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The best, worst and most useful employment cases of 2014

The bounty of good decisions was both surprising and heartening

As we reach the middle of 2015, it's time to reflect back on some of the best and worst employment cases of 2014 and early 2015, considering how they can help and/or hurt our clients. Last year, our pessimism almost got the best of us as the litany of bad decisions left us feeling hopeless. This year, however, the bounty of good decisions was both surprising and heartening. Although the bad decisions still felt like a punch in the gut, the sheer number of good decisions gave us renewed optimism that even as wily defendants try to evade, and conservative jurists try to erode, what little protections our clients' have left, some courts are still willing to step in and enforce our employment laws.

Best cases for reversing summary judgment

This year, the California Courts of Appeal handed us some terrific cases for defeating summary judgment. The first, *Swanson v. Morongo Unified Sch. Dist.* (2014) 232 Cal.App.4th 954, is a great disability discrimination case.

Lauralyn Swanson, an educator with over 30 years of experience, was diagnosed with breast cancer after her first year working for the defendant school district. While on leave undergoing a mastectomy, the defendant informed her that, upon her return, she would be given a position she had never taught. According to the defendant, this was not a problem since Swanson could attend training *just two weeks* after her surgery. Swanson did what any conscientious teacher would do – she attended the training (despite the fact that on the last day, she was sent to the ER due to complications from her surgery). Although her doctors scheduled her for radiation and chemotherapy treatments during the start of the next school year, Swanson – again, ever the diligent employee – put off her treatment to prepare instructional materials to be used while she was on leave.

Upon her return to work, the school district informed Swanson that all of her training and lesson plans were for

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naught; it re-assigned her to a different position – a fifth grade classroom. Swanson, who had done everything asked of her, to the detriment of her own health, finally asked for an accommodation. She asked to be placed in an open position in a second grade classroom.

The school district's benevolent response? Nope. Not happening. Instead, the open position was given to another teacher, and Swanson was assigned to teach kindergarten, even though the defendant knew that she had not taught kindergarten in nearly 30 years, and even though teaching kindergarten-age children would threaten Swanson's already fragile immune system. After a few contrived negative performance evaluations, Swanson's contract was not renewed.

The Court of Appeal, in a lovely decision, saw through the school district's smoke and mirrors and reversed summary judgment on Swanson's disability discrimination claims. The court found that once Swanson informed the school district of her disability and took a leave of absence, the school district began a course of conduct designed "to set her up for failure." (*Id.* at p. 967.) The court emphasized that "an employer has a *duty* to reassign a disabled employee if an already funded, vacant position at the same level exists." (*Id.* at p. 970 (emphasis in original).) Not only this, but "a disabled employee seeking reassignment to a vacant position is entitled to preferential consideration." (*Ibid.*)

Like *Swanson*, *Cheal v. El Camino Hosp.* (2014) 223 Cal.App.4th 736, is another fantastic summary judgment case. Carol Cheal was a 61-year-old registered dietician, employed for 21 years before her termination. Like Swanson, Cheal was an exemplary employee. Cheal always received the glowing performance evaluations. That is, until she got a new supervisor. Cheal's new supervisor accused her of numerous shortcomings, gave her written warnings and then fired her. On summary judgment, the trial court bought the defendant hospital's "argue in the alternative" approach: (1) Cheal's performance was unsatisfactory; and (2) even if her performance *was* satisfactory, the hospital honestly (but mistakenly) believed that her performance was unsatisfactory.

Thankfully, the Court of Appeal did not buy this disingenuous line of reasoning.

Reversing summary judgment on Cheal's age discrimination claim, the court reasoned that a:

> factfinder could conclude that, apart from . . . one error eight months before her discharge, plaintiff exhibited no significant failures of competence while under [the new supervisor's] supervision . . . a jury could find that [the new supervisor's] list of supposed deficiencies had more to do with [the new supervisor's] attitude toward plaintiff than with plaintiff's actual performance.

