures of a policy that the employee *reasonably* believes violates the law are protected disclosures, whether or not there is an actual violation of the law.
- Defendant's requested instruction that "information passed along to a supervisor in the normal course of duties is not a protected disclosure" was erroneous under established California law.
- Unfortunately, the Court of Appeal also held that reporting publicly known facts is not a protected disclosure.

And, if you are unable to get the verdict reversed, you may be able to prevent the defendants from recovering their expert-witness fees. (*Baker v. Mulholland Sec. and Patrol, Inc.* (2012) 204 Cal.App.4th 776 [prevailing FEHA defendant must show plaintiff's case was frivolous in order to recover expert-witness fees].)

On the opposite end of the spectrum, two good cases came down that are helpful to the plaintiffs who prevail at trial. In *Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, the court rejected any challenge to a jury verdict made under an "inherent improbability" of the plaintiff's allegations argument. In *Fuentes*, Marcela Fuentes alleged that her supervisor had sexually harassed her by: (1) spinning her around to expose her buttocks to customers; (2) suggesting that she become a stripper or a bikini model; (3) making bets whether she was sleeping with a co-worker; and (4) asking her to go to a strip club. After a jury found in her favor, the defendant appealed, arguing that her testimony was "inherently improbable." The Court of Appeal rejected this argument commenting that inconsistencies and contradictions in trial testimony are commonplace and are left for resolution by the jury.

On an unrelated note, plaintiff counsel should use *Fuentes* to encourage defendants to settle even relatively low-value cases, since the court affirmed an attorneys' fee award of $677,000 despite the fact that the jury only awarded her $160,000. The other decision, *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, a non-employment case, is one every plaintiff's attorney with a prayer at recovering punitive damages should review. In *Bankhead*, the Court of Appeal affirmed a $4.5 million punitive-damages' award against a defendant with a *negative* net worth. In this decision, the Court of Appeal cogently explained that "net worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts." (*Id.*, 205 Cal.App.4th at p. 68.) Rather, other methods for determining wealth for punitive-damages' purposes – such as immediately available funds (cash flow and amounts that could be borrowed) – are equally valid measures.

The worst: You're really "hot" — and you're fired!

Possibly the worst ruling, but certainly the most notoriously absurd, has to be *Nelson v. James H. Knight DDS, P.C.* (Iowa 2012) 2012 WL 6652747, by an "Old Boys Club" in Iowa (also known as the Iowa Supreme Court) issued just before Christmas 2012. Melissa Nelson worked as a dental assistant for Dr. Knight. Dr. Knight complained to Ms. Nelson about his lack of sex life with his wife, asked her how often she experienced an orgasm, and told her that if she saw his pants bulging, she would know her clothing was too revealing. Eventually, Dr. Knight fired Ms. Nelson explaining that he feared he would try to have an affair with her if he did not fire her. Ms. Nelson sued for gender discrimination. The Iowa Supreme Court found that an employer may fire an employee to whom he is irresistibly attracted without engaging in gender discrimination. Quite difficult to believe that this argument would fly under FEHA, but I bet that California employers are going to start advancing it.

Twenty-twelve is likely to be remembered as the year in which defendants crafted a new line of defense to discrimination/retaliation cases – the so-called "honest, but mistaken belief" defense. In this regard, the courts have recognized that one method for a plaintiff to demonstrate pretext is to show that the employer's articulated legitimate non-discriminatory reason for the adverse employment action is false. The "honest, but mistaken belief" defense makes it extremely difficult to prove that the articulated non-discriminatory reason is false.

For example, in *Seeger v. Cincinnati Bell Tel. Co., LLC* (6th Cir. 2012) 681 F.3d 274, the defendant argued that it fired an employee on FMLA leave, not because the employee had committed fraud in connection with his application for FMLA leave (by exaggerating his

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disability), but rather that it "honestly believed" that he had engaged in such fraud regardless of whether he had actually engaged in such fraud.

Unfortunately, over a vigorous dissent, the Sixth Circuit affirmed summary judgment in favor of the defendant employer because the plaintiff employee was unable to refute the company's purported "honest belief" that he had engaged in disability fraud.

The California counterpart to *Seeger* is *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207. In *Joaquin*, the Court of Appeal held that while you can't fire an employee for complaining about sexual harassment, you can fire an employee if you "conclude" that the employee had done so falsely (*i.e.*, if you fire the employee because you "honestly but mistakenly" concluded that his complaint of harassment was false, you escape liability). Not content with its absurd holding, this activist Court of Appeal then went on to consider an issue that it admitted that not only that the parties had *not* raised but also that was completely unnecessary to its decision ("The City has not raised the issue of instructional error, and in light of our conclusion that there is no substantial evidence of retaliatory intent, we need not decide whether the jury was correctly instructed."). (*Id.* at 1229.) And it incorrectly opined that there was a "significant flaw." (Judicial Council's retaliation jury instruction (CACI 2505).)

In *Dutra v. Mercy Med. Ctr. Mt. Shasta* (2012) 209 Cal.App.4th 750, the court curtailed the rights of workers who are fired because they suffer a workers' compensation injury and held that the statute prohibiting termination of an employee for filing a workers' compensation claim (Labor Code § 132a) cannot support a common law action for wrongful termination in violation of public policy.

In *Veronese v. Lucasfilm Ltd.* (2012) 2012 WL 6628544 (Cal.Ct. App.,1st Dist., Div.2.) the court reversed a jury verdict in favor of Julie Gilman Veronese against Lucasfilm, Ltd. for, among other things, pregnancy discrimination. At trial, the court instructed the jury (based on CACI 2500) that Ms. Veronese must prove that her pregnancy was a motivating reason for her discharge. On appeal, Lucasfilm argued that the CACI instruction was wrong and, in any event, the jury should have been instructed on the so-called business judgment rule – *i.e.*, that the jury could not find discrimination "based upon a belief that Lucasfilm made a wrong or unfair decision" or "an error in business judgment." In a decision that is likely to have negative consequences for all employment discrimination/retaliation cases, the Court of Appeal held that employers are entitled to a business judgment instruction.

Making matters worse, the Court of Appeal held that the following instruction should not have been given to the jury: "A potential hazard to a fetus or an unborn child is not a defense to pregnancy discrimination." Although the Supreme Court's holding in *Automobile Workers v. Johnson Controls, Inc.* (1991) 499 U.S. 187, makes perfectly clear that this instruction was legally accurate, the Court of Appeal would apparently allow an employer to fire a pregnant employee based on its paternalistic views (*i.e.*, its business judgment) about what is best for the unborn baby. But see, *Holland v. Gee* (11th Cir. 2012) 677 F.3d 1047 (holding that an employer's so-called "good intentions" will not shield it from a pregnancy discrimination claim). The *Veronese* court refused to address Lucafilm's argument that the CACI motivating factor instruction is deficient as that issue is presently before the California Supreme Court, in *Harris v. City of Santa Monica*, (S181004).

The others

There were at least two cases that came down during 2012 that were neither *per se* good nor bad – *Yeager v. Bowlin*, 693 F.3d 1076 (9th Cir. 2012) (inability to recall information at deposition may render a subsequent declaration sham and justify grant of summary judgment) and *Coito v. Superior Court*, 54 Cal.4th 480 (2012) (California Supreme Court's latest pronouncement on the discoverability of the identities of witnesses and attorney-directed witness statements). However, all litigators should carefully review these decisions.

Here is to a healthy and prosperous 2013!

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