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The best and worst employment developments of 2017

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

During his first year or so in office, President Trump and his administration launched an all-out war on the American worker in every area touching upon the employment relationship. From wage and hour, to anti-discrimination, to workplace health and safety, to the unionized work place – the Trump government has begun to completely gut the rights and protections of the American worker.

In addition, President Trump has nominated to the Supreme Court, the Circuit Courts of Appeal, and the District Courts individuals who are extremely hostile to employee rights.

Sadly, the Democrats and Independents in Congress have been unable to stop the Trump administration. And Republicans, who should know better, have been cowed into a state of sycophantic submission. Fortunately, at least for those workers living in California, Governor Jerry Brown, Attorney General Xavier Beccera, and the Democrats in the California State Legislature have moved to beef-up protections for California workers.

This article attempts to "cherry-pick" and briefly summarize not just the most significant employment developments and cases of 2017 (and early 2018) but also those that are of the most utility to plaintiff employment practitioners.

The Trump administration's anti-worker efforts

In a little over a year, the Trump administration has moved to eviscerate so many employee rights and protections that it is impossible to detail all of them.

Accordingly, what follows are just a few examples of the efforts by President Trump and his administration to curtail employee rights and protections.

While the Obama administration attempted to bolster employee wages by increasing the salary threshold for the White Collar Exemption from $455/workweek (or $23,660 for a full-year worker) to $913/workweek (or $47,476 for a full-year worker) so that more employees would be eligible for overtime, the Trump administration made clear its opposition to this Obama initiative. Likewise, while the Obama administration sought to benefit lower-wage restaurant employees by establishing a "tip pooling" rule which limited the scenarios in which restaurant employers

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could force tipped workers to share their gratuities with others (including not just the traditionally non-tipped "back of the house" employees, but also managers and owners), the Trump administration has announced plans to undo the Obama-era "tip pooling" rule and allow restaurant owners and managers to steal the tips left for these workers.

Similarly, while the Obama administration took the position that Title VII protected LGBTQ employees from discrimination, harassment and retaliation, the Trump Justice Department has reversed course and taken the position that those employees are not entitled to Title VII protection and President Trump has taken the position that trans individuals should be kicked out of and not allowed to join the military.

The Trump EPA has argued in favor of repealing an Obama-era OSHA rule designed to protect workers from exposure to harmful silica dust (which is linked to lung cancer, kidney disease, and chronic obstructive pulmonary disease). Indeed, while the Obama administration issued a rule that reduced permissible exposure to beryllium from 2.0 micrograms per cubic meter of air to 0.2 micrograms per cubic meter of air over an eight-hour period, the Trump administration has proposed keeping beryllium exposure limits at the previous level for workers in the shipyard and construction industries. The Trump administration has also halted an Obama-era rule requiring employers to submit workplace injury and illness data for posting online.

The Trump administration has also taken affirmative steps to dramatically curtail the rights of unions and unionized workers. Indeed, on December 1, 2017, Peter B. Robb, the NLRB's new Trump-appointed General Counsel, issued an internal memorandum declaring that he would be rescinding seven "guidance memos" that were crafted by his Democratic predecessors and that he was freezing worker-friendly reforms made under the Obama administration; that generally showed that he plans to take a much narrower view of worker rights than his predecessors. Similarly, while President Obama's Solicitor General sided with the unions in *Friedrichs v. California Teachers Association* (2016) 136 S.Ct. 1083, and argued that public-employee fair share fees were legal, President Trump's Solicitor General sided against the unions on that precise issue in *Janus v. American Federation of State, County, and Municipal Employees* and argued that fair share fees are unconstitutional because they violated free speech rights.

Compare Obama Justice Department Brief of the United States as Amicus Curiae Supporting Respondents, p. 11 ("*Abood* was correctly decided and should be reaffirmed."), accessible at http://www.scotusblog.com/wp-content/uploads/2015/11/14915_amicus_resp_US.authcheckdam.pdf with Trump Justice Department Brief of the United States as Amicus Curiae Supporting Petitioner, p. 11 ("The court should overrule *Abood* and hold that the first amendment prohibits compulsory agency fees in public employment.") accessible at https://www.supremecourt.gov/DocketPDF/16/16-1466/22919/20171206205129333_16-1466tsacUnitedStates.pdf.

