Andrew H. Friedman
HELMER FRIEDMAN LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2019 Issue

The best and worst employment developments of 2018 – Part II

A REVIEW OF THE RECENT CASES MOST USEFUL TO PLAINTIFF EMPLOYMENT PRACTITIONERS

In Part I of this article, I compared, contrasted and summarized the legislative/regulatory developments that occurred during 2018 in federal and California State employment law. Here I will focus on not just the most important cases of 2018 (and early 2019) but on those that are of the most utility to plaintiff employment practitioners.

U.S. Supreme Court

During the past year, the U.S. Supreme Court issued five decisions directly related to employment law. One of the decisions – *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31* (2018) 138 S.Ct. 2448 – dealt a serious blow to public employee unions; another decision – *Digital Realty Tr., Inc. v. Somers* (2018) 138 S.Ct. 767 – broadly curtailed the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and the remaining three decisions – *Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612, *Schein, Inc. v. Archer and White Sales, Inc.* (2019) 139 S.Ct. 524, and *New Prime, Inc. v. Oliveira*, (2019) 139 S.Ct. 532 – significantly undercut the ability of employees (and consumers) to bring individual, class, and collective actions in court (or otherwise).

Janus, *supra*, 138 S.Ct. 2448, serves as the perfect vehicle for illustrating just how far to the right our Supreme Court has shifted during most of our lifetimes due to the appointment of increasingly activist scorched-earth Republican conservatives.

To understand the significance of *Janus* and how it illustrates this dramatic right-ward shift, one must remember *Abood v. Detroit Bd. of Ed.* (1977) 431 U.S. 209. In *Abood*, the Supreme Court was called upon to determine the constitutionality of a Michigan law allowing governmental entities to enter collective bargaining agreements with public sector unions that contain "agency shop" clauses requiring those public employees who elect to not join the union, to pay to the union a "service charge" equal in amount to union dues. In *Abood*, the Supreme Court upheld the Michigan law with the caveat that no part of that service charge could go to any of the union's political or ideological activities. This payment became known as a "fair share" payment. The *Abood* Supreme Court was composed of seven justices nominated by Republicans and only two justices nominated by Democrats. That conservative Republican Supreme Court upheld the Michigan law without a single dissent.

For more than 41 years, through multiple iterations of an ever-changing Court, *Abood* stood not only as binding precedent but it has been affirmed and applied by the Supreme Court multiple times. Indeed, less than 10 years ago, the Supreme Court – unanimously – called the *Abood* rule a "general First Amendment principle." (*Locke v. Karass* (2009) 555 U.S. 207, 213.) Notwithstanding the precedential weight of *Abood* and the fact that 22 states relied on it and enacted laws and entered into

See Friedman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2019 Issue

collective bargaining agreements on the belief that *Abood* was the law of the land, the activist right-wing Supreme Court – a Court that many commentators have noted is the most pro-corporate and anti-employee/anti-consumer Court since the 1930s – struck down *Abood* in a highly partisan 5-4 decision written by Justice Samuel A. Alito, Jr. with the five Republican conservatives in the majority and the four Democratic moderates dissenting.

In the second case, *Digital Realty Tr.*, *supra*, 138 S.Ct. 767, the Supreme Court oddly held, in an opinion authored by Justice Ruth Bader Ginsburg, that the anti-retaliation provision of 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.

In the third case, *Epic Sys.*, *supra*, 138 S.Ct. 1612, the Supreme Court held, in a highly divided 5-4 decision authored by Justice Gorsuch, that employers may use arbitration agreements to preclude class and collective actions from being brought against them. Interestingly, this decision completely ignores the express language of the Federal Arbitration Act, which excludes all employment contracts from its reach, providing that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. § 1.)

Given the Supreme Court's extraordinarily broad interpretation of what constitutes interstate commerce (see *Gonzales v. Raich* (2005) 545 U.S. 1, 43 [holding that Congress' Commerce Clause authority allows it to prohibit the personal cultivation, possession, and use of just six cannabis plants which were not intended for, and did not enter, the stream of commerce]), it is rather surprising that the Court would not likewise interpret section 1's exemption to the full extent of the commerce power over employment contracts – i.e., to hold that all employment contracts are excluded from the FAA's coverage. (See e.g., *Cir. City Stores, Inc. v. Adams*, (2001) 532 U.S. 105, 137, J., Souter, dissenting.) In any event, the *Epic Sys.* decision calls to mind the following quote: "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation." And no, that quote is not from Justice Ruth Bader Ginsburg, who wrote a compelling dissent in *Epic Sys.* Rather, that quote is from a concurring opinion authored by Justice Sandra Day O'Conner in *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 283, J., O'Connor, concurring.) Commentators have correctly derided *Epic Sys.* and the FAA as not merely some type of neutral forum selection mechanism, but rather, a vehicle that actually eliminates employment/consumer cases and otherwise transfers wealth upwards from employees and consumers to corporations. (See Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, (2017) 35 Yale L. & Pol'y Rev. 499.)

