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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2017 Issue

The best and worst employment cases of 2016

WE PULL BACK THE CURTAIN TO TURN THE SPOTLIGHT ON THE CASES THAT SHAPED THE YEAR IN EMPLOYMENT LAW (WITH A BIT OF COLOR COMMENTARY)

Orange. Incurious. Angry. Vengeful. Prevaricator. Tyrant. Dangerous. Unhinged. Unbalanced. Unfit. Before the Orange Pestilence was handed the reins of power, the courts were independent and, in 2016 and early 2017, generally favorably disposed toward the claims of plaintiff employees. This article attempts to "cherry-pick" and then briefly summarize not just the most significant employment cases but also those that are of the most utility to plaintiff employment practitioners.

U.S. Supreme Court

During 2016, the U.S. Supreme Court issued four major decisions impacting labor and employment law practitioners. Interestingly, three of the four decisions favored employees while the fourth was a wash as the Court "punted" on making a substantive decision until another day. Of the four decisions, the most significant – ***Campbell-Ewald Co. v. Gomez,*** 136 S.Ct. 663 (2016) – was in a non-employment law case. In *Campbell-Ewald*, the Supreme Court answered a question that it left open three years earlier in *Genesis Healthcare Corp. v. Symczyk* (2013) 133 S.Ct. 1523 – is an unaccepted offer to satisfy the named plaintiff's individual claim sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated? The Court held that an unaccepted settlement offer or offer of judgment does *not* moot a plaintiff's case.

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The Supreme Court's ruling removes what was rapidly becoming an effective defense tactic to use Rule 68 offers of judgment (or settlement offers) to resolve the named plaintiffs' claims in putative class actions and thereby attempt to end the class action.

Justice Ginsburg, writing for the majority (and joined by Justices Kennedy, Breyer, Sotomayor, and Kagan with a concurring opinion by Justice Thomas), explained that the Court was *not* deciding whether a claim can be mooted "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." (*Id.* at 672.) Taking advantage of this unanswered question, Chief Justice Roberts wrote a dissenting opinion (in which Justices Scalia and Alito joined) that provides a roadmap for other defense tactics that might moot the named plaintiff case and, thereby, the class action; for example, Justice Roberts suggests that defendants can end the case by depositing full relief with the district court on the condition that it be released to the plaintiff when the case is dismissed as moot.

The next most important Supreme Court case was ***Tyson Foods, Inc. v. Bouaphakeo***, 136 S.Ct. 1036 (2016). Following Justice Scalia's 5 to 4 majority opinion in 2011 in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), defense bar began to slowly ring the funeral bells for the employment class action predicting that *Dukes* had effectively established a categorical exclusion of representative or statistical evidence in class actions. The *Tyson Foods* decision, however, brings to mind a quote attributed to Mark Twain: "The reports of my death are greatly exaggerated."

The *Tyson Foods* plaintiffs brought a class action under the FLSA contending that because they spent unpaid time donning and doffing safety gear, they actually worked more than 40 hours per week and were entitled to overtime pay. At trial, because there were no records regarding how long it took the employees to don and doff, the plaintiffs used an industrial relations expert who watched videotapes of the workers changing their clothing and then averaged that it took 18 minutes a day for employees in the "cut and retrim" departments and 21.25 minutes in the kill department. The plaintiffs then used another expert to estimate the amount of uncompensated work that each employee performed. This expert estimated that the plaintiffs were owed $6.7 million. The jury returned a verdict in the plaintiff's favor in the amount of $2.9 million.

Relying heavily on *Dukes*, Tyson Foods appealed, arguing that the verdict had to be overturned because "[r]eliance on a representative sample, absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims." Tyson Foods and its amici then called upon the Court of Appeal, and then the Supreme Court, to finish the job that *Dukes* started and formally announce a broad rule against the use in class actions of what the parties call representative evidence.