U.S. Supreme Court

During 2017, the U.S. Supreme Court did not issue any major decisions impacting labor and employment law practitioners. It did, however, issue three decisions covering certain niche labor and employment law issues – *Perry v. Merit Systems. Protection. Bd.* (2017) 137 S.Ct. 1975 (holding that the proper review forum when the Merit Systems Protection Board dismisses a mixed case on jurisdictional grounds is district court, not the Federal Circuit); *McLane Co. v. EEOC* (2017) 137 S.Ct. 1159 (clarifying that the scope of review for employers facing EEOC administrative subpoenas is "abuse-of-discretion" rather than de novo review); and *NLRB v. SW Gen., Inc.* (2017) 137 S.Ct. 929 (holding that the Federal Vacancies Reform Act of 1998, which prevents a person who has been nominated to fill a vacant office requiring presidential appointment and Senate confirmation from performing the duties of that office in an acting capacity, applied to Lafe Solomon, who President Barack Obama directed to perform the duties of general counsel for the NLRB, once the President nominated him to fill that post; and as a result, an NLRB order charging an employer with an unfair labor practice was properly vacated).

In early 2018, the Supreme Court decided two important employment cases. In the first case, *Artis v. D.C.* (2018) 138 S.Ct. 594, the Supreme Court addressed an interesting procedural question involving tolling and, in the process, showed just how remarkably heartless some judges including, in particular, the conservatives on the Supreme Court can be. Stephanie Artis filed a lawsuit in federal district court alleging that her employer, the District of Columbia, violated Title VII and several District of Columbia laws. At the time she filed her lawsuit, she had two years remaining of the statutes of limitation applicable to her state law claims.

Her lawsuit languished in the District Court for two years before the Court granted the District of Columbia's motion for summary judgment on her Title VII claims and declined to exercise supplemental jurisdiction over her state law claims.

In declining to exercise jurisdiction over her state law claims, the District Court expressly opined that Artis would not be prejudiced by the dismissal because, under the Federal Supplemental Jurisdiction Statute, 28 U.S.C. section 1367(d), her state law claims were tolled during the time period in which they were pending in federal court *plus* an additional 30 days. Fifty-nine days after the dismissal of her state law claims, Artis re-filed those claims in the District of Columbia Superior Court. The Superior Court dismissed her state law claims holding that she filed them 29 days too late. The Superior Court bizarrely rejected Artis's "stop the clock" interpretation of the word "tolled" in the Sup- plemental Jurisdiction Statute and concluded that she only had 30 days following the dismissal of her claims in federal court to refile.

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On appeal, the District of Columbia Court of Appeals affirmed. On further appeal, the U.S. Supreme Court, in an opinion by Justice Ginsburg joined by Justices Breyer, Sotomayor, Kagan and Roberts, reversed, holding that "tolled" means what it says – to stop the clock. Notoriously hostile to employee rights, Justice Gorsuch filed a dissenting opinion in which Justices Kennedy, Thomas, and Alito joined, explaining that the word "tolled" can have two different meanings – to stop the clock or to not stop the clock – depending on context. And, in this case, where the Supplemental Jurisdiction Statute says that the statutes of limitation on claims are tolled during the time that the case is pending in federal court, it means that the running of the statutes of limitation is actually not tolled or stopped.

In the second case, *Digital Realty Trust, Inc. v. Somers* (2018) 138 S.Ct. 767, the Supreme Court oddly held that the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act only protects individuals who have reported a violation of the securities laws to the SEC. Strangely, in so holding, the Supreme Court rejected the interpretations of the Second and Ninth Circuit, which had cogently explained why an internal complaint was sufficient to invoke the protections of Dodd-Frank.

The Ninth Circuit

During 2017, the Ninth Circuit issued five important decisions in the areas of retaliation (*Arias v. Raimondo* (9th Cir. 2017) 860 F.3d 1185), sexual harassment (*Zetwick v. County of Yolo* (9th Cir. 2017) 850 F.3d 436), gender discrimination (*Mayes v. WinCo Holdings, Inc.* (9th Cir. 2017) 846 F.3d 1274), the Fair Credit Reporting Act (*Syed v. M-I, LLC* (9th Cir. 2017) 846 F.3d 1034), and taxes (*Clemens v. Centurylink Inc.* (9th Cir. 2017) 874 F.3d 1113).

