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The best and worst employment cases of 2013

For better and for worse, the cases employment litigators must know today

As 2014 begins, we reflect back on some of the best and worst employment cases of 2013 and consider how they can help or hurt our clients during the coming year. The cases highlighted here are neither necessarily the best nor the worst, but the ones that we believe would be of the most utility to the employment litigator. Unfortunately, in 2013, the worst cases were often quite bad and left us wishing that we could, as Justice Kagan wrote in her scathing dissent in *Genesis Healthcare v. Symczyk* (2013) __ U.S. __ 133 S. Ct. 1523 "relegate the majority's decision[s] to the furthest reaches" of our minds. The best cases, however, gave us hope that good decisions and good judges still exist – even if they are increasingly rare to find.

Worst

Nowhere was a bad decision more apparent than the Supreme Court's ruling in *American Express Co. v. Italian Colors* (2013) __ U.S. __, 133 S.Ct. 2304. *Italian Colors*, a non-employment case, and a horrific example of how large corporate defendants attempt to force plaintiffs into binding arbitration while, at the same time, precluding them from bringing their claims as class/collective actions. Although technically an antitrust class action, this case has huge ramifications for employment-law practitioners.

Brought by merchants accepting American Express credit cards, the plaintiffs argued that their arbitration agreement, which precluded class-wide arbitration, was invalid. Likely taking a page from their employees' own lawsuits (and making an argument they will no doubt disavow in future employment litigation brought against them), the merchants argued that the cost of bringing an individual claim outweighed the maximum possible recovery thereby preventing, as a practical matter, their ability to effectively vindicate their statutory rights.

Predictably – and in line with his previous decisions frustrating the core purpose of Rule 23 and the FLSA – Justice Scalia, writing for the majority, held that the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration even if it prevents the effective vindication of statutory rights. In doing so, defendants have already begun to argue that Justice Scalia effectively signaled the death-knell to class-wide arbitration of employment claims, and further subverted not only *Gentry v. Sup. Ct.* (2007) 42 Cal.4th 443 – which holds that class-arbitration waivers cannot be enforced if class-wide arbitration would be a significantly more effective way of vindicating statutory rights under California's wage and hour laws – but also *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83 – which holds that employment arbitration agreements must meet certain minimum requirements including neutrality of the arbitrator, adequate discovery, a written decision that permits judicial review, and limitations on the costs of arbitration.

Another "Katy bar the door" case for the class/collective-action plaintiffs is the "pick off" tactic commonly utilized by defendants, and 2013 gave us a despicable example of how this technique could very well undermine the entire class-action mechanism. In *Genesis Healthcare v. Symczyk*, supra, 133 S.Ct. 1523, Laura Symczyk, a registered nurse, brought an FLSA collective action alleging that her employer automatically deducted 30 minutes for a meal period, regardless of whether or not she and the other employees actually took the meal break. When the defendant answered Ms. Symczyk's complaint, it simultaneously served her with a Rule 68 offer of judgment for her unpaid wages, and *unspecified* costs and attorneys' fees. Although Ms. Symczyk *never accepted* the offer, and the defendant did not make a similar offer to the other adversely affected employees, the defendant filed a motion to dismiss, arguing there was no subject matter jurisdiction for either Ms. Symczyk's individual claims *or* her collective action.

The Supreme Court, in a 5-4 decision authored by Justice Thomas, sided with the defendant and held that the defendant's *unaccepted* Rule 68 offer – despite the fact that no money was ever paid – had mooted the case because Ms. Symczyk lacked any personal interest in representing others. Understandably, Justice Kagan eviscerated this holding in her dissent, instructing us to "[f]eel free to relegate the majority's decision to the furthest reaches of [our] mind[s]: The situation it addresses should never again arise." (*Id.* at 1534.) Perhaps forgetting for a moment that she was no longer in a Harvard lecture hall, Justice Kagan further chided, "[a]s every first-year law student learns, the recipient's rejection of

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an offer leaves the matter as if no offer had ever been made" and wrote that an *unaccepted* Rule 68 offer would not moot a case. [*Editor's Note*: The majority in *Symczyk* did not hold that an unaccepted Rule 68 offer would moot a case; it held that this was the rule in the Third Circuit, which it applied because the plaintiff had challenged the rule in the Supreme Court. Hence, the comment in the dissent about a case that would "never arise again."] Heeding the wisdom of Justice Kagan's dissent, the Ninth Circuit, in *Diaz v. First Am. Home Buyers Prot. Corp.* (9th Cir. 2013) 2013 WL 5496762, rejected the majority's ruling in *Genesis Healthcare* as dicta and held that a claim is *not* mooted where a defendant makes an unaccepted Rule 68 offer of judgment even if it is made in an amount sufficient to make plaintiff whole.