The fox watches the hen house

In *Schein*, *supra*, 139 S.Ct. 524, Justice Brett Kavanaugh authored his first opinion and, writing for the Court, held that even "wholly groundless" claims for arbitration must be sent to the arbitrator for determination if the arbitration agreement contains a clause delegating "gateway" issues of arbitrability to the arbitrator. This decision is a bit like assigning guard duty of the hen house to the fox – will arbitrators who stand to earn tens of thousands of dollars from presiding over an arbitration really be able to decide threshold issues in an unbiased manner?

In *New Prime*, *supra*, 139 S.Ct. 532, the Court oddly completely ignored *Schein* and held: (1) a court – and not an arbitrator – should determine whether the FAA's Section 1 exclusion for disputes involving the "contracts of employment" of certain transportation workers applies before ordering arbitration even if the arbitration agreement contains a clause delegating "gateway" issues of arbitrability to the arbitrator; and (2) the FAA does not apply to seamen, railroad employees, and certain other workers engaged in foreign or interstate commerce regardless of whether they are classified as employees or independent contractors.

The Court should have used *Epic Sys.* and/or *New Prime* as an opportunity to clarify that the FAA neither prohibits class and collective actions nor applies to arbitration agreements which employers force employees to sign as a condition of employment.

The Ninth Circuit

During 2018 (and early 2019), the Ninth Circuit issued four decisions of relevance to the employment practitioner: *Biel v. St. James School* (9th Cir. 2018) 911 F.3d 603; *Scott v. Gino Morena Enterprises, LLC* (9th Cir. 2018) 888 F.3d 1101; *Rodriguez v. Taco Bell Corp.* (9th Cir. 2018) 896 F.3d 952; and *Golden v. California Emergency Physicians Med. Grp.* (9th Cir. 2018) 896 F.3d 1018.

In *Biel*, *supra*, 911 F.3d 603, the Ninth Circuit addressed the First Amendment's ministerial exception and held that it did not bar a former teacher's ADA claim against the Catholic elementary school that fired her following her breast cancer diagnosis. The Ninth Circuit concluded that, although the former teacher taught religious lessons and incorporated religious themes into her curriculum, she did not fall within the ministerial exception because the school had no religious requirements for her teaching position and she did not have any ministerial training or titles.

The *Scott* case is illustrative of the difficulties that plaintiff employees face in the federal courts (particularly when appearing in front of judges appointed by Presidents George W. Bush and Trump). (888 F.3d 1101.) Under Title VII, prior to filing a civil lawsuit, an aggrieved employee must first exhaust her administrative remedies by filing a charge with the EEOC. (42 U.S.C. § 2000e-5(b).) The employee then has 90 days from the date of her EEOC Right-To-Sue notice to file her civil action. (42 U.S.C. § 2000e-5(f)(1).)

See Friedman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2019 Issue

In *Scott*, the plaintiff employee timely filed her civil action within 90 days of her receipt of the EEOC Right-To-Sue notice. However, the district court granted the defendant employer's motion for summary judgment using the following Kafkaesque reasoning – the plaintiff could have asked the EEOC to issue her Right-To-Sue notice after her case had been pending with the EEOC for more than 180 days; had she done so, the EEOC would have issued her Right-To-Sue notice on May 24, 2014 and she would have been required to file her civil action on August 22, 2014, but because she filed her civil action on November 20, 2014, she blew her 90-day deadline (even though she filed her civil action within 90 days of the date on which the EEOC actually issued her Right-To-Sue notice). (*Scott v. Gino Morena Enterprises, L.L.C.* (S.D. Cal. July 21, 2016) 2016 WL 3924107, at *2.) The Ninth Circuit reversed holding that the 90-day period for filing a Title VII action begins when the aggrieved person is given a Right-To-Sue notice by the EEOC, and not merely when the aggrieved person becomes eligible to receive a Right-To-Sue notice after 180 days have expired from the date the charge was filed with the EEOC.