Both the Court of Appeals and the Supreme Court rejected this invitation. Instead, the Supreme Court held:

> [P]etitioner and various of its amici maintain that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence. A categorical exclusion of that sort, however, would make little sense. A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.

(*Id.*, 136 S.Ct. at p. 1046.)

The bottom line from *Tyson Foods* is that if you bring or defend class actions, you will want to closely read this case because it details the standards that must be satisfied when plaintiffs seek to rely on statistical evidence to transform individualized issues into common ones for purposes of Rule 23(b)(3)'s predominance inquiry.

The Supreme Court's decision in ***Encino Motorcars, LLC v. Navarro*** (2016), 136 S.Ct. 2117 illustrates what appears to be a growing problem with the Roberts' Court: not only accepting fewer and fewer cases but also "punting" in more cases than ever. In *Encino Motorcars*, five current and former service advisors for an automobile dealership sued the dealership, alleging that it violated the Fair Labor Standards Act by failing to pay them overtime compensation. The district court dismissed the lawsuit finding that the FLSA overtime provisions did not apply to them because service advisors are covered by the statutory exemption in 29 U.S.C. § 213(b)(10)(A) (providing that any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles is exempt from FLSA). The Ninth Circuit, applying *Chevron* deference to a Department of Labor regulation, held that service advisors are not covered by the section 213(b)(10)(A) exemption and reversed.

Because the Ninth Circuit's decision conflicted with cases from the Fourth and Fifth Circuits and the Supreme Court of Montana, the Supreme Court granted certiorari to determine "whether 'service advisors' at car dealerships are exempt under 29 U.S.C. section 213(b)(10)(A) from the FLSA's overtime-pay requirements." Rather than answering that question, the Supreme Court "kicked the can down the road" by merely holding that the Ninth Circuit should not have applied *Chevron* deference to the DOL regulation, and then reversing and remanding for the Ninth Circuit to interpret the statute without consideration of the DOL's regulation. In concurrence, Justices Ginsburg and Sotomayor suggested that the service advisors are not exempt from overtime. In dissent, Justices Thomas and Alito chastised the majority for "punting" on the ultimate issue in the case and said that the service advisors were exempt from overtime. On remand, the Ninth Circuit held that service advisors did not fall within FLSA overtime compensation exemption provision which exempted "any salesman,

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partsman, or mechanic primarily engaged in selling or servicing automobiles." (*Navarro v. Encino Motorcars, LLC*, (9th Cir. 2017) 845 F.3d 925.)

In ***Heffernan v. City of Paterson, N.J.*** (2016), 136 S.Ct. 1412, the Supreme Court continued a remarkable pro-employee streak by finding in favor of a plaintiff employee in a retaliation case as it has now done in 10 of the last 12 retaliation cases. *Heffernan* involved a police officer who sued his employer (the City of Paterson, New Jersey) for retaliation under section 1983, contending that he was demoted in retaliation for exercising his First Amendment rights. Heffernan worked for the Chief of Police, James Wittig. At that time, the mayor of Paterson, Jose Torres, was running for reelection against Lawrence Spagnola. Torres had appointed to their current positions both Chief Wittig and a subordinate who directly supervised Heffernan. Heffernan argued that Chief Wittig and the subordinate demoted Heffernan because they believed that he was overtly supporting Spagnola in the mayoral race. Interestingly, Heffernan was not actually involved in the Spagnola campaign.

In his lawsuit, Heffernan claimed that Chief Wittig and others had demoted him because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech. The District Court dismissed his lawsuit, finding that Heffernan had not engaged in protected conduct. The Third Circuit affirmed, finding that a free-speech retaliation claim is actionable under section 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights. In a 6-2 decision written by Justice Breyer, the Supreme Court reversed finding that "[w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. section 1983 even if, as here, the employer makes a factual mistake about the employee's behavior." (*Id.*, 136 S.Ct. at 1418.) Dissenting, Justice Thomas (joined by Justice Alito) explained that he would have affirmed the dismissal of Heffernan's lawsuit because, in his view, public (and presumably private) employers are free to fire employees whom they *mistakenly* believe to have engaged in protected activity. Attempting to turn a phrase *a la* Justice Scalia (and failing miserably), Justice Thomas writes "'[W]hat is sauce for the goose' is not 'sauce for the gander,' when the goose speaks and the gander does not." (*Id.*, 136 S.Ct. at 1423.)