In *Arias*, the Ninth Circuit held that an employer's outside counsel may be personally liable for violating the anti-retaliation provisions of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. section 215(a)(3). The plaintiff, Jose Arias, who had sued his former employer, Angelo Dairy, in California State Court on behalf of himself and other employees under California's Private Attorneys General Act of 2004, Cal. Labor Code section 2698 et seq., alleged that the Dairy's outside counsel, Anthony Raimondo, set in motion an underhanded plan to derail Arias's lawsuit by enlisting the services of U.S. Immigration and Customs Enforcement ("ICE") to take him into custody at a scheduled deposition and then to remove him from the United States. Raimondo moved for summary judgment arguing that because he was never Arias's actual employer, he could not be held liable under the FLSA for retaliation against someone who was never his employee. While the district court granted Raimondo's motion, the Ninth Circuit reversed, holding that an employer's attorney can be held liable for retaliating against his client's employee because the employee sued his client for violations of workplace laws.

Preceding the dramatic rise of the #MeToo movement, *Zetwick* serves as a powerful reminder that some courts will no longer excuse sexually inappropriate conduct as being merely innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. Victoria Zetwick alleged that her employer created a sexually hostile work environment in violation of Title VII by, among other things, greeting her with unwelcome hugs on more than one hundred occasions, and a kiss at least once, during a 12-year period. Opining that "hugging and kissing on the cheek in the workplace is not only insufficient to sustain a claim of hostile work environment, but overextends the intended scope of Title VII," the District Court granted the employer's motion for summary judgment. (*Zetwick v. Cty. of Yolo*, (E.D. Cal. 2014) 66 F.Supp.3d 1274, 1280.)

On appeal, the Ninth Circuit reversed, holding, "we cannot accept the conclusion that Zetwick did not state an actionable claim of a sexually hostile work environment . . . A reasonable juror could find, for example, from the frequency of the hugs, that [her supervisor's] conduct was out of proportion to 'ordinary workplace socializing' and had, instead, become abusive." (850 F.3d at 443-444.) Importantly, the Ninth Circuit also highlighted several mistakes that the district court made (that are also commonly made by other courts): (1) the district court applied an incorrect standard for assessing hostile work environment claims – the standard is "severe *or* pervasive," not "severe *and* pervasive"; (2) the district court completely overlooked legal recognition of the potentially greater impact of harassment from a supervisor versus a co-worker; (3) the court improperly disregarded "me too" evidence showing that the alleged harasser also sexually harassed others – the sexual harassment of others, if shown to have occurred, is relevant and probative of a defendant's general attitude of disrespect toward his female employees and his sexual objectification of them; (4) it was improper for the court to determine that Zetwick's testimony that another woman was offended by the alleged harasser's hugs, based on Zetwick's firsthand observation, was somehow less credible than that other woman's assertion in a post hoc declaration that she was not offended as a reasonable jury could conclude that the woman had reasons not to complain about the past treatment by her employer and to make a declaration, not subject to cross-examination, to support her employer's position.

As in *Zetwick*, the Ninth Circuit reversed summary judgement granted to an employer in *Mayes* and highlighted multiple mistakes made by the district court (mistakes that are also commonly made by other courts). Katie Mayes sued her former employer, a grocery store, for gender discrimination after she was fired for taking a stale cake from the store's bakery to the break room to share with fellow employees. The district court granted the store's motion for summary judgment, finding that Mayes was unable to prove pretext. On appeal, the Ninth Circuit initially explained that an employee can prove pretext either: (1) directly,

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by showing that unlawful discrimination more likely motivated the employer; or (2) indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable.

Then, the Ninth Circuit found that summary judgment was inappropriate because Mayes was able to establish pretext both directly and indirectly. With respect to the direct route of proving pretext, the Ninth Circuit found that unlawful discrimination more likely motivated the employer because Mayes put forward evidence that one of the individuals who participated in the decision-making process (but did not participate in the ultimate termination decision): (1) commented that a man "would be better" at leading one of the company's committees; (2) commented that she did not like "a girl" running the company's freight crew; and (3) criticized Mayes, but not her male counterpart, for leaving work early to care for her children. In this regard, the Ninth Circuit held that racist or sexist statements constitute direct evidence of discrimination and rejected the district court's determination that these were so-called "stray remarks."

The Ninth Circuit also rejected the district court's view that direct evidence had to be "specific and substantial." With respect to the direct route of proving pretext, the Ninth Circuit found that the employer's proffered explanation for the termination was unworthy of credence because: (1) multiple employees testified that it was a common, accepted practice – rather than an offense punished by termination – for supervisors such as Mayes to take cakes to the break room; (2) the grocery replaced her with a less qualified male employee; the Ninth Circuit explained that evidence that an employer replaced a plaintiff with a less qualified person outside the protected class can be evidence of pretext.

