

The best and worst employment cases of 2024

A brief overview of the cases that shaped the year in employment law (with a bit of color commentary)

By Andrew Friedman & Erin Kelly

Continuing what has become the new normal, the courts churned out an astonishing number of employment-law decisions during the past year – often multiple such decisions per day. 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 the plaintiff's side employment practitioner.

U.S. Supreme Court

2024 marks the year that decades of highly questionable behavior from U.S. Supreme Court justices was finally uncovered in the media. Only time will tell whether there will be any meaningful change to the Court's ethical practices (highly unlikely, but hope springs eternal). On the bright side, the justices still managed to deliver a few surprisingly employee- friendly decisions.

The Court held in *Muldrow v. City of St. Louis, Missouri* (2024) 601 U.S. 346, 144 S.Ct. 967, that an employee alleging a discriminatory job transfer does not have to show that the harm incurred was significant, serious, substantial, or any similar adjective. Rather, the employee, merely must show that it caused "some harm." In an extremely helpful concurrence, Justice Kavanaugh set forth a roadmap for employees to follow in satisfying the some-harm requirement.

And in *Murray v. UBS Securities, LLC* (2024) 601 U.S. 23, 144 S.Ct. 445, the Court held that a Sarbanes-Oxley Act whistle-blower need only demonstrate that their protected activity was a contrib-

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uting factor in an adverse employment action; there is no requirement to show that the employer acted with retaliatory intent.

Ninth Circuit

As social media and text messaging continue to shape the landscape in employment cases, the Ninth Circuit underscored their evidentiary relevance. In *Okonowsky v. Garland* (9th Cir. 2024) 109 F.4th 1166, the Ninth Circuit held that a coworker's social media posts that "occurred" outside of work could be considered when assessing the totality of circumstances surrounding the employee's Title VII claim for hostile work environment, "especially in light of the ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace."

The Ninth Circuit also issued decisions defining the scope of federal and state employment statutes. In *Rajaram v. Meta Platforms, Inc.* (9th Cir. 2024) 105 F.4th 1179, the Ninth Circuit held that 42 U.S.C. § 1981 prohibits discrimination against United States citizens based on their citizenship. And in *Daramola v. Oracle America, Inc.* (9th Cir. 2024) 92 F.4th 833, the Ninth Circuit held that the anti-retaliation provisions of the Sarbanes-Oxley and Dodd-Frank Acts and California's Unfair Competition Law do not apply extraterritorially so as to protect citizens of other countries working outside of the U.S.

While acknowledging there is no bright-line rule for when the timing between an employee's protected activity and the employer's adverse employment action is sufficient on its own to show pretext for retaliation, the Ninth Circuit, in *Kama v. Mayorkas* (9th Cir. 2024) 107 F.4th 1054, held that the 56-day gap between a TSA officer's EEO complaint and his firing was insufficient, by itself.

The Ninth Circuit en banc rejected an equal-protection challenge to AB 5 brought by app-based transportation and delivery companies in *Olson v. California* (9th Cir. 2024) 104 F.4th 66. The Ninth Circuit correctly held that AB 5's differential treatment of app-based work arrangements in the transportation and delivery industry was rationally related to legitimate state interests in protecting workers, stemming erosion of middle class, and reducing income inequality, and thus it did not violate equal protection.

California Supreme Court

Employment practitioners were reminded of the crushing disappointments that we continue to feel as a result of *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, when gig corporations spent $200 million to convince the public to pass their deceptive Prop 22, which allows those companies to classify drivers as independent contractors and exempts them from employment protections like workers' compensation and many anti-discrimination laws. Despite the tireless efforts of employee-rights advocates, who argued that the California Constitution vested the power to govern workers' compensation solely with the Legislature, the California Supreme Court in *Castellanos v. State of California* (2024) 16 Cal.5th 588, upheld the constitutionality of Prop 22, codified as Business and Professions Code section 7451.