The Ninth Circuit

The most important Ninth Circuit case of 2016 is almost certainly ***Morris v. Ernst & Young, LLP*** (9th Cir. 2016) 834 F.3d 975. *Morris* is the latest high-profile case in the ongoing arbitration/class-action waiver wars and it may cause the Supreme Court to finally weigh in. In *Morris*, the Ninth Circuit disagreed with the Fifth Circuit (*Murphy Oil USA, Inc. v. NLRB* (5th Cir. 2015) 808 F.3d 1013) and joined the National Labor Relations Board (*D.R. Horton Inc.*, 357 NLRB 184 (2012) and the Seventh Circuit (*Lewis v. Epic Systems Corporation* (7th Cir. 2016) 823 F.3d 1147) in holding that a provision in an arbitration agreement that prohibits class and collective actions violates the National Labor Relations Act, 29 U.S.C. §§ 151 *et. seq.*, and, is therefore, non-enforceable. Presaging a blockbuster decision likely to come later this year, the Supreme Court, on January 13, 2017, granted the petitions for writs of certiorari in *Morris, Murphy Oil USA, Inc.* and *Lewis v. Epic Systems Corporation*.

In addition to *Morris*, the Ninth Circuit decided six other pro-employee cases addressing a variety of claims: The Dodd-Frank Act, gender discrimination, hostile work environment, retaliation, and the Fair Credit Reporting Act.

In ***Somers v. Digital Realty Trust, Inc.*** (9th Cir. 2017) 2017 WL 908245, the Ninth Circuit addressed the scope of the anti-retaliation protections of the Dodd-Frank Act which extends protection to those who make disclosures under the Sarbanes-Oxley Act. In particular, the Ninth Circuit was called upon to decide whether, in using the term "whistleblower," Congress intended to limit protections to those who come within Dodd-Franks' formal definition, which would include only those who disclose information to the SEC. The Ninth Circuit, relying on *Berman v. Neo@Ogilvy LLC* (2d Cir. 2015) 801 F.3d 145, 155, and giving *Chevron* deference to the pertinent SEC regulation (17 C.F.R. § 240.21F-2), held that the Dodd Frank Act extends protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC.

Mayes v. WinCo Holdings, Inc. (9th Cir. 2017) 846 F.3d 1274, is a wonderful new gender discrimination case with applicability to any type of discrimination. In reversing summary judgment for the defendant employer, the Ninth Circuit gifted the plaintiff employment bar with several pearls of wisdom that can be used to defeat a motion for summary judgment including, for example, statements that: (1) replacing a plaintiff with a less qualified person outside of the protected class can be evidence of pretext; (2) pretext can be shown by an employer's decision to fire the plaintiff for engaging in a common, accepted practice for which others have not been fired; (3) the fact that the decision-maker is of the same protected class as the plaintiff does not preclude a finding of discriminatory animus; (4) the animus of a supervisor can affect an employment decision if the supervisor influenced or participated in the decision-making process; and (5) even if a biased supervisor does not participate in the ultimate termination decision, the supervisor's reports about the plaintiff may remain a causal factor in the termination decision if an independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.

The two hostile-work-environment cases decided by the Ninth Circuit are ***Zetwick v. County Of Yolo*** (9th Cir. 2017) 2017 WL 710476, and ***Reynaga v. Roseburg Forest Products*** (9th Cir. 2017) 847 F.3d 678.