Syed v. M-I, LLC is a case of first impression in the federal appellate courts: whether a prospective employer may satisfy the Fair Credit Reporting Act's ("FCRA") disclosure requirements by providing a job applicant with a disclosure that a consumer report may be obtained for employment purposes which simultaneously serves as a liability waiver for the prospective employer and others. The Ninth Circuit held that a prospective employer violates the FCRA when it procures a job applicant's consumer report after including a liability waiver in the same document as the statutorily mandated disclosure. The Ninth Circuit also held that in light of the clear statutory language that the disclosure document must consist "solely" of the disclosure, a prospective employer's violation of the FCRA is "willful" when the employer includes terms in addition to the disclosure, such as a liability waiver, before procuring a consumer report or causing one to be procured.

Finally, in *Clemens*, the Ninth Circuit followed the Third, Seventh, and Tenth Circuits and held that Title VII authorizes district courts, in their sound discretion, to permit equitable gross-up adjustments to compensate successful plaintiffs for increased income-tax liability resulting from the receipt of a back-pay award in one lump sum.

One Ninth Circuit case, *Perez v. City of Roseville* (9th Cir. 2018) 2018 WL 797453, from thus far in 2018 merits discussion. Janelle Perez was a probationary police officer employed by the Roseville Police Department. Although she was married, she had an off-duty affair with a fellow police officer – Shad Begley.

Begley's wife learned about the affair and was not very happy about it. So, she reported Begley and Perez to the police department. The police department investigated the complaint, corroborated the affair between Perez and Begley, and issued to them a written reprimand. Perez appealed the Reprimand. At the hearing, the Department informed Perez that she had been fired. When Perez asked why, the Department refused to give a reason. Two weeks later, the Department issued a revised written Reprimand to Perez reversing the statements about Unsatisfactory Work Performance and Conduct and, instead, basing it on Perez's inappropriate Use of Personal Communication Devices. Perez did not appeal this version of the Reprimand because she had already been fired. Instead, Perez sued the Department pursuant to 42 U.S.C. Section 1983, alleging that the Department's decision to fire her violated her constitutional rights to privacy and intimate association. The Department filed a motion for summary judgment arguing that (1) the decision to fire Perez had nothing to do with her extramarital affair; and (2) even if her affair played a role in the decision, it didn't do anything wrong as Perez had no constitutional right to not be fired for having an affair.

The district court agreed with the Department and granted its motion. On appeal, the Ninth Circuit reversed. Initially, the Ninth Circuit held that public employees such as police officers have a right to privacy in their private, off-duty sexual behavior. Then, the Ninth Circuit concluded that there was a genuine factual dispute about whether the Department fired her "in part" because of her affair. In so ruling, the Ninth Circuit focused on several critical pieces of evidence including: (1) a non-decision-maker – who played a role in contributing information in the decision-making process – morally disapproved of the affair and thought that Perez should be fired because of it; (2) the speed with which the Department "discovered" unrelated problems with Perez's performance – within 8 weeks after it learned about the affair; and (3) the shifting explanations offered by the Department for firing Perez. When it first notified Perez that she had been fired, the Department refused to provide a reason. Next, well after her firing, the Department issued a new Reprimand to Perez reversing the findings of "Conduct Unbecoming" and "Unsatisfactory Work Performance" and substituting a new violation ("Use of Personal Communication Devices"). Then, when the litigation began, the Department put forth the three brand new reasons – failure to get along with women officers, citizen's complaint, and bad attitude with supervisor – all of which differ from both the original and the belated reprimands issued by the Department after she was fired.