The California Supreme Court made three important holdings for discrimination and harassment cases in *Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611: (1) a one-time use of a racial slur "may be actionable if it is sufficiently severe in light of the totality of the circumstances;" (2) a coworker's use of a racial epithet, such as the N-word, may be sufficient, by itself, to create a hostile work environment; and (3) the actions of a high enough official, particularly an HR official, to effectively prevent an employee's means of reporting and addressing workplace discrimination and harassment may constitute an act of prohibited retaliation. In a footnote, the Court appeared to suggest that it is open to arguments that the so-called "materiality" standard for retaliation cases adopted by the Court in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, should be replaced by the more expansive "dissuasion" test articulated by the U.S. Supreme Court in *Burlington N. & S. F. R. Co. v. White* (2006) 548 U.S. 53.

The California Supreme Court also issued key decisions impacting motions to compel arbitration in the state. As expected, the Court held in *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, that a party opposing arbitration does not need to show they suffered prejudice in order to establish the moving party waived the right to compel arbitration. This decision follows the U.S. Supreme Court's 2022 decision in *Morgan v. Sundance, Inc.* (2022) 596 U.S. 411.

In *Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, the Court issued several helpful holdings for employees seeking to avoid arbitration: (1) an arbitration agreement provision which requires the arbitration of claims more likely to be brought by an employee but exempts from arbitration claims more likely to be brought by an employer lacks mutuality and is substantively unconscionable; (2) a provision placing an unreasonable time limit on the filing of covered claims, such as reducing a three-year statute of limitations to one year, is substantively unconscionable; and (3) an attorneys' fees provision which allows for a fee award against a party who unsuccessfully opposed a motion to compel arbitration is substantively unconscionable unless the action was "frivolous, unreasonable, or groundless when brought, or that the employee continued to litigate after it clearly became so" under Government Code section 12965, subdivision (c).

Consistent with the judiciary's unending (and, frankly, unfounded) faith in private arbitration companies, the *Ramirez* Court also held that a provision potentially limiting discovery rights was

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not unconscionable because the arbitration agreement granted the arbitrator the discretion to order more discovery if necessary. (Note, however, the recent change to the CAA effective January 1, 2025 which allows parties to access discovery under Code Civ. Proc., § 1283.05.)

Finally, and perhaps most importantly for future oppositions to motions to compel arbitration, the Court established a test for determining whether to sever unconscionable terms and enforce the rest of the agreement or to invalidate the entire agreement. Courts may only sever unconscionable provisions and enforce the rest of the agreement when: "the illegality is collateral to the contract's main purpose; it is possible to cure the illegality by means of severance; *and* enforcing the balance of the contract would be in the interests of justice."

In *Huerta v. CSI Electrical Contractors* (2024) 15 Cal.5th 908, the California Supreme Court held that when an employee spends time on an employer's premises awaiting and undergoing a vehicle-security inspection that is mandated by the employer for its own benefit, the employee, even when in their personal vehicle, is subject to employer's control, and the time is compensable as "hours worked."

In a follow-up to its 2022 decision holding that wage statements must list premium pay for missed meal periods and penalties may be recoverable if they are not listed (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93), the California Supreme Court issued the long-awaited *Naranjo v. Spectrum Security Services, Inc.* (2024) 15 Cal.5th 1056. Despite its earlier holding, the Court unfortunately ruled that, because the law was unsettled prior to its 2022 decision, the employer was not liable for civil statutory penalties under Labor Code section 226 because it had a "reasonable and good faith" belief that it was providing complete and accurate wage statements and had "not knowingly and intentionally failed to comply with the wage statement law."

California Courts of Appeal – arbitration cases

As usual, the California Courts of Appeal churned out a blizzard of employment decisions in 2024. Amongst this snowstorm were a slew of arbitration-related cases including:

Vazquez v. SaniSure, Inc. (2024) 101 Cal.App.5th 139, in which the court held that an arbitration agreement executed during an employee's first stint of employment did not apply during her second stint of employment because there was no evidence that the parties agreed to arbitrate claims arising from their subsequent employment relationship.

Mar v. Perkins (2024) 102 Cal.App.5th 201, in which the court held that, where an employer modifies its employment policy to require employees to arbitrate their disputes and clearly communicates to employees that continued employment will constitute assent to an arbitration agreement, employees will generally be bound by the agreement if they continue to work for the company. But, where an employee promptly and expressly rejects the arbitration agreement and makes clear that they refuse to be bound by the agreement and the employer takes no action, there is no mutual assent to arbitrate.