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In *Zetwick*, Victoria Zetwick, a county correctional officer, alleged that Edward G. Prieto, the County Sheriff, 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. Zetwick also alleged that Sheriff Prieto did not hug male employees; rather, she claimed Sheriff Prieto gave male employees handshakes. The defendants, Sheriff Prieto and the County of Yolo, argued that Sheriff Prieto's conduct was not objectively severe or pervasive enough to establish a hostile work environment, but merely innocuous, socially acceptable conduct. They also alleged that although Zetwick may not have seen it, Sheriff Prieto did, in fact, hug male employees. After waiting more than one year after oral argument on the defendants' motion for summary judgment, the District Court granted the motion and dismissed.

On appeal, the Ninth Circuit, quoting *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788, reversed, holding "a reasonable juror could conclude that the differences in hugging of men and women were not, as the defendants argue, just 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.'" (*Id.* at * 4.) In so holding, the Ninth Circuit chastised the District Court for applying an "incorrect legal standard" that "involved extraction of a sort of black letter rule, from just a few cases, that courts do not consider hugs and kisses on the cheek to be outside the realm of common workplace behavior." (*Ibid.*) The Ninth Circuit also criticized the District Court for making an all too common mistake – requiring a hostile work environment plaintiff to demonstrate that the harassment was severe *and* pervasive.

The Ninth Circuit reiterated the long-standing legal principle that the proper standard is whether the defendant's conduct was severe or pervasive.

In *Reynaga*, Efrain Reynaga and his son Richard Reynaga were Mexican-Americans who worked as millwrights for Roseburg Forest Products. Efrain Reynaga alleged that the lead millwright, Timothy Branaugh, harassed him (Efrain Reynaga) and his son with racially disparaging comments and conduct including: (1) saying, "We should close the borders to keep motherfuckers like you; (2) saying, "Minorities are taking over the country;" (3) asking, "Efrain, are all Mexican women fat?" and (4) frequently assigning Efrain and his son the harder, dirtier, and more dangerous jobs.

Efrain Reynaga complained to Roseburg about the racial harassment and, in response, Roseburg initiated an investigation into Efrain's allegations and ultimately rearranged Branaugh's work schedule so that Branaugh would not be on the same shift as Efrain. Subsequently, the Reynagas showed up for work and discovered that they had been assigned to work on the same shift as Branaugh. When they refused to work on the same shift as Branaugh, Roseburg suspended and then fired them for job abandonment. Efrain Reynaga filed suit against Roseburg, alleging hostile work environment. Roseburg moved for summary judgment.

The District Court, stating that it was "certainly troubled by Reynaga's allegations" and that it recognized that "these events caused him to suffer pain, granted the motion for summary judgment as to the hostile work environment claim concluding that Branaugh's conduct was not severe or pervasive enough to alter the conditions of Efrain's employment. In this regard, the District Court completely discounted the demeaning comments made by Branaugh that directly referenced race or national origin as nothing more than "offhand comments" or "mere offensive utterances." On appeal, the Ninth Circuit disagreed and reversed:

> Viewing the facts in the light most favorable to Efrain, the incidents described in the record are sufficient to create genuine disputes of material fact as to the severity and pervasiveness of Branaugh's conduct.

(847 F.3d at 687.)

The Ninth Circuit concluded that Roseburg could be liable for Branaugh's conduct because a reasonable trier of fact could find that Roseburg knew about Branaugh's misconduct and responded inadequately.

