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The best and worst employment cases of 2015

The good, the bad, and the most useful: A look back at the year's most important employment law cases

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 within this torrent of opinions are some cases – the "best" and the "worst" (from the perspective of the plaintiff employee) – about which the employment practitioner must be aware. This article attempts to "cherry-pick" and summarize not just the most important cases from 2015 (and very early 2016) but also those that are of the most utility to the plaintiff employment practitioner.

U.S. Supreme Court

In 2015, the Supreme Court issued a quartet of employment opinions. Perhaps surprisingly, Justice Scalia took the side more favorable to the employee than the employer in three of these four decisions.

Dep't of Homeland Sec. v. MacLean ("*Maclean*") (2015) 135 S.Ct. 913, serves as an absolutely stunning reminder that, while the U.S. Supreme Court is generally hostile to employment claims, it actually favors plaintiff employees in 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." (5 U.S.C. § 2302(b)(8)(A).)

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") had decided to cut costs by removing air marshals from certain long-distance flights thought by the Department of Homeland Security to be at a 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 it had promulgated regulations prohibiting the unauthorized disclosure of what it called "sensitive security information." The Supreme Court held that Maclean could proceed with his lawsuit because, although his disclosure violated the TSA's regulations, it was not "specifically prohibited by law." That is, the court found that in order to lose the protections of the WPA, Maclean's disclosure would have had to have been "prohibited by a statute rather than by a regulation."

•Accommodating a religious practice

In *EEOC v. Abercrombie & Fitch Stores, Inc.* (2015) 135 S.Ct. 2028, Justice Scalia, writing for the majority, held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq., prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship regardless of whether the applicant has informed the employer of her need for such an accommodation. This decision will provide much needed protections for religious employees deemed by their employers to need inconvenient accommodations. 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 will observe the Sabbath and thus be unable to work on Saturdays, the employer violates Title VII.

In *Mach Mining, LLC v. EEOC* (2015) 135 S.Ct. 1645, the Supreme Court was confronted with the question of whether and how the courts could review the efforts of the EEOC to satisfy its conciliation obligations under Title VII. In a unanimous decision authored by Justice Kagan, the Supreme Court held that, while the courts may review whether the EEOC satisfied its statutory conciliation obligations, the scope of that review is quite narrow. Indeed, the court ruled that a sworn affidavit from the EEOC stating that it has performed its conciliation obligations will typically be enough to demonstrate that it has satisfied its conciliation requirement. However, the court also held that if the employer proffers credible evidence indicating 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.

•Accommodating pregnant women

In *Young v. UPS* (2015) 135 S.Ct. 1338, the Supreme Court was called upon to determine the meaning of the second clause of the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k), which provides:

> 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, sued the company, arguing that it had violated the PDA by not accommodating medical restrictions resulting from her pregnancy, which precluded her from being able to lift more than 20 pounds (UPS required drivers to lift parcels weighing up to 70 pounds). Young alleged that UPS accommodated other drivers who were similar to her in their "inability to work" and that it was required to accommodate her as well. UPS, on the other hand, argued that the "other persons" whom it had accommodated fell within three discrete classes: (1) drivers who had become disabled on the job; (2) drivers who had lost their DOT certifications; and (3) drivers who suffered from a disability covered by the ADA. UPS said that, since Young did

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not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all "other" *relevant* "persons" (i.e., those drivers who did not fall within the aforementioned categories).

In his opinion, Justice Scalia 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 his 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 – that a PDA plaintiff can prevail by showing that the employer's policies unjustifiably burden pregnant women, and evidence that the employer accommodates nonpregnant employees while failing to accommodate pregnant employees can establish the existence of that burden. The majority's adoption of a third interpretation prompted some observers to quote Wolfgang Ernst Pauli, the Austrian-born, Nobel prize winning, Swiss theoretical physicist, who, commenting on a colleague's erroneous interpretation, remarked "Das ist nicht nur nicht richtig, es ist nicht einmal falsch!" The majority's interpretation prompted Justice Scalia to issue a scathing dissent:

> Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts instead a new law that is splendidly unconnected with the text and even the legislative history of the Act. To "treat" pregnant workers "the same ... as other persons," we are told, means refraining from adopting policies that impose "significant burden[s]" upon pregnant women without "sufficiently strong" justifications. Where do the "significant burden" and "sufficiently strong justification" requirements come from? Inventiveness posing as scholarship – which gives us an interpretation that is as dubious in principle as it is senseless in practice.