(*Cheal v. El Camino Hosp.*, *supra*, 223 Cal.App.4th at pp. 753-754.)

In short, the evidentiary conflicts and false statements made by the new supervisor established pretext for age discrimination. Score two for plaintiffs.

Supreme Court shows some heart in retaliation cases

The next three cases are a stunning reminder that, while the U.S. Supreme Court has heart of coal when it comes to employees, a teeny tiny part of it still bleeds when it comes to retaliation cases. Indeed, since 2005, employees have won 10 out of the 11 retaliation cases decided by the Supreme Court, including this year's *Dep't of Homeland Sec. v. MacLean* (2015) 135 S.Ct. 913 (holding that an air marshal's disclosure to a reporter that his employer, the TSA, was cancelling air marshal missions after a terror alert, was protected activity under 5 U.S.C., § 2302, subd. (b)(8)(A), notwithstanding the fact that the disclosure violated TSA regulations) and last year's *Lawson v. FMR LLC* (2014) 134 S.Ct. 1158 (holding that the whistleblower protections of the Sarbanes-Oxley Act are not confined to employees of public companies, but also extend to employees of contractors and subcontractors of public companies, reasoning that "Congress plainly recognized [in enacting the whistleblower protections after the Enron debacle] that outside professionals – accountants, law firms, contractors, agents and the like – were complicit in, if not integral to, the shareholder fraud and subsequent cover-up [at Enron]," and it was not Congress's intention to "exclude from whistleblower protection countless professionals equipped to bring fraud on investors to a halt") and *Lane v. Franks* (2014) 134 S.Ct. 2369 (holding that the First Amendment prohibits a state entity – in this case, a community college in Alabama – from firing an employee on the basis of that employee's truthful testimony in a trial when the employee was acting outside of his ordinary job duties, reasoning that "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment . . . .")

California also stands up against retaliation

Like the United States Supreme Court, the California Courts of Appeal handed us four wonderful retaliation cases this year, reminding us that Labor Code section 1102.5 and wrongful termination in violation of public policy claims (especially when tethered to section 1102.5) continue to be extremely powerful tools in our arsenals. In *Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, plaintiff Cecilia Diego, an assistant director at a preschool, was fired based on her employer's *mistaken* belief that she had lodged a complaint with the California Department of Social Services. The court reversed summary judgment in favor of the defendant and held that Diego's claim for wrongful termination could proceed: it was tethered to a fundamental public policy embodied in Labor Code section 1102.5 (prohibiting retaliation against whistleblowers). (*Id.* at p. 932; see also *Ferrick v. Santa Clara Univ.* (2014) 231 Cal.App.4th 1337 (plaintiff's allegations that she was terminated in violation of public policy for reporting that her

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supervisor had engaged in commercial bribery was sufficiently tethered to a fundamental public policy embodied in Labor Code section 1102.5); *Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144 (plaintiff adequately alleged wrongful termination since his reports to his superiors that his employer – a Ford dealership – was submitting fraudulent warranty repair claims to Ford was sufficiently tethered to statutory provisions prohibiting theft and fraud).

Like *Ferrick*, *Diego* and *Yau*, *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, is another superb retaliation case.

Darren Hager, a former sheriff's deputy, brought an action under Labor Code section 1102.5 after he was fired for disclosing his suspicions that a fellow sheriff's deputy was complicit in drug trafficking and the death of another deputy. In response, the County argued that Hager's disclosure was unprotected because the County *already knew* of the possible involvement of its sheriff's deputy in this illegal activity. In a rebuke to the County, the court held that the plain language of section 1102.5 "does not limit whistleblower protection only to an employee who discloses unlawful conduct that had not been previously disclosed by another employee." (*Id.* at p. 1549.) The court recognized that "[p]rotection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so." (*Ibid.*) The court also rejected the County's "interpretation that the statutory protections of section 1102.5(b) do not apply when the disclosure of information addresses the wrongdoing of a fellow employee." (*Id.* at p. 1550.)