In ***Stilwell v. City of Williams*** (9th Cir. 2016) 831 F.3d 1234, Ronnie Stilwell, the Superintendent of the Water Department for the City of Williams, sued the City for retaliation in violation of the ADEA and section 1983 First Amendment. Stilwell alleged that he was fired because he signed a sworn statement for and agreed to testify on behalf of another employee who was suing the City for age discrimination. The district court granted summary judgment in favor of Defendants on Stilwell's § 1983 First Amendment claim on the grounds that (1) the retaliation provision of the ADEA, 29 U.S.C. § 623(d), precluded a § 1983 First Amendment retaliation claim such as Stilwell's; and (2) Stilwell's speech was not "speech as a citizen on a matter of public concern" and so fell outside the First Amendment's protections. On appeal, the Ninth Circuit reversed. First, the Ninth Circuit held that the retaliation provision of ADEA did not preclude a related § 1983 First Amendment retaliation claim. Second, the Ninth Circuit ruled that Stilwell's affidavit on a matter of public concern and his express plan to testify in court along the same lines, fell within the purview of the First Amendment.

In ***Syed v. M-I, LLC*** (9th Cir. 2017) 846 F.3d 1034, the Ninth Circuit was presented with a question of first impression in the federal courts of appeals: 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. (*See* 15 U.S.C. § 1681b(b)(2)(A).)

The Ninth Circuit held that a prospective employer violates section 681b(b)(2)(A) when it procures a job

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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 the liability waiver here, before procuring a consumer report or causing one to be procured.

California Supreme Court

In 2016, Christmas and Hanukkah came several days early for thousands of security guards employed by ABM Security Services, Inc. ("ABM") — ***Augustus v. ABM Sec. Services, Inc***. (2016) 2 Cal.5th 257. In 2005, Jennifer Augustus filed a putative class action on behalf of all ABM security guards alleging, among other things, that ABM violated California law requiring that they remain "on call" (*i.e.*, keeping their radios and pagers on, remaining vigilant, and responding when needs arose) during their rest breaks. The trial court granted summary judgment on behalf of the plaintiffs and then awarded them approximately $90 million in statutory damages, interest, and penalties. The Court of Appeal reversed holding that state law does not require employers to provide off-duty rest periods, and moreover, "simply being on call" does not constitute performing work. On December 22, 2016, the Supreme Court reversed explaining that state law does, in fact, prohibit on-duty and on-call rest periods; during required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time.

In 2016, the California Supreme Court also issued opinions in two major cases involving attorneys' fees and costs: ***Laffitte v. Robert Half Int'l Inc.*** (2016) 1 Cal.5th 480 and ***DeSaulles v. Community Hosp. of Monterey Peninsula*** (2016) 62 Cal.4th 1140.

Laffitte involved objections to a $19 million settlement of a wage and hour class action which included an attorneys' fees award of one-third of the gross settlement. The objector argued that the fee award was not reasonable because it was not calculated on the basis of time spent by the attorneys on the case. In a unanimous decision authored by Justice Werdegar, the Court held that "a trial court [may] calculate an attorney fee award from a class action common fund as a percentage of the fund." The Court also held that while trial courts have discretion to conduct a lodestar cross-check on a percentage fee, they are also free to forgo a lodestar cross-check altogether and use other means to evaluate the reasonableness of a requested percentage fee. Finally, the Court held that if the trial courts elect to conduct a lodestar cross-check, they retain the discretion to either rely on attorney declarations summarizing the overall time spent or to consider detailed time sheets broken down by individual task. One important question remains unanswered in the aftermath of *Laffitte,* given that the Court expressly did not adopt a benchmark percentage but did affirm a one-third percentage, will the Ninth Circuit continue to apply a 25 percent benchmark in cases arising under California law, increase that benchmark to one-third, or simply grant district courts the discretion to determine fee awards constrained only by *Laffitte*?

In *DeSaulles*, the Supreme Court interpreted Code of Civil Procedure section 1032, which provides that a prevailing party is entitled to recover costs. (Code Civ. Proc., § 1032(b).) Section 1032(a)(4) defines the "prevailing party" to include "the party with a net monetary recovery" and "a defendant in whose favor a dismissal is entered." The question *DeSaulles* answered was whether a plaintiff who voluntarily dismisses an action after entering into a monetary settlement is a prevailing party. The Supreme Court answered in the affirmative, holding "When a defendant pays money to a plaintiff in order to settle a case, the plaintiff obtains a 'net monetary recovery,' and a dismissal pursuant to such a settlement is not a dismissal 'in [the defendant's] favor.' As emphasized below, this holding sets forth a default rule; settling parties are free to make their own arrangements regarding costs." (62 Cal.4th at 1144.)