In *Rodriguez*, *supra*, 896 F.3d 952, the Ninth Circuit held that Taco Bell did not violate California's meal break laws which require that employees who work more than five hours in a day be afforded a meal period of "not less than 30 minutes." (Lab. Code, § 512(a).) Taco Bell offered employees the following meal break options: (a) purchasing a meal from the restaurant at a discount and eating it in the restaurant; or (b) leaving the premises and spending their meal break time in any way that they so choose.

In *Golden*, *supra*, 896 F.3d 1018, the Ninth Circuit held that a no-employment provision in a settlement agreement between a medical group and an emergency room doctor substantially restrained the doctor's lawful profession and thereby violated section 16600 of the Business & Professions Code to the extent the provision prevented him from working for employers that have contracts with the medical group and to the extent that the clause permitted the medical group to terminate the doctor from existing employment in facilities that are not owned by the medical group.

California Supreme Court

The most important employment law decisions issued by the California Supreme Court in 2018 were a trio of wage and hour cases – *Dynamex Operations W., Inc. v. Superior Court* (2018) 4 Cal.5th 903, *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, and *Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542. All three were very favorable to employees.

In *Dynamex*, *supra*, 4 Cal.5th 903, the Supreme Court issued a blockbuster decision clarifying how workers should be classified – as either employees or independent contractors – for the purposes of the wage orders adopted by California's Industrial Welfare Commission ("IWC"). Ultimately, the Court adopted the so-called ABC test under which, a worker is presumed to be an employee for wage order purposes, unless the putative employer proves: "(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." (*Id.* at pp. 916-917.)

Note that the putative employer bears the burden of proving that each of these requirements has been met in order for the presumption that a worker is an employee to be rebutted, and for a court to recognize that a worker has been properly classified as an independent contractor.

Prong B of the ABC test is particularly helpful for workers suing as employees as most workers labeled as "independent contractors" by the hiring entity perform work within the usual course of the hiring entity's business. Despite prognostications from defense counsel and the business community that *Dynamex* signaled the end of the world, California continues to boom.

Unfortunately, the Supreme Court's decision left a number of important questions unanswered – Does the ABC test govern any claims other than those involving the IWC wage orders, e.g., other wage and hour claims, Labor Code violations, FEHA claims, wrongful termination claims? Bills are currently pending in the California State Legislature to both dramatically expand *Dynamex* (bills brought by Democrats) and to legislatively overturn *Dynamex* (a bill brought by a Republican with the backing of the notoriously anti-employee/consumer California Chamber of Commerce).

In *Troester*, *supra*, 5 Cal.5th 829, the Supreme Court accepted a homework assignment from the Ninth Circuit to determine whether the federal Fair Labor Standards Act's de minimis doctrine applies to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197. The de minimis doctrine is an application of the maxim *de minimis non curat lex*, which means "[t]he law does not concern itself with trifles." (Black's Law Dict. (10th ed. 2014) p. 524.) Federal courts have applied the doctrine in some circumstances to allow employers to force employees to work off-the-clock without compensation where the employers can show that the bits of time worked are administratively difficult to record. The Supreme Court held that the relevant wage order and statutes do not permit application of the de minimis doctrine, where the employer required the employee to work off-the-clock several minutes per shift. The Court did not decide whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded.

In *Alvarado*, *supra*, 4 Cal.5th 542, the Supreme Court took up the question of how flat sum bonuses factor into overtime calculation. In a unanimous decision, the Court held that to calculate overtime in pay periods during which an employee earns a flat rate bonus, employers must divide the total compensation earned in a pay period by only the non-overtime hours worked by

See Friedman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2019 Issue

an employee. The Court expressly rejected the FLSA approach of attributing the flat sum bonus to all hours worked.

California Courts of Appeal

During 2018 and early 2019, the California Courts of Appeal issued dozens of important employment law decisions. Due to space limitations, the remainder of this article will briefly summarize eight of those decisions: three arbitration cases – *Nieto v. Fresno Beverage Company, Inc.* (Mar. 7, 2019) ___ Cal.App.5th___ [2019 WL 1305459]; *Honeycutt v. JPMorgan Chase Bank* (2018) 25 Cal.App.5th 909, and *Ramos v. Superior Court of San Francisco Cty.* (2018) 28 Cal.App.5th 1042 – a failure to hire case – *Abed v. W. Dental Servs., Inc.* (2018) 23 Cal.App.5th 726 – a wrongful termination case – *Siri v. Sutter Home Winery, Inc.* (2019) 31 Cal.App.5th 598 – two harassment cases – *Meeks v. Autozone, Inc.* (2018) 24 Cal.App.5th 855, and *Caldera v. Dep't of Corr. & Rehab.* (2018) 25 Cal.App.5th 31 – and two cases involving foolhardy employer appeals from Labor Commissioner decisions – *Stratton v. Beck* (2018) 30 Cal.App.5th 901 and *Nishiki v. Danko Meredith, APC* (2018) 25 Cal.App.5th 883.