Independent contractor cases gain ground

This year, courts were also generous to all of you fighting the employee-versus-independent-contractor battle, gifting us with *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, *Alexander v. FedEx Ground Package Sys., Inc.* (9th Cir. 2014) 765 F.3d 981, and *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093. In all three of these cases, the courts reminded us that the "right to control" test is alive and well, holding that the *right* to control (versus *how* and *to what extent* that control is actually exercised) is the determinative inquiry in the employee-versus-independent-contractor analysis.

For instance, in *Ayala*, the Court, finding that the trial court had improperly denied class certification, cited the fact that the putative class members (newspaper delivery carriers), had all signed the same preprinted standard-form contract. Specifically, the Court held:

> [a]t the certification stage, the importance of a form contract is not in what it says, but that the degree of control it spells out is uniform across the class. Here, for example, the two form contracts address, similarly for all carriers, the extent of [defendant's] control over what is to be delivered, when, and how, as well as [defendant's] right to terminate the contract without cause on 30 days' notice.

(59 Cal.4th at p. 534.)

According to the California Supreme Court, the trial court had, in essence, put the cart before the horse as it were, and instead considered the "actual exercise of control . . . ." (*Id.* at p. 343.) In addition to emphasizing the importance of the *right* to control, the California Supreme Court also noted that if the hiring party has the "right to fire at will," this factor is "of inordinate importance [ ]" to the analysis. (*Id.* at p. 539; see also *Alexander v. FedEx Ground Package Sys., Inc.* (9th Cir. 2014) 765 F.3d 981 (reversing summary judgment in favor of FedEx, and granting summary judgment in favor of the class of plaintiffs, holding that FedEx drivers were employees, not independent contractors, since FedEx controlled the drivers' uniforms, type of vehicle, grooming standards, delivery schedule, route and supervision); *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093 (reversing judgment in favor of the trucking company defendant, holding that the class of drivers were employees, not independent contractors, reasoning that the defendant controlled the drivers' rates, schedules, routes, equipment, uniforms, appearance standards and maintained close supervision of the drivers).

Using the Private Attorneys General Act

This year, courts were not only benevolent to plaintiffs in the class-action context, but also gave us invaluable cases for those of us using the Private Attorneys General Act ("PAGA") to level the playing field. In the first case, *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, Joseph Baumann sued his employer, Chase Investment Services Corporation, in state court under PAGA alleging claims for unpaid overtime, meal and rest breaks and timely expense reimbursements. Chase removed the action under the Class Action [Un]Fairness Act ("CAFA"). The Ninth Circuit, in a glorious decision (and in reproach to all of those defense lawyers out there who claim that PAGA and class actions are one and the same), held that the district court could not exercise jurisdiction under CAFA because "a PAGA suit is fundamentally different than a class action." (*Id.* at p. 1123.) Ruling that "Rule 23 and PAGA are more dissimilar than alike[,]" the court reasoned that PAGA, unlike class actions, seeks to vindicate the public interest, has no notice requirements, does not require the court inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees, contains no requirements of numerosity, commonality or typicality, and the finality of PAGA judgments differ from class actions. (*Id.* at pp. 1121-23.) Surprising the defense bar, the U.S. Supreme Court denied the employer's petition for certiorari. (*Chase Inv. Services Corp. v. Bauman* (2104) 135 S.Ct. 870.)

In the second case, *Iskanian v. CLS Transportation Los Angeles, LLC* ("*Iskanian*") (2014) 59 Cal.4th 348, a wage-and-hour class action brought on behalf of drivers at defendant CLS Transportation, the Court reaffirmed *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, as to the enforceability of

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Like *Ellis*, *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1 is both good and bad. In *Duran*, loan officers for U.S. Bank claimed they were improperly misclassified as exempt under the outside salesperson exemption. The trial court certified a class of 260 plaintiffs, *and yet*, when it came to trial, decided that it would determine U.S. Bank's liability based on a random sample of just 21 plaintiffs. Finding that such statistical sampling was completely faulty, the 43 percent margin of error was "intolerably high," and U.S. Bank was denied its due process right to litigate affirmative defenses by introducing impeachment evidence as to class members outside of the 21 individuals, the Supreme Court affirmed the Court of Appeal's reversal of the judgment.