And, in 2016, the California Supreme Court issued two important decisions concerning arbitration: ***Baltazar v. Forever 21, Inc.*** (2016) 62 Cal.4th 1237, and ***Sandquist v. Lebo Auto, Inc*** (2016) 1 Cal.5th 233 (2016).

In *Baltazar*, a unanimous opinion authored by Justice Kruger, the Supreme Court resolved several issues frequently encountered during proceedings to enforce arbitration agreements. Maribel Baltazar sued her former employer, Forever 21, Inc., alleging that she was constructively discharged and subjected to discrimination and harassment based on race and sex. Forever 21 moved to compel arbitration based on an arbitration agreement between it and Baltazar.

Baltazar argued that the arbitration provision was procedurally unconscionable because Forever 21 did not attach a copy of the arbitration rules to the arbitration agreement and that the agreement was substantively unconscionable because it: (1) allowed the parties to seek a temporary restraining order or preliminary injunctive relief; (2) listed only employee claims as examples of the types of claims that were subject to arbitration; and (3) stated that "all necessary steps will be taken" to protect employer's trade secrets and proprietary and confidential information. Initially, the Supreme Court noted that Baltazar's argument of procedural unconscionability faltered because she merely challenged Forever 21's failure to attach the arbitration rules to the arbitration agreement as opposed to challenging some element of the arbitration rules of which she had been unaware when she signed the arbitration agreement. Next, the Supreme Court rejected all of Baltazar's substantive unconscionability arguments. At bottom, *Baltazar* is a very favorable ruling for employers providing ammunition to shoot down common employee attempts to circumvent the unfriendly environs of arbitration.

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In *Sandquist*, a 4-3 opinion written by Justice Werdegar, the California Supreme Court answered the following question – who decides whether an arbitration agreement permits or prohibits class-wide arbitration, a court or the arbitrator? The Supreme Court's answer was, essentially, "It depends":

> We conclude no universal rule allocates this decision in all cases to either arbitrators or courts. Rather, who decides is in the first instance a matter of agreement, with the parties' agreement subject to interpretation under state contract law.

(1 Cal.5th at 214.)

The Court admonished that when construing arbitration provisions to determine whether a court or the arbitrator decides whether an arbitration agreement permits or prohibits class-wide arbitration, the parties' likely expectations about allocations of responsibility must be considered. In that regard, the Court recognized that those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts. The Court also explained that two interpretive principles should be considered in determining whether an arbitrator or court should decide whether the arbitration agreement allows class-wide arbitration: (1) when the allocation of a matter to arbitration or the courts is uncertain, all doubts should be resolved in favor of arbitration; and (2) any ambiguities in written agreements are to be construed against their drafters.

Applying the foregoing, the Court concluded, as a matter of state contract law, that the parties' arbitration provisions allocated the decision on the availability of class arbitration to the arbitrator, rather than reserving it for a court. Accordingly, the Supreme Court remanded the matter to be determined by an arbitrator. Justices Kruger, Chin and Corrigan dissented, arguing that the availability of class arbitration should be a question for a court, rather than an arbitrator, unless the parties' agreement clearly and unmistakably provides otherwise.

California Courts of Appeal

The three most important California Court of Appeal decisions of 2016/2017 involve California's anti-SLAPP statute, (Code Civ. Proc., § 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 *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, CBS Broadcasting, Inc. – an "economic powerhouse" if there ever was one – used the anti-SLAPP statute to defeat a gender and age-discrimination lawsuit. Likewise, in *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, the defendant also used the anti-SLAPP statute to obtain the dismissal of a gender discrimination lawsuit.