(*Young v. UPS*, *supra*, 135 S.Ct. at 1361 (citation omitted).)

•Employment class actions

The Supreme Court began 2016 with a huge victory for employees in a class action case – *Tyson Foods, Inc. v. Bouaphakeo* ("*Tyson Foods*") (U.S. Mar. 22, 2016) 2016 WL 1092414. "Employment class actions are dead!" proclaimed many defense employment attorneys following *Wal-Mart Stores, Inc. v. Dukes* ("*Wal-Mart*") (2011) 564 U.S. 338 [131 S.Ct. 2541]. These defense attorneys interpreted *Wal-Mart* to mean that statistics and representative samples are impermissible means of establishing classwide liability. "Not dead yet!" rejoined plaintiff employment attorneys upon reading *Tyson Foods*. In *Tyson Foods*, the Supreme Court expressly held that "*Wal-Mart* does *not* stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability." (2016 WL 1092414, at *10 (emphasis added).) Rather, as *Tyson Foods* explains, a representative or statistical sample may, depending on the degree to which it is reliable, be used to show predominance of common questions of law or fact.

In addition to the five employment cases mentioned above, the Supreme Court also decided two non-employment cases that will have a significant impact on employers, employees, and employment class actions.

First, the non-employment law decision by the Supreme Court that will likely have the greatest impact on employers and employees is *Obergefell v. Hodges* ("*Obergefell*") (2015) 135 S.Ct. 2584. In a highly divided 5-4 decision authored by Justice Kennedy (and issued on June 26th – the second and twelfth anniversaries of Justice Kennedy's decisions in *United States v. Windsor* (2013) 133 S.Ct. 2675 and *Lawrence v. Texas* (2003) 539 U.S. 558, the court held that the right to marry is a fundamental right and that couples of the same sex may not be deprived of that right. *Obergefell* will have profound implications for employers in many areas including anti-discrimination (many state and local anti-discrimination laws treat "marital status" as a protected class and, following *Obergefell*, same-sex spouses will have the protections under those laws), family and medical leaves, and employee benefits including health insurance and COBRA rights.

Second, in *Campbell-Ewald Co. v. Gomez* ("*Campbell-Ewald*") (2016) 136 S.Ct. 663, the court held that, under basic contract principles, an unaccepted offer to satisfy the named plaintiff's individual claim is *not* sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated. *Campbell-Ewald* puts to rest a defense strategy in class action cases to end those cases by making an offer of judgment to the named plaintiff pursuant to Federal Rule of Civil Procedure 68 and, when the plaintiffs fail to accept it, move to dismiss arguing that the plaintiffs' case is moot because the plaintiff was provided with complete relief.

The Ninth Circuit

With the exception of several decisions involving the removal of cases from state to federal court, the Ninth Circuit generally issued pro-employee decisions. Perhaps the most important employment decision to come from the Ninth Circuit in 2015 is *Sakkab v. Luxottica Retail N. Am., Inc.* ("*Sakkab*") (9th Cir. 2015) 803 F.3d 425. In *Sakkab*, the Ninth Circuit was presented with an issue of first impression regarding the interplay between Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 *et seq.*, preemption and the U.S. Supreme Court's decision in *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. In particular, the Ninth Circuit was asked to determine whether the FAA preempts the rule announced by the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC* ("*Iskanian*") (2014) 59 Cal.4th 348, which barred the waiver of representative claims under California's Private Attorneys General Act of 2004 ("PAGA"), California Labor Code section 2698 et seq.

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." (*Sakkab*, *supra*, 803 F.3d at 427.) This decision, unless overturned by the U.S. Supreme Court, will allow employees to vindicate certain Labor Code violations that would otherwise go unpunished

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because the employee signed an arbitration agreement that bars representative actions. Where an agreement bars representative claims, violations often go unpunished not only because arbitrating such claims on an individual basis does not make economic sense, but also because the vast majority of employees would never learn about the violations.

Following closely on the heels of *Sakkab* for the distinction of being the most pro-employee employment case of 2015 is *Nigro v. Sears, Roebuck & Co.* ("*Nigro*") (9th Cir. 2015) 784 F.3d 495. In *Nigro*, a disability discrimination, failure to accommodate, and failure to engage in the interactive process case, the defendant moved for summary judgment arguing that the plaintiff failed to proffer any evidence in support of his claims. The plaintiff, who suffered from ulcerative colitis, opposed the defendant's motion arguing that the following evidence, established by his own declaration testimony, created a triable issue of material fact because, in response to his request for accommodation: (1) a Sears General Manager told him "[i]f you're going to stick with being sick, it's not helping your situation. It is what it is. You're not getting paid, and you're not going to be accommodated"; and (2) his immediate supervisor told him that a Sears District General Manager said, shortly after the plaintiff's accommodation request, "I'm done with that guy."