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Two non-Ninth Circuit cases merit a brief discussion as they: (1) put the Ninth Circuit to shame and cast doubt on its reputation as the Nation's leading progressive court; and (2) shed light on an absolutely fascinating internecine war between the Trump/Jeff Sessions Justice Department and, what for all intents and purposes is still, the Obama EEOC, having two Democratic Obama appointees, one Republican Obama appointee, and no General Counsel. In *Zarda v. Altitude Express, Inc.* (2nd Cir. 2018) 883 F.3d 100, the Second Circuit, in a 10-3 en banc decision, joined the Seventh Circuit and the EEOC in holding that Title VII prohibits discrimination on the basis of sexual orientation. In so holding, the Second Circuit rejected the arguments of the Trump/Jeff Sessions Justice Department which had filed an amicus brief stating that it, and not the EEOC, was speaking on behalf of the United States and that "discrimination because of sexual orientation is not discrimination because of sex under Title VII." In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (6th Cir. 2018) 2018 WL 1177669, the Sixth Circuit found persuasive the arguments of the EEOC and held that Title VII prohibits discrimination on the basis of an employee's status as a transgender employee. Importantly, the Sixth Circuit also rejected an attempt by the Funeral Homes employer to argue that the federal Religious Freedom Restoration Act serves as an affirmative defense to a Title VII claim being prosecuted by the EEOC.

California Supreme Court

Anti-SLAPP jurisprudence

The most important employment law case issued by the California Supreme Court in 2017 involved California's anti-SLAPP statute, Code of Civil Procedure section 425.161. California enacted the anti-SLAPP statute in 1992 "out of concern over 'a disturbing increase'" in civil suits "aimed at preventing citizens from exercising their political rights or punishing those who have done so." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) The courts have recognized that "[t]he quintessential SLAPP is filed by an economic powerhouse to dissuade its opponent from exercising its constitutional right to free speech or to petition." (*Nam v. Regents of the University of California* (2016) 1 Cal.App.5th 1176, 1193.)

Unfortunately, since its passage, "economic powerhouses" have perverted the anti-SLAPP statute and used it to quash the very people whom it was supposed to protect. For example, in *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, *DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1, *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, and *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, employers used the anti-SLAPP statute to defeat FEHA discrimination claims.

In *Park v. Board of Trustees* (2017) 2 Cal.5th 1057, the California Supreme Court took an important first step toward restoring anti-SLAPP jurisprudence so that it is more closely aligned with the legislative intent by: (1) disapproving of *Nesson*, *DeCambre*, and *Tuszynska*; (2) expressly taking no opinion regarding whether the terrible *Hunter* decision was correctly decided; and (3) specifically approving of the terrific pro-employee *Nam v. Regents of the University of California* case, *supra*, 1 Cal.App.5th 1176. Ultimately, the Supreme Court concluded: "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (2 Cal.5th at 1060.)

In *Williams v. Superior Court* (2017) 3 Cal.5th 531, the Supreme Court confirmed that broad discovery is available in claims brought under California's Private Attorneys General Act ("PAGA") and held that the contact information of those a plaintiff purports to represent is routinely discoverable as an essential prerequisite to effectively seeking group relief, without any requirement that the plaintiff first show good cause.

Mendoza *addresses employees' rest days*

In *Mendoza v. Nordstrom Inc.* (2017) 3 Cal. 5th 531, the California Supreme Court turned in a homework assignment given to it by the Ninth Circuit, 865 F.3d 1261 (9th Cir. 2017), and addressed several questions regarding California Labor Code sections 551, 552 and 556 by stating the following:

1. A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited.

2. The exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If on any one day an employee works more than six hours, a day of rest must be provided during that workweek, subject to whatever other exceptions might apply.

3. An employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest.

California Courts of Appeal

Ly v. Cty. of Fresno

One of the most surprising and, perhaps, troublesome cases of 2017 is *Ly v. Cty. of Fresno* (2017) 16 Cal.App.5th 134. In *Ly*, the Court of Appeal held that a decision in a workers' compensation proceeding could have preclusive effects in an employee's FEHA case. Three Laotian correctional officers filed suit against their employer, alleging that they were subjected to racial and national origin discrimination, harassment, and retaliation. The three simultaneously pursued workers' compensation claims. The workers' compensation judges denied the plaintiffs' claims after finding their employers' actions were non-discriminatory, good faith personnel decisions. Subsequently, in the FEHA action, their employer moved for summary judgment

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based on the doctrines of res judicata and collateral estoppel, arguing the workers' compensation decisions barred the plaintiffs' FEHA claims. The trial court granted summary judgment, and the Court of Appeal affirmed. Unless this decision is depublished or overruled, there is a high degree of risk that the workers' compensation system will be hijacked or militarized by plaintiff and defense employment attorneys to serve as a proxy for any employment claims that employees may bring in civil court. Such a development will be unfortunate not only for the workers' compensation system but also employees and employers.

Bareno v. San Diego Cmty. Coll. Dist.