In 2016, the California Courts of Appeal issued two powerful decisions that plaintiff employment attorneys hoped would reign in the ability of employers to thwart employment discrimination cases via the anti-SLAPP statute – ***Nam v. Regents of the University of California*** (2016) 1 Cal.App.5th 1176 and ***Wilson v. Cable News Network, Inc.***, *review granted* 2017 WL 889054 (Mar. 1, 2017). In *Nam*, the Court of Appeal (for the Third District) affirmed the denial of the Regents of the University of California's motion to strike the sexual harassment and retaliation claims brought by a former anesthesiology resident at the state university hospital. In its affirmance, the Court of Appeal explained that alleged victims of discrimination and retaliation should not be subjected to an "earlier and heavier burden of proof than other civil litigants" and thereby dissuaded from "the exercise of their right to petition for fear of an onerous attorney fee award."

In *Wilson*, in which the Supreme Court unfortunately granted review on March 1, 2017, the Court of Appeal (for the Second District, Division 1) reversed the trial court's grant of CNN's motion to strike discrimination and retaliation claims brought by a former Emmy Award-winning producer. The Court of Appeal explained that the discrimination and retaliation that the plaintiff had allegedly suffered were not acts in furtherance of CNN's free speech rights and therefore could not support an anti-SLAPP motion. At bottom, both the *Nam* and *Wilson* decisions stand for the general proposition that private employment discrimination and retaliation claims are not properly the subject of anti-SLAPP motions because they are not acts designed to prevent employers from exercising their First Amendment rights.

In 2017, a California Court of Appeal issued an absolutely terrible decision in an anti-SLAPP case – ***Daniel v. Wayans*** (2017) 8 Cal.App.5th 367, which threatens to destroy much of the good done in *Nam* and *Wilson*. In *Wayans*, Pierre Daniel, an actor working on "A Haunted House 2," alleged that actor Marlon Wayans racially harassed him by, among other things: (1) calling Daniel a "Nigga"; (2) mocking Daniel's afro; (3) negatively referring to Daniel as "Cleveland Brown" – an African-American cartoon character in the adult cartoon comedy series "Family Guy"; (4) routinely leering at, staring at, and rolling his eyes at Daniel; (5) ridiculing Daniel in the presence of other crew members; and (6) treating Daniel negatively because of his race/national origin. In response to Daniel's FEHA employment discrimination lawsuit, Wayans moved to strike Daniel's claims as a SLAPP suit, arguing that all of Daniel's claims arose from Wayans's constitutional right of free speech because the core

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injury-producing conduct arose out of the creation of the movie. The trial court agreed with Wayans and also found that Daniel had failed to establish the probability that he would prevail on any of his claims against Wayans.

On appeal, the Court of Appeal, perhaps blinded by "Hollywood," affirmed. The Court of Appeal fell victim to the so-called "creative process" defense and bizarrely concluded that Daniel was suing "based squarely on Wayans's exercise of free speech the creation and promotion of a full-length motion picture, including the off-camera creative process." Then, the court concluded that Daniel could not show a probability of prevailing on his racial harassment claim because "a reasonable Black actor who voluntarily agreed to participate in a movie addressing racial stereotypes that was written, produced and starred Wayans — an artist known for his frequent use of both the words nigger and nigga in his work — would be on notice that potentially racially charged language would be used in the film, and, given the improvisational nature of the production, that such language might be used among the actors and production staff when the cameras were not rolling to help develop storylines and dialogue."

Orange, in summary

Incurious. Angry. Vengeful. Prevaricator. Tyrant. Unhinged. Unbalanced. Unfit. Dangerous. The Orange Pestilence has arrived. Resist.

Andrew H. Friedman is a partner with Helmer Friedman LLP *in Culver City. 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 2005-2016). 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.*