The district court disregarded the plaintiff's evidence because the sole "source of this evidence is [the plaintiff's] own self-serving testimony" and granted the defendant employer's motion for summary judgment. The Ninth Circuit reversed, holding that a plaintiff can, in fact, use his 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 a plaintiff in a discrimination case to overcome a summary judgment motion." The Ninth Circuit also held that later start times and finite medical leaves may be reasonable accommodations.

•Restaurant tips

In a very recent decision roiling the hospitality industry, the Ninth Circuit, in *Oregon Rest. and Lodging Ass'n v. Perez* (9th Cir. Feb. 23, 2016) 2016 WL 706678, upheld a Department of Labor regulation, 76 Federal Register 18,832, 18,841-42 (Apr. 5, 2011), that bars restaurant and hospitality employers from including kitchen staff in "tip pools." Under this case, employers are not allowed to form mandatory tip pools that include anyone who does not "customarily and regularly receives tips."

Rosenfield v. GlobalTranz Enters., Inc. ("*GlobalTranz*") (9th Cir. 2015) 811 F.3d 282, is one of those cases that doesn't neatly fit into a "best" or "worst" box. It has some helpful language but it could have been a lot better (or worse). At issue in *GlobalTranz* is the interplay between statutes which prohibit retaliation against employees for reporting conduct that they reasonably believe to be illegal and employees with job duties and responsibilities that include ensuring compliance with these same statutes. The Ninth Circuit created a highly fact-intensive test to determine whether managers may state a claim for retaliation even if making such reports was part of his or her job duties. Under this test, a manager may state a retaliation claim regardless of her job duties so long as the employer had "fair notice" that she was "making a complaint that could subject [it] to a later claim of retaliation." The Ninth Circuit explained that the employer must be able to "understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."

As Darth Vader was a frightening figure in Star Wars, *Bell Atlantic Corp. v. Twombly* ("*Twombly*") (2007) 550 U.S. 544 [127 S.Ct. 1955], and *Ashcroft v. Iqbal* ("*Iqbal*") (2009) 556 U.S. 662 [129 S.Ct. 1937], are scary decisions for plaintiffs because they can and do result in the dismissal of meritorious claims where courts do not believe those claims have been pled with sufficient factual specificity to demonstrate their plausibility. In *Twombly* and *Iqbal*, the U.S. Supreme Court imposed a plausibility requirement on the federal pleading rules: Complaints must not only set forth the elements of a claim, they must contain enough factual content to make the claim plausible on its face.

•Minimum wage and overtime violations

Landers v. Quality Commc'ns, Inc. ("*Landers*") (9th Cir. 2015) 771 F.3d 638, illustrates the perils of *Iqbal/Twombly* for plaintiffs alleging minimum wage or overtime violations. 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 Rule 8 of the Federal Rules of Civil Procedure for failure to state a plausible claim under *Iqbal/Twombly* 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. Although Landers alleged that he had not been paid for overtime hours worked, he failed to include details showing overtime hours worked in any given week for which he had not been paid. The court held that, while a complaint need not allege precise overtime or minimum wage calculations, the plausibility rule requires detailed allegations about at least one workweek. Further, an estimation of all unpaid overtime hours, while not "the *sine qua non* of plausibility" for FLSA claims, will help meet the plausibility requirement. (*Id*. at 645.)

The *Landers* holding is irrational for two reasons. First, plaintiffs suing for unpaid FLSA overtime, obviously, like Landers, allege that they worked more than forty hours in a workweek without

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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, as the court recognized. It is not information readily available to most plaintiffs at the pleading stage, and suggesting that complaints may fail the plausibility test if they do not contain that information leaves litigants and courts with little guidance. There is simply no reason for requiring the pleadings to contain information.

As with *Landers*, the Ninth Circuit's decision in *Alcantar v. Hobart Serv.* (9th Cir. 2015) 800 F.3d 1047, is somewhat unfortunate. In that case, the court affirmed dismissal of the plaintiff employee's Private Attorneys General Act ("PAGA") claims on the ground that the plaintiff's written notice of his PAGA claim to the Labor Workforce & Development Agency did not contain sufficient facts to comply with the statute's notice requirement. The court also affirmed denial of class certification of the plaintiff's meal and rest break claims holding that the putative class failed under Federal Rules of Civil Procedure, rule 23(b)(3) because questions as to why the service technicians missed their meal and rest breaks varied. In a bit of good news, the court ordered certification of the plaintiff's claim for commute time wages.