Jenkins v. Dermatology Management, LLC (2024) Cal.App.5th, 2024 WL 5182213 (Nov. 20, 2024), in which the court held that an arbitration agreement was procedurally unconscionable because the agreement was pre-signed by the company's Chief People Officer four months before it was presented to the employee and the Chief People Officer was not present when the employee received it, so the employee could reasonably conclude that the agreement was not negotiable and was offered on a take-it-or-leave-it basis. The court held that the agreement was substantively unconscionable because, among other things, it lacked mutuality as it required the employee to arbitrate all her claims, but it exempted from mandatory arbitration certain claims by the employer, including claims for injunctive and/or other equitable relief. Finally, the court held that, even though substantively unconscionable provisions could be cured by severing them from the agreement, severance would be inappropriate if it would create an incentive for employers to draft one-sided arbitration agreements in the hope employees would not challenge the unlawful provisions.

And *Cook v. University of Southern California* (2024) 102 Cal.App.5th 312, in which the court found an arbitration agreement to be substantively unconscionable because, among other things, it: (1) required the employee to arbitrate claims that were unrelated to her employment; (2) survived indefinitely following the employee's termination of employment; (3) lacked mutuality by requiring the employee to arbitrate any and all claims she may have against her employer and any of its related entities and all of their officers, trustees, administrators, employees or agents while not requiring the "related entities" to arbitrate their claims against the employee; and (4) severance of the offending provisions was not appropriate as those multiple defects indicated a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage.

It has been nearly two years since President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA"), 9 U.S.C. § 401, et seq., which permits victims to invalidate pre-dispute arbitration agreements in disputes that arose or claims that accrued on or after the EFAA's enactment on March 3, 2022. California appellate courts have since issued helpful guidance for employees seeking to litigate in court.

The employee in *Kader v. Southern California Medical Center, Inc.* (2024) 99

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Cal.App.5th 214, alleged sexual harassment that occurred before the EFAA's enactment. Notwithstanding, the court held that the EFAA still applied because his sexual harassment "dispute" arose when he filed his charge of discrimination with the then-Department of Fair Employment and Housing. The court held that a "dispute" does not arise under the EFAA at the time of injury; rather, a dispute arises when a party first asserts "a right, claim, or demand," which, in *Kader*, was in his DFEH charge.

In *Doe v. Second Street Corp.* (2024) 105 Cal.App.5th 552, the court held that the EFAA precluded an employer from compelling an employee's non-sexual harassment claims for discrimination, retaliation, and wage and hour law violations to arbitration because the non-sexual harassment claims were still a part of a sexual harassment "case" against the same defendants arising out of the plaintiff's employment with the same employer.

Only one week later, the court decided *Liu v. Miniso Depot, Inc.* (2024) 105 Cal.App.5th 791, which also held that an employee who raised claims of sexual harassment could opt out of arbitrating her other claims for wage and hour violations, discrimination, and retaliation under the EFAA.

Courts have spilled much ink in recent years over a moving party's burden to prove the authenticity of a signature to an arbitration agreement, particularly when the opposing party declares that they do not recall signing one. (See, e.g., *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, and *Gamboa v. N.E. Community Clinic* (2021) 72 Cal.App.5th 158.)

Unfortunately, *Ramirez v. Golden Queen Mining Company, LLC* (2024) 102 Cal.App.5th 821, is another tally in the employer's column. Joining *Iyere*, the *Ramirez* court held that an individual is capable of recognizing his or her own handwritten signature on an arbitration agreement and, if that individual does not deny a handwritten signature is authentic, that person's failure to remember signing the document does not create a factual dispute about the signature's authenticity.

Thankfully, *Garcia v. Stoneledge Furniture, LLC* (2024) 102 Cal.App.5th 41, is a win for employees. There, the court held that employee's declaration that she did not electronically sign an arbitration agreement was sufficient to shift burden to the employer to prove agreement's existence. And, because the employer in *Garcia* failed to show that only Garcia herself could have electronically signed the arbitration agreement, the employer failed to carry its burden.