Nieto – workers engaged in interstate commerce

In *Nieto*, *supra*, 2019 WL 1305459, the Court of Appeal examined section 1 of the FAA, which is the statutory exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. § 1.) In response to the plaintiff employee's lawsuit alleging various wage and hour violations, the employer filed a petition to compel arbitration pursuant to the FAA. The plaintiff opposed the petition, arguing that because he was a worker engaged in interstate commerce within the section 1 exemption, a California law allowing court actions on wage claims notwithstanding the existence of an arbitration agreement (i.e., Lab. Code, § 229) was not preempted by the FAA. The defendant employer countered that the plaintiff was not a worker engaged in interstate commerce because he was merely a truck driver who made deliveries exclusively within California. The Superior Court denied the petition, holding that because the plaintiff physically transported interstate goods – even though his deliveries were exclusively to destinations within California – that were essentially the last phase of a continuous journey of the interstate commerce, he fell within the section 1 exemption. The Court of Appeal affirmed.

Honeycut – disclosures by arbitrator

In *Honeycut*, *supra*, 25 Cal.App.5th 909, the Court of Appeal considered an employee's contention that an arbitral award against her should be vacated because, during the pendency of the arbitration, the arbitrator failed to disclose that she agreed to serve as an arbitrator in six other cases for the employer and/or its counsel. The Court of Appeal held that the arbitrator's failure to disclose the other pending arbitrations violated the ethics standard requiring disclosure of matters that could cause a person to reasonably doubt the arbitrator's ability to be impartial, thus requiring vacatur of arbitration award.

Ramos – arbitration and superior bargaining position

In *Ramos*, *supra*, 28 Cal.App.5th 1042, Winston & Strawn filed a motion to compel arbitration of an "income" partner's state court sex discrimination lawsuit. The partner, Constance Ramos, opposed the motion, arguing that the arbitration agreement did not comply with *Armendariz v. Found. Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. Winston & Strawn contended that: (1) *Armendariz* did not apply because Ramos was a partner and not an employee; and (2) even if *Armendariz* did apply, it was no longer good law following the U.S. Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 and *Epic Sys.*, *supra*, 138 S.Ct. 1612. The Court of Appeal held that: (1) *Armendariz* applied regardless of whether Ramos was an employee because the record demonstrated that Winston & Strawn was in a superior bargaining position vis-à-vis Ramos akin to that of an employer-employee relationship, and there is no evidence in this record that Ramos had an opportunity to negotiate the arbitration provision. The Court of Appeal then held that *Armendariz* remained good law even after *Concepcion* and *Epic Sys.* and vacated the Superior Court's order granting the law firm's motion to compel arbitration.

Abed – discrimination

In *Abed*, *supra*, 23 Cal.App.5th 726, the Court of Appeal held that a plaintiff bringing a failure to hire pregnancy discrimination claim did not have to show that she applied to work at the defendant employer. Rather, the Court excused her failure to apply because a genuine issue of material fact existed as to whether the employer acted with discriminatory animus in telling the plaintiff that there was no job opening.

Siri – retaliation/wrongful termination

In *Siri*, *supra*, 31 Cal.App.5th 598, the Court of Appeal revived a wrongful termination case that had been dismissed by the Superior Court on the grounds that the plaintiff, who alleged she had been fired for expressing concerns that her employer was not properly paying taxes, would not be able to prove her claims without violating her employer's taxpayer privilege. The Court of Appeal found that the taxpayer privilege does not preclude an employee from either speaking up if the employer files incorrect or fraudulent returns, or suing for wrongful termination if the employer fires the employee in retaliation.

Meeks – sexual harassment

Meeks, *supra*, 24 Cal.App.5th 855, is a terrific sexual harassment case in which the Court of Appeal reversed a defense verdict due to fundamentally flawed evidentiary rulings by the Superior Court. At trial, the Superior Court refused to allow the plaintiff to testify about text

See Friedman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2019 Issue

messages she claimed that her supervisor had sent her, including sexually explicit writing, photos, videos, and drawings. Neither the plaintiff nor the supervisor had copies of the text messages, so she wanted to testify about them. The Superior Court ruled that she could only say that the text messages were sexual in nature; she could not testify regarding what the text messages specifically said or what the pictures depicted.