Even if an individual plaintiff is able to make it to the courthouse doors, the California Supreme Court's holding in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 2013, has now made it that much more difficult to win once the plaintiff is there. Wynona Harris, a former Santa Monica city bus driver sued the City for sex discrimination, alleging that the City fired her after she disclosed to her supervisor she was pregnant. Apparently attempting to position himself for a nomination to the United States Supreme Court, Justice Liu wrote a business-friendly opinion holding that in FEHA lawsuits, a plaintiff can no longer prevail by proving that discrimination is "a" motivating factor in the adverse employment action; rather, the plaintiff must prove that discrimination was a *substantial* motivating reason for the adverse employment decision. Worse, if the employer can prove that it would have made the same adverse employment decision absent the discrimination, the employee-plaintiff is limited to the recovery of declaratory and injunctive (not including reinstatement or instatement) relief only (i.e., no compensatory or punitive damages), and the recovery of his or her costs and attorneys' fees. In what can only be described as oxymoronic reasoning, the Court concluded that although discrimination resulted in "stigmatic harm," compensation for such harm would result in a "windfall" to the plaintiff if there are other, nondiscriminatory reasons for the plaintiff's discharge. (*Id.* at 233.)

If a defendant is unable to win by fabricating a non-discriminatory reason for an employee's termination, the defendant can always try to use the Constitution as a backstop. Further stacking the deck in favor of defendants this year was *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510. In *Hunter*, Kyle Hunter filed an employment discrimination lawsuit alleging that two local CBS television stations had repeatedly shunned him for a weather anchor position due to his gender and his age. Mr. Hunter alleged that such actions were "part of [the stations'] plan to turn prime time weather broadcasting over to younger attractive females." CBS moved to strike Mr. Hunter's complaint under anti-SLAPP, arguing that the selection of its weather anchor qualified as an act in furtherance of the exercise of the stations' free speech. In a decision insulting to female weather anchors everywhere, the Court agreed. The Court held that CBS' selection of its weather anchors was "essentially casting decisions regarding who was to report the news on a local television newscast, 'helped advance or assist' both forms of First Amendment expression." (*Id.* at 1521.)

Media company employers won big in 2013, and this was especially true in *Carter v. Entercom Sacramento, LLC* (2013) 219 Cal.App.4th 337, a truly lecherous case. After the radio station-defendant held a contest called "Hold your wee for a Wii," (we could not make this up if we tried) – in which participants, vying for a Nintendo Wii, were challenged to drink water at regular intervals without urinating – a participant died. Matt Carter, a radio-station employee, sought indemnification from the radio station for the attorneys' fees he expended defending against both the ensuing wrongful-death lawsuit, and potential criminal homicide charges. Mr. Carter argued that his retention of an attorney versed in criminal law, and who would be able to defend against punitive damages, was a necessary expenditure under Labor Code section 2802. The Court of Appeals disagreed. The Court reasoned that "necessity was a question of fact," and held that Mr. Carter was required to use his employer's insurance attorney if he wanted his defense paid for. In doing so, the Court reminded us of a frightening reality: corporate interests will always trump an individual plaintiff's right to defend himself against possible felony homicide charges and punitive damages – such trivialities are simply not "necessary expenditures."

Even non-media scored big in 2013 as some courts continued to narrowly construe employment discrimination claims to favor employers. For example, in *Hatai v. Dep't of Transp.* (2013) 214 Cal.App.4th 1287, Kenneth Hatai, sued under FEHA for discrimination alleging that his supervisor, who was of Arab ancestry, discriminated against him because of his Japanese ancestry and Asian ethnicity. At trial, the court excluded Mr. Hatai's proffered "me too" evidence from other non-Arab employees, showing that his supervisor discriminated against any employee who was not of Arab descent. The Court of Appeals agreed.

It concluded this evidence was properly excluded because it was not actually "me too" evidence. In a line of reasoning which can only be described as, "We didn't fire him because he was Asian, we fired him because he wasn't Arab," the Court concluded that Mr. Hatai pled his case as an anti-Asian case, *not* an Arab favoritism case and "the "me-too" doctrine did not entitle Hatai to present evidence of discrimination against employees *outside of Hatai's protected class* . . . ." (*Id.* at 1298.) Sadly, this decision should serve to remind us that because pro-business courts will use semantic formalism to dismiss our cases, we must be mindful and careful in drafting our complaints (and discovery responses).