•Important removal cases

Finally, 2015 saw the Ninth Circuit publish 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* ("*Dart Cherokee*") (2014) 135 S.Ct. 547, significantly expand 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." (*Id*. at 554.) In *Ibarra v. Manheim Investments, Inc.* (9th Cir. 2015) 775 F.3d 1193, and *LaCross v. Knight Transp. Inc.* (9th Cir. 2015) 775 F.3d 1200, two employment cases, the Ninth Circuit issued two opinions regarding the amount of proof that a defendant must produce 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") when the amount is not facially apparent in the complaint. 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* (9th Cir. 2015) 781 F.3d 1178, 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. Finally, in *Reyes v. Dollar Tree Stores, Inc.* (9th Cir. 2015) 781 F.3d 1185, 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 million 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. (See also *Bridewell-Sledge v. Blue Cross of Cal.* (9th Cir. 2015) 798 F.3d 923 [remanding case to state court because local controversy exception to Class Action Fairness Act applied because two class actions brought against same defendants and consolidated for all purposes by California court, actions should have been treated as single action, rather than as two separate actions filed at different times].)

The EEOC

The Equal Employment Opportunity Commission (EEOC) issued one decision in 2015 which merits discussion – *Baldwin v. Dep't. of Transp.* ("*Baldwin*") (July 16, 2015) EEOC No. 0120133080, 2015 WL 4397641. In *Baldwin*, the EEOC ruled that Title VII forbids discrimination on the basis of sexual orientation. Although California law has long forbade sexual orientation discrimination, *Baldwin* marks the first time that the EEOC has taken the position that Title VII likewise forbids such discrimination.

California Supreme Court

In 2015, the California Supreme Court issued a trinity of employment cases – two of these three decisions were highly favorable to employees.

First, in *Williams v. Chino Valley Indep. Fire Dist.* ("*Williams*") (2015) 61 Cal.4th 97, the court held that the Fair Employment and Housing Act ("FEHA"), Government Code section 12965, subdivision (b), governs cost awards in FEHA actions (as opposed to Code of Civil Procedure section 1032), allowing trial courts discretion in awards of both attorney fees and costs to prevailing FEHA parties and that the trial court's discretion is bounded by the rule of *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*. (1978) 434 U.S. 412, that is, 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.* ("*Mendiola*") (2015) 60 Cal.4th 833, the court was called upon to decide whether California IWC Wage Order 4, 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.

As to on call time, the employer argued that because the guards could 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.

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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 argument and held that the guards were entitled to compensation for both on call time and sleep time.

In stark contrast to the well-reasoned and pro-employee decisions in *Williams* and *Mendiola*, the California Supreme Court issued a poorly reasoned, pro-employer decision in *Richey v. AutoNation, Inc.* ("*Richey*") (2015) 60 Cal.4th 909, that leaves more issues unresolved than it answers. Avery Richey worked for AutoNation. AutoNation 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 a "CFRA" (Gov. Code, §§ 12945.1 and 12945.2) medical leave. 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 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 a leave of absence" 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 correctly finding that California does not recognize the "honest belief" defense.

The California Supreme Court concluded that although the arbitrator may have committed error in adopting the "honest belief" defense – a defense that it described as untested in the California courts and which it refused to weigh in on the defense's viability– it found that any error that may have occurred did not deprive the employee of an un-waivable statutory right because Richey violated his employer's written 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 forbidding outside employment in this context was an illegal restraint on Richey's CFRA leave because Richey supposedly forfeited that argument by not making it before the trial court. If AutoNation's policy is illegal, then what was the point of this decision? Unfortunately, employees, employers, their counsel, and the lower courts will have to waste hundreds of thousands of hours and hundreds of millions of dollars unnecessarily litigating the issues left unresolved in *Richey* over the next decade or so.

The California Supreme Court began 2016 with another big win for plaintiff employees in *DeSaulles v. Community Hosp. of Monterey Peninsula* ("*DeSaulles*") (Cal. Mar. 10, 2016) 2016 WL 903944. In *DeSaulles*, the Supreme Court held that if a plaintiff employee receives a settlement payment in exchange for voluntarily dismissing her case, the payment constitutes a "net monetary recovery" in favor of the employee such that she is a prevailing party under Code of Civil Procedure section 1032. Accordingly, absent a settlement agreement providing to the contrary, the employee is entitled as a matter of right to recover costs.