Bareno v. San Diego Cmty. Coll. Dist. (2017) 7 Cal.App.5th 546, is a terrific case for plaintiff employment practitioners handling summary judgment and/or claims involving the California Family Rights Act ("CFRA"). Leticia Bareno was employed by the San Diego Community College District. Bareno requested medical leave and provided a medical certification from her physician. After the time period identified in her request for leave expired and Bareno failed to report to work, the District informed her that it had accepted her voluntary resignation. Bareno immediately informed the District that she had not resigned and that she had emailed her supervisor an additional medical certification indicating her need for additional medical leave. The College, claiming that the supervisor never received the additional medical certification, refused to reconsider its position. Bareno sued, alleging that the District had retaliated against her for taking medical leave, in violation of CFRA. The College moved for summary judgment, and the trial court granted the motion. On appeal, Bareno argued that the trial court erred in granting summary judgment on her CFRA retaliation claim because there were triable issues of material fact in dispute. The Court of Appeal agreed, initially noting that:

> When viewed as a whole, it is clear that CFRA and its implementing regulations envision a scheme in which employees are provided reasonable time within which to request leave for a qualifying purpose, and to provide the supporting certification to demonstrate that the requested leave was, in fact, for a qualifying purpose, particularly when the need for leave is not foreseeable or when circumstances have changed subsequent to an initial request for leave. (7 Cal.App.5th at 565.)

Accordingly, the Court of Appeal held that the question of whether notice is sufficient under CFRA is a question of fact. The court then reversed, finding the following three disputed issues of material fact. First, the court concluded that there was a triable dispute regarding whether Bareno's supervisor had timely received the email providing notification of Bareno's need for additional medical leave. Second, it concluded that even if Bareno's supervisor had not received the email, there was a triable issue as to whether it fulfilled its obligations under CFRA, which obligates employers to make further inquiries of an employee if it requires additional information from that employee regarding the employee's request for leave. Third, the court concluded that even if Bareno's supervisor had not received the email, there was a triable issue as to whether the College decided to interpret Bareno's absences as a "voluntary resignation," despite evidence to the contrary, in retaliation for taking medical leave. In reversing summary judgment, the Court of Appeal reiterated that "[M]any employment cases present issues of intent, ... motive, and hostile working environment, issues not determinable on paper. Such cases ... are rarely appropriate for disposition on summary judgment, however liberalized [summary judgment standards may] be." (7 Cal.App.5th at 561, *quoting Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286.)

Husman v. Toyota Motor Credit Corp.

Husman v. Toyota Motor Credit Corp. (2017) 12 Cal.App.5th 1168, should serve as a sharp reminder to employment practitioners that not all employee oppositional conduct will qualify as protected activity. *Husman* affirmed a summary judgment on Joseph Husman's FEHA retaliation claim against his former employer, Toyota Motor Credit Corporation, because his criticisms regarding Toyota's commitment to diversity did not rise to the level of protected activity.

Husman, a gay man, ran Toyota's diversity and inclusion program. After he was fired, he claimed that Toyota retaliated against him because of his protected activity in complaining that: (1) Toyota would not include AIDS Walk LA on the list of the company's automatic payroll deductions; and (2) while Toyota's LGBT employees had made some progress, there was still work to be done. With respect to his first complaint, the Court of Appeal found that it did not constitute protected activity because the company's denial of his request did not violate any FEHA prohibition. With respect to his second complaint, the court found that it fell "short of communicating a particularized complaint about discriminatory treatment of LGBT employees and, instead, was likely understood as an exhortation common among diversity advocates to the effect that, while progress has been made, much work remains to be done." (*Id.* at 1194.)

Although *Husman* was a disappointing retaliation case for plaintiff employment practitioners, *Husman* is, on the other hand, a terrific summary judgment case for plaintiffs as it effectively hammers the final "nail in the coffin" of the so-called hirer-firer or same-actor inference as an argument on summary judgment. Initially, the Court of Appeal noted that while the same-actor inference was "once commonly relied on by courts affirming summary judgment against a plaintiff alleging discriminatory action, the same-actor inference has lost some of its persuasive appeal in recent years." (*Id.* at 1188.) The court then went on to explain that "[p]sychological science on moral licensing reveals that, when a person makes both an initial positive employment decision and a subsequent negative employment decision against a member of a protected group, the second negative decision is more likely to have resulted from bias, not less." (*Id.* at 1189.)

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