In addition to narrowing the scope of employer liability under California employment laws, 2013 also gave employers the opportunity to insulate themselves further under Federal employment laws. If you practice under Title VII, *Vance v. Ball State University*

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(2013) __ U.S. __, 133 S.Ct. 2434, is critical as it defines the word "supervisor." In this case, Maetta Vance brought a lawsuit against her university-employer, alleging that an employee created a racially hostile work environment in violation of Title VII. While Ms. Vance conceded that the alleged harasser did not have the power to hire, fire, demote, promote, transfer or discipline her, the alleged harasser did have the power to direct Ms. Vance's day-to-day work activities. Nevertheless, Justice Alito, bowing to his corporate masters, adopted an oppressively narrow definition of the word "supervisor." Despite the fact that Ms. Vance's alleged harasser wielded control over her work, the Court, as Justice Ginsburg noted in her dissent, exhibited "remarkable resistance to the thrust of [the Court's] prior decisions, workplace realities, and the EEOC's Guidance," and instead held that a "supervisor" is only an individual who is empowered by the employer to take "tangible employment actions." (*Id*. at 2462.)

Last year this article discussed *In Re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 – a little ray of light in the context of employer efforts to force employees into binding arbitration. This year, that light was extinguished. *D.R. Horton, Inc. v. N.L.R.B.* (5th Cir. 2013) 737 F.3d 344, 348, reverses the NLRB's decision that held that an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees to sign an agreement precluding them from filing class claims. Instead, the Fifth Circuit, subtly signaling its loyalties, cited The Chamber of Commerce's amicus brief, and held that the NLRB did not give proper weight to the Federal Arbitration Act, and the arbitration agreement at issue had to be enforced according to its terms – meaning no class-wide arbitration. Attempting to buttress its imprudent holding, the Circuit reasoned that when Congress enacted the FAA, "Congress did not discuss the right to file class or consolidated claims against employers." Of course, such a discussion would not have occurred at the time of the passage of the FAA (1925) as neither Rule 23 (1934) nor the FLSA (1938) were in existence.

Best

If you have not been so depressed by the foregoing that you have chosen to stop reading (or change the side of the bar you are practicing on), 2013 did give us some helpful cases which, while failing to level the playing field completely, at least helped a little bit. This was especially true in *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, a critical case to combat arguments that non-comparable employment, obtained post-termination, must be used to offset your client's compensatory damages.

In *Villacorta*, Alfredo Villacorta sued his employer for national origin discrimination in violation of FEHA. Although Mr. Villacorta eventually found new employment earning more than the job from which he was fired, it took Mr. Villacorta so long to commute to his new job each day that he was forced to rent an apartment and be away from his family five days per week. After finding for Mr. Villacorta, the jury awarded Mr. Villacorta three years of lost wages, although he was actually unemployed for eight months. The defendant appealed, asserting that any emotional distress resulting from Mr. Villacorta's distance from his family should have been considered in non-economic damages, and besides, Mr. Villacorta found comparable employment (earning more!), so what was he even complaining about? In a heartening decision, the Court of Appeals rejected this callous line of reasoning and affirmed Mr. Villacorta's judgment. The Court held:

> Wages actually earned from an inferior job may not be used to mitigate damages because if they were used then it would result 'in senselessly penalizing an employee who, either because of an honest desire to work or a lack of financial resources,' is willing to take whatever employment he can find.

(*Id*. at 446, *citing Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 Cal.App.3d 91.)

In other words, Mr. Villacorta's new job was not comparable because of its inferior location, *in addition* to any emotional distress he suffered at being away from his family.

Sanchez v. Swissport, Inc. (2013) 213 Cal.App.4th, is a wonderful case of first impression for female employees suffering from high-risk pregnancies, and, although it confirms the obvious, another reassuring decision. Ana G. Fuentes Sanchez was an employee who became disabled by her high-risk pregnancy, and in the months leading up to the birth of her child, took the full amount of leave allotted to her under the Pregnancy Disability Leave Law ("PDLL"). After Ms. Sanchez gave birth, she would have been able to return to work with the need for only minimal accommodations.

Nevertheless, just months before Ms. Sanchez gave birth, and after providing Ms. Sanchez with leave under the PDLL, the defendant terminated Ms. Sanchez, arguing that its compliance with the PDLL satisfied its duty to comply with FEHA. The Court swiftly disabused the defendant of this notion, concluded defendant's position was a "fallacy" and held that the trial court erred in sustaining the defendant's demurrer without leave to amend – the PDLL *supplements* rather than displaces the FEHA.

In the event that your client makes it past the pleading stage and on to trial, but is awarded only a minimal or nominal verdict, *Muniz v. United Parcel Serv., Inc.* (9th Cir. 2013) 2013 WL 6284357 and *Arizona v. ASARCO, LLC* (9th Cir. 2013) 733 F.3d 882, make it clear that all is not lost, and provide great support for attorneys' fees and punitive damages respectively.

Muniz v. United Parcel Serv., Inc. teaches that simply because your client receives a low verdict, it does not mean you will receive a low-fee award for all of your efforts in securing this verdict. In *Muniz*, Kim Muniz sued UPS in California State court for gender discrimination in violation of FEHA. After UPS removed the case to Federal court and it was tried to a jury, the jury returned a verdict in Muniz's favor and awarded damages of $27,280.