Another hot topic in arbitration law is the use of Code of Civil Procedure section 1281.98, which permits the non-drafting party to an arbitration agreement (usually an employee or consumer) to withdraw from arbitration, proceed in court, and seek fees and costs when a drafting party fails to timely pay its arbitration fees.

In *Reynosa v. Superior Court of Tulare County* (2024) 101 Cal.App.5th 967, the court held that an employer materially breached an arbitration agreement under section 1281.98 and thereby waived the right to compel the employee to proceed with arbitration by twice failing to timely pay arbitration fees and costs. The court explained that the employee's silence, failure to object, and continued involvement in the arbitration proceeding did not evince that the employee "agreed" to an extension of time for payment under section 1281.98, subdivision (a)(2) or that the employee deliberately chose to continue the arbitration proceeding under section 1281.98, subdivision (b)(2).

Trujillo v. J-M Manufacturing Company, Inc. (2024) 107 Cal.App.5th 56, is a cautionary tale for plaintiff's side employment practitioners. After filing in court, the employee agreed to stipulate to arbitration. The employer failed to timely pay its arbitration fees, and the employee promptly sought to withdraw from arbitration and return to court. Despite the fact that the employee entered a pre-dispute arbitration agreement, the Court of Appeal held that section 1281.98 did not apply because the parties entered a *post*-dispute stipulation to arbitrate after the employee filed in court, which was primarily drafted by the employee's counsel.

Courts of Appeal – beyond arbitration cases

All too often, employers and individual defendants attempt to chill the rights of plaintiff employees by threatening to and/or actually filing defamation claims based on complaints that the plaintiff employees have made to human resources.

Osborne v. Pleasanton Auto. Co. (2024) 106 Cal.App.5th 361, is a terrific case that shields plaintiff employees from these efforts. After Eva Osborne sued Defendants Pleasanton Automotive Company and one of its vice presidents, Bob Slap, for gender discrimination, harassment and retaliation, Slap filed a cross-complaint against her, contending statements she made about him in a letter to HR defamed him and intentionally caused him to suffer emotional distress. Osborne filed a special motion to strike Slap's cross-complaint. She argued her prelitigation statements to HR were conditionally privileged protected activity because they were made in connection with potential litigation. The trial court granted her motion, and the Court of Appeal affirmed.

In many cases, plaintiff employees attempt to prove that the employer acted with discriminatory or retaliatory intent by using evidence that the employer treated similarly situated employees outside the plaintiff's protected class more favorably. Employers frequently argue that the plaintiff's comparators are not proper comparators because of ticky-tacky differences.

Wawrzenski v. United Airlines, Inc. (2024) 106 Cal.App.5th 663, is broadly helpful as it rejects such attempts holding that "whether the plaintiff is similarly situated to other employees is generally a

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question of fact" and that the comparators need not be identical to the plaintiff, just similar "in all relevant respects." Indeed, the Court of Appeal rejected the employer's argument that the consideration of comparators with different supervisors is "deductively unsound" because a jury could not infer that the decision-maker had a discriminatory motive without evidence he knew how other supervisors disciplined similarly situated employees. In this regard, the Court of Appeal explained that the same supervisor requirement does not apply where the plaintiff and the comparators have to follow the same policies and procedures and the employer coordinates disciplinary actions in an effort to ensure they are subject to consistent standards.

In *Paleny v. Fireplace Products U.S., Inc.* (2024) 103 Cal.App.5th 199, the court oddly held that a female employee, who was fired while undergoing egg retrieval and freezing procedures, could not proceed on her FEHA discrimination claim because those procedures did not qualify as a protected pregnancy or medical condition related to pregnancy. Really?

And, finally, in *Shah v. Skillz Inc.* (2024) 101 Cal.App.5th 285, the court discussed how stock and stock options should be treated when sought as damages in an employment case and held: (1) stocks are not wages under the Labor Code; and (2) the trial court was not required to value the stock on or near date of breach (i.e., the date the employee was fired) when calculating damages for breach of contract; rather, the trial court could reasonably value the stock from date when the lock-up period ended after employer's initial public offering.



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