A marvelous 2015 case involved the "after-manufactured" (or as defense counsel like to say, "after-acquired") evidence defense – *Horne v. District of Council 16 Int'l. Union of Painters and Allied Trades* ("*Horne*") (2015) 234 Cal.App.4th 524. In *Horne*, an applicant for position as a union organizer brought a FEHA action against his union alleging 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 under the federal Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 504(a), the plaintiff was legally barred from holding the organizer position. The Court of Appeal properly reversed finding that, under *Salas v. Sierra Chem. Co.* (2014) 59 Cal.4th 407, "after-acquired evidence cannot be used as an absolute bar to a worker's FEHA claims." (234 Cal.App.4th at 541.) Rather, the after-acquired evidence could only be used during the damages portion of the trial.

Hirst v. City of Oceanside ("*Hirst*") (2015) 236 Cal.App.4th 774 is an important opinion interpreting a provision within FEHA prohibiting employers from harassing a "person providing services pursuant to a contract." (Gov. Code, § 12940, subd. (j)(1).) 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 one of its police officers sexually harassed her as she was providing her 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 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 that "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." (236 Cal.App.4th at 791.)

In *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal. App.4th 141, the Court of Appeal analyzed a contractual forum selection clause and held that when employers force employees to agree to such clauses, the employers will bear the burden of proving that litigating such claims outside of California would not diminish unwaivable rights that the California Labor Code confers on all

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California employees to timely receive their proper pay, meal and rest breaks, and wage statements.

In *SunPower Corp. v. SunEdison, Inc.* (N.D. Cal. 2015) 2015 WL 5316333, a typically formidable foe to employee rights – Proskauer Rose LLP – represented a group of former employees accused of violating Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, and created wonderful law for all employees so accused. The district court dismissed the former employer's CFAA lawsuit on the grounds that the law prohibits the unauthorized access to a computer or certain information but not the mere misappropriation of confidential information.

Finally, our last "best" case – *Royal Pac. Funding Corp. v. Arneson* ("*Arneson*") (2015) 239 Cal.App.4th 1275 – brings to mind an old Liberace saying, "Too much of a good thing is . . . wonderful." In *Arneson*, an employer, who had 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." (*Id.* at 1277.)

At issue, was whether the employee's attorney was entitled to fees. The trial court concluded because there was no award "on the merits," fees could not be awarded. Correctly recognizing that 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" (*Id.* at 1280), the Court of Appeal reversed and awarded fees to the employee (both on the case below and the appeal itself).

Worst employment cases

Luckily, the "worst" employment decisions of 2015 were few and far between and largely confined to the removal realm. In *Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, the Court of Appeal addressed whether the California Legislature meant it when mandating that employers "shall take all reasonable steps to prevent harassment from occurring." (Cal. Gov. Code § 12940, subd. (j)(1).) Relying on *Trujillo v. N. Cnty. Transit Dist.* (1998) 63 Cal.App.4th 280, the Court of Appeal incorrectly held that this provision was effectively meaningless as it reasoned that there cannot be a valid claim for failure to take reasonable steps necessary to prevent sexual harassment if the jury finds that the sexual harassment that occurred was not sufficiently severe or pervasive as to result in liability.

In *Cifuentes v. Costco Wholesale Corp.* (2015) 238 Cal.App.4th 65, the plaintiff prevailed on a breach of employment contract claims and received a judgment in the amount of $325,692.07. 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.* (1992) 10 Cal.App.4th 1500. The Court of Appeal erroneously held that Costco had properly withheld payroll taxes from the award of lost wages.

In *Noe v. Superior Court* ("*Noe*") (2015) 237 Cal.App.4th 316, the Court of Appeal (mis)concluded that, although Labor Code section 226.8 provides that the willful misclassification of an individual as an independent contractor is illegal, it cannot be enforced through a direct private action. Rather, an aggrieved employee must pursue enforcement of Section 226.8 through the Labor Commissioner or a PAGA claim. The *Noe* decision did contain some favorable language stating that Section 226.8 is not limited to persons or employers who make the decision to misclassify employees, but rather that liability may extend to employers who know that a co-joint employer has willfully misclassified their joint employees and fail to remedy the misclassification.

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