The Court of Appeal ruled that the Superior Court had abused its discretion by limiting the plaintiff's testimony regarding the text messages. The Court of Appeal held that because the texts themselves were unavailable, the plaintiff should have been allowed to testify about their contents. Additionally, the Superior Court also precluded the plaintiff from presenting so-called "me-too" evidence showing that the supervisor had also sexually harassed other employees. The Superior Court ruled that because the supervisor's alleged behavior toward other employees had not taken place when the plaintiff was present, it could not be relevant to her claim. The Court of Appeal ruled that the Superior Court's refusal to admit the evidence constituted reversible error. In so ruling, the Court of Appeal explained that "me-too" evidence may be admissible to prove motive or intent, even when committed outside of the plaintiff's presence or even after the plaintiff was no longer employed.

Caldera – disability harassment

Caldera, *supra*, 25 Cal.App.5th 31, is a terrific disability harassment case in which the Court of Appeal affirmed a $500,000 verdict in favor of an employee alleging that his fellow employees, including a supervisor, "mocked and mimicked" his stutter at least a dozen times over a period of two years. The Court of Appeal rejected the employer's argument that the verdict was not supported by substantial evidence because the harassing conduct was, as a matter of law, neither severe nor pervasive.

Stratton and *Nishiki* – Labor Commissioner's awards

Stratton, *supra*, 30 Cal.App.5th 901, and *Nishiki*, *supra*, 25 Cal.App.5th 883, both involve the judicial review of awards to former employees by the California Labor Commissioner of unpaid wages, liquidated damages, interest, and statutory penalties. In both cases, the actions of the employers were so foolhardy that in reading them one can't help but thinking about that wise old saying about being penny wise and pound foolish. In *Stratton*, the employer refused to pay its former employee around $300 in unpaid wages, forcing the employee to file a wage claim with the Labor Commissioner, who awarded the plaintiff the $303.50 he requested, plus an additional $5,757.46 in liquidated damages, interest, and statutory penalties, for a total award of $6,060.96. The employer then launched a de novo review in the Superior Court, two appeals to the Court of Appeal, and petitions for review with the California Supreme Court. Ultimately, the employer was ordered to pay the plaintiff's attorneys' fees which were significantly more than $150,000.

In *Nishiki*, the plaintiff employee resigned her employment and was owed $2,880.31 for her unused vacation time. The defendant mailed her a handwritten check, which had an inconsistency: the amount in numerals in the dollar amount box was "2,880.31," the correct amount; however, the amount as spelled out was "Two thousand eight hundred and 31/100," or $80 less than the correct amount. Oddly, when apprised that the plaintiff was unable to deposit the check due to the inconsistency and was now also owed waiting time penalties, the employer refused to rectify the situation, explaining, "No check has been refused or returned so we are unable to confirm it was not honored upon presentation to the bank." (*Nishiki*, *supra*, 25 Cal.App.5th at p. 888.) The plaintiff then filed a wage claim with the Labor Commissioner who awarded the plaintiff $4,250 in waiting time penalties. The employer then launched a de novo review in the Superior Court and an appeal to the Court of Appeal. Ultimately, the employer was ordered to pay the plaintiff's attorneys' fees which were significantly more than $100,000.

Andrew H. Friedman is a partner with Helmer Friedman LLP *in Beverly Hills. He received his B.A. from Vanderbilt University and his J.D. from Cornell Law School, where he was an Editor of the Cornell Law Review. Mr. Friedman clerked from the Honorable Judge John T. Nixon (U.S. District Court for the Middle District of Tennessee). Mr. Friedman represents individuals and groups of individuals in employment law and consumer rights cases. Mr. Friedman is the author of Litigating Employment Discrimination Cases (James Publishing 2005-2019). Mr. Friedman served as Counsel of Record in Lightfoot v. Cendant Mortgage Corp. et. al. (Case No. 10-56068) where he successfully convinced the U.S. Supreme Court to grant the petition for certiorari that he filed on behalf of his clients. In January 2017, the Supreme Court, in a unanimous decision authored by Justice Sotomayor, reversed the Ninth Circuit and ruled in favor of Mr. Friedman's clients.*