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Despite this minimal verdict, the Court awarded Ms. Muniz's attorneys $697,972 in statutory attorneys' fees. In response, UPS's attorneys, whose attorneys' fees were undoubtedly significantly higher than $697,000, appealed the award, arguing that Ms. Muniz's damages constituted "nominal" or "minimal" damages, therefore the Court was required to reduce Ms. Muniz's attorneys' fees accordingly. The Ninth Circuit rejected UPS' argument, and affirmed Ms. Muniz's attorneys' fee award. In a final slap to UPS, the Ninth Circuit ordered the district court to award attorneys' fees to Ms. Muniz's attorneys which they incurred in defending the appeal.

Arizona v. ASARCO, LLC is another strong case to use in the event your client has been awarded low damages, and supports the proposition that discrimination and harassment are deserving of high punitive damage awards even if compensatory damages are nominal. Plaintiff Angela Aguilar worked at ASARCO, LLC – a large copper mining and refining company located in Arizona. Ms. Aguilar alleged that during her employment, she was repeatedly sexually harassed, and after she complained, retaliated against. After a trial on Ms. Aguilar's Title VII and constructive discharge claims, the jury found ASARCO liable on Ms. Aguilar's sexual harassment claim and awarded Ms. Aguilar nominal compensatory damages. The jury also awarded Ms. Aguilar $868,750 in punitive damages, which the district court reduced to $300,000 – the statutory maximum under Title VII for an employer of ASARCO's size.

On appeal, the Ninth Circuit unequivocally found ASARCO's conduct deserving of punitive damages, holding the defendant's conduct was "targeted, worse than reckless, and served no possible productive purpose." The Court reasoned that "many other cases involving lengthy periods of harassment and discrimination have noted that similar conduct is highly reprehensible along these dimensions." After reviewing other punitive damage awards in cases of discrimination, the Court reduced Ms. Aguilar's punitive damage award to $125,000 – the highest punitive award supportable under due process and "in accord with the highest ratio [the Court] could locate among discrimination cases." (*Id*. at 891.)

Davis v. Kiewit Pac. Co. (Cal.Ct. App. 2013) 2013 WL 5530356 [although unpublished and therefore not citeable in California state courts] provides ammunition against defendants providing canned declarations in support of their motions for summary adjudication of punitive damages' claims. Lisa Davis was one of two women who worked the day shift excavating a canal in Imperial County. After Ms. Davis reported to her supervisor that her job site lacked portable toilets for females, she was subjected to a hostile work environment and retaliation. On summary judgment, the defendant submitted threadbare declarations, devoid of any facts but which parroted the legal conclusions of *White v. Ultramar, Inc.*, 21 Cal.4th 563 (1999). The trial court granted summary adjudication as to Ms. Davis's request for punitive damages, finding no officer or managing agent ratified or engaged in any oppressive, malicious, and/or fraudulent conduct against Ms. Davis. The Court of Appeals reversed, reasoning that the defendant, "by simply restating the applicable legal standard under *White* for the determination of whether [one of Ms. Davis's supervisors] was its managing agent, did not satisfy its initial burden of production." Providing additional fodder for plaintiffs seeking punitive damages, the Court further held that "evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation."

Rounding out the list of 2013's best cases is *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701 – the sole wage and hour case in this year's review. *Benton* is the most recent in a line of cases instructing us that an employer's lack of a policy governing meal and/or rest periods is the glue that can make or break class certification. Brought as a class action by technicians who worked on the cell phone towers and other cell phone equipment of wireless service providers, they alleged violations of the California Labor Code's meal and rest break requirements and overtime requirements. Adopting the pro forma argument of virtually every single defendant facing class-action litigation, the defendants argued that the technicians could not possibly prevail on class certification as individual issues predominated, and their lack of policy on meal and rest periods was irrelevant.

In a rebuke to both the defendants and the trial court, the Court of Appeals held otherwise. Instead, citing *Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, the Court held:

> [T]he fact that individual inquiry might be necessary . . . is not a proper basis for denying certification. Rather, for purposes of certification, the proper inquiry is whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. In this case, the plaintiffs' theory of recovery is that [the defendant] violated wage and hour requirements by failing to adopt a policy authorizing and permitting meal and rest breaks to its technicians.

(*Id*. at 726.)

The Court also definitively rejected the argument that the defendant would not be liable to any employee who was co-employed by a staffing company that *did have* a lawful meal and rest break policy. Instead, the Court reasoned that such an "assumption . . . is not supported by the language of the Wage Order, which imposes an affirmative obligation on every employer to authorize and provide legally-required meal and rest breaks; if it fails to do so, it has violated the law and is liable." (*Id*. at 728.)

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