Now, why is this case good? Because the Supreme Court *did not* use it as an opportunity to obliterate statistical sampling altogether, nor did it use it as a chance to allow a defendant to put on evidence as to each class member. Instead, the Court held that it "remained open to the appropriate use of representative testimony, sampling, or other procedures employing statistical methodology," *but* such a trial plan must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced. (*Id.* at p. 33). The Court emphasized however, that "[n]o case, to our knowledge, holds that a defendant has a due process right to litigate an affirmative defense as to each individual class member." (*Id.* at p. 38.)

Fewer bad cases

Now, unfortunately, it's time to brace yourself for the "bad" decisions. Don't worry though – there are only three worthy of discussing (if you are thinking to yourself "*only*"?!... try to comfort yourself by remembering the deluge from last year . . . or just re-read the foregoing).

In *Integrity Staffing Solutions, Inc. v. Busk* (2014) 135 S.Ct. 513, former hourly warehouse workers who were charged with retrieving products from warehouse shelves and packaging them for delivery to Amazon.com filed a class action alleging that they were entitled to compensation under the FLSA for the roughly 25 minutes each day that they spent undergoing a security screening. The Court, in a unanimous decision, held that even though the screenings were employer-mandated (and the workers would be fired if they didn't comply), such screenings were non-compensable because the screenings were purportedly *not* "integral and indispensable" to the workers' duties. (*Id.* at p. 519.) It would certainly be interesting to see if the justices would have ruled the same way if they were forced to spend upwards of 25 minutes each day standing in a security screening line.

Along these same lines of absurdity, this year also brought us *Rhea v. General Atomics* (2014) 227 Cal.App.4th 1560. In *Rhea*, Lori Rhea brought a class action challenging her employer's practice of requiring that exempt employees use their accrued paid time off for partial-day absences. The court, despite *conceding* that vacation pay is a type of wages, that California "has a policy of "jealously protect[ing]" wages," and that California "prohibit[s] any forfeiture of a private employee's vested vacation time," held that the defendant was not doing anything unlawful. (*Id.* at pp. 1570-72.) Let's recap: you can't dock an exempt employee's pay for a partial-day absence, but you really can if you characterize it as "vacation pay."

Koval v. Pac. Bell Tel. Co. (2014) 232 Cal.App.4th 1050 is not only an example of a terrible decision, but also an example of brilliantly evil defensing. Frank Koval and other service technicians for Pacific Bell filed a class action alleging that Pacific Bell did not relinquish control of them during their meal and rest breaks. Pacific Bell's *own written policies* prohibited service technicians from using their meal breaks to meet up with colleagues, go to their personal residences, leave their trucks, ride in other vehicles, sleep in their trucks, drive their trucks outside their routes to get a meal or to take rest breaks at coffee shops or restaurants. Seems like a slam dunk, right? Nope. Pacific Bell, in opposing the motion for class certification basically argued, "yes, we *have* these written policies, but that doesn't mean we are following them, and besides, who knows whether the policies were even communicated to our employees!" The Court of Appeal bought this ridiculousness and held class certification was properly denied:

> While Pacific Bell maintained written policies that are uniform, in the sense that they are in writing, the evidence supports the trial court's conclusion that supervisors did not consistently articulate these policies to class members. Instead, substantial evidence supports the court's finding that each supervisor conveyed the policies to class members orally, a practice which the evidence also shows resulted in diverse practices and differing interpretations as to what the rules required. In this sense, the policies are far from uniform.

(*Koval v. Pac. Bell Tel. Co.*, 232 Cal.App.4th at p. 1062.)

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