Appellate Reports

Court sees triable issue of fact as to "intolerable conditions" in constructive-termination case brought by gay CHP officer

By Jeffrey I. Ehrlich

Employment discrimination; FEHA; discrimination based on sexual orientation; constructive discharge

Brome v. California Highway Patrol (2020) __ Cal.App.5th __ (First Dist., Div. 5.)

Law enforcement officer who was openly gay brought action against California Highway Patrol, asserting that he suffered harassment and discrimination because of his sexual orientation in violation of the Fair Employment and Housing Act (FEHA) and that he was constructively discharged. The trial court granted summary judgment to California Highway Patrol. Reversed.

Brome's summary-judgment opposition established that, at the Solano office where Brome worked since 2008, homophobic "locker room" talk using words like "gay or fag" "was ongoing" and "very common" amongst the officers there. Officers "would use gay in a negative connotation," saying things like "[o]h, I hated that movie, it was so gay," or "[q]uit looking at me, [f]aggot." An officer made up a poem about Brome's sexual orientation. In another incident, officers used the word "faggots" to describe the potential victims of a hate crime that a recently arrested individual had planned to commit against homosexuals. This type of locker room talk "lessened" over time at the Solano office because officers "didn't want to say things around [Brome]."

Officers at the Solano office frequently refused to provide Brome with backup assistance during enforcement stops, which led him to fear for his life. Brome was "the only one who did not receive backup on a daily basis," and "every time [he] went to work within [his] 12-hour day this would typically happen." These denials of assistance happened so often that it was "impossible to list them all." Brome was left to handle high-risk situations that generally should be handled by at least two officers, such as high-speed vehicle pursuits, impounding vehicles, or hit-and-run accidents, on his own. When asked if "it would be appropriate for at least two officers to respond" to situations similar to those in which Brome was denied backup, his captain testified, "[a]t a minimum." An officer without backup assistance would be in a "very precarious" situation. Some officers who refused to back Brome up were known to be homophobic or had cut off contact with other officers known to be gay. Brome's captain testified that "not responding to other officers' calls is a serious allegation" and "[i]t is a ... corrosive thing to have officers not responding to other officers' calls because of some perceived bias."

As a result, Brome feared for his life during enforcement stops, experienced headaches, muscle pain, stomach issues, anxiety and stress, and became suicidal by early 2015. In January 2015, he went on medical leave and filed a workers' compensation claim based on work-related stress. Brome's workers' compensation claim was resolved in his favor on October 27, 2015. He took industrial disability retirement on February 29, 2016, ending his employment with the Patrol.

The Court of Appeal concluded that Brome had raised a triable issue as to whether his working conditions were so intolerable that a reasonable employee would have resigned. Unlike the other officers at the Solano office, Brome was routinely forced to respond to high-risk enforcement and accident scenes on his own, placing his life in danger. These denials of backup assistance happened daily and were at least in some instances due to his sexual orientation. His captain testified that the denial of backup could put an officer in a "very precarious" situation, reinforcing that a reasonable officer would have found the conditions objectively intolerable

The Patrol contended that the working conditions could not have been intolerable if Brome endured them for years. But Brome transferred to the Solano office because he was hoping to get away from the discrimination and harassment he suffered in his previous post, and once there he sought resolution by repeatedly complaining to his superiors. Because of his working conditions, Brome suffered from anxiety, trauma, and sleep disturbances, and eventually became suicidal. Viewed as a whole, the record could support a conclusion that Brome's working conditions became objectively intolerable over time and would have forced a reasonable employee to resign.

Intentional infliction of emotional distress

Defendant's officer's conduct – yelling at 13-year-old plaintiff who had been drugged and raped by the defendant's employee that plaintiff was stupid and that the rape was her fault – constituted outrageous conduct sufficient to support verdict for intentional infliction of emotional distress.

Crouch v. Trinity Christian Center of Santa Ana, Inc. (2019) 39 Cal.App.5th 995 (Fourth Dist., Div. 3.)

Carra Crouch, at age 13, was drugged and raped by a 30-year-old employee of Trinity Christian Center of Santa Ana, Inc. (TCC) while she was in Atlanta, Georgia to participate in a TCC-sponsored telethon. When Carra returned to California, she and her mother, Tawny Crouch, went to see Carra's grandmother, Jan Crouch, who was a TCC officer and director and was responsible for overseeing the telethon. When Tawny explained to Jan Crouch what had happened to Carra in Atlanta, Jan Crouch flew into a tirade and yelled at Carra that she was stupid, it was really her fault, and she was the one who allowed it to happen. Carra was devastated.

Based on Jan Crouch's conduct, the jury awarded Carra $2 million in damages (later remitted to $900,000) against TCC on her cause of action for intentional infliction of emotional distress (IIED). The jury found that Jan Crouch was acting within her authority as an officer or director of TCC when she yelled at Carra. TCC appealed, arguing that Jan Crouch's conduct was not extreme or outrageous but was just a grandmotherly scolding or irascible behavior. According to TCC, Carra endured nothing more than insults, petty indignities, and annoyances.

The appellate court concluded that Jan Crouch's behavior toward Carra was sufficiently extreme and outrageous to impose liability for IIED. Yelling at a 13-year-old girl who had been drugged and raped that she was stupid and she was at fault exceeds all possible bounds of decency. By telling Carra she was at fault, Jan Crouch displayed a reckless disregard for the almost certain emotional distress Carra would, and did, suffer.

The court also concluded that the evidence was sufficient to support the jury's finding that Jan Crouch was acting within the course and scope of her authority as an officer or director and, therefore, to support respondeat superior liability against TCC. Accordingly, the court affirmed the judgment.

Exclusion of expert testimony

Thirty-day period to request trial de novo under Mandatory Fee Arbitration Act is not extended by Code of Civil Procedure section 1013 when the award is served by mail.

Soni v. SimpleLayers, Inc. (2019) 42 Cal.App.5th 1071. (Second Dist., Div. 5.)

Tieney (client) filed a request for arbitration under the MFAA with the Los Angeles County Bar Association (LACBA) against Soni, his attorney (attorney). The attorney objected to the arbitrator that the request for arbitration was untimely, and therefore, the client had waived the right to arbitrate. Arbitration proceedings were held, and the arbitrator issued an award of $2.50 in favor of the attorney. Thirty-three days after the arbitration award was served on the parties by mail, the attorney filed an action in the trial court to recover the full amount of the disputed fees. The client filed a petition in the pending action to confirm the arbitration award on the ground that the award became binding when the attorney did not file an action within 30 days after service of the award. The attorney filed a response to the petition, more than 100 days after service of the award, asserting that the request for trial was timely and the arbitrator lacked jurisdiction. The trial court concluded that the attorney's action was timely, because Code of Civil Procedure section 1013 extended the attorney's time to file by five days for service of the award by mail; the trial court denied the client's petition to confirm the arbitration award. At trial, the court issued an award of $2,890 in favor of the attorney, and also awarded $79,898 in attorney fees to the attorney as the prevailing party. Reversed.

The court held that under LACBA's Rules for Conduct of Mandatory Arbitration of Fee Disputes Pursuant to Business & Professions Code Section 6200 et seq. (the LACBA rules), service is complete at the time of deposit in the mail and not extended for service by mail. The arbitration award became binding when the attorney did not file an action within 30 days after service. Section 6206 did not extend this 30-day deadline. The attorney is barred under Code of Civil Procedure section 1288 from asserting a ground that supports vacating the award, because the attorney did not file a petition or a response within 100 days of service of the award. Even if the attorney were not barred from raising arbitrability issues, however, the LACBA rules provide that the arbitrator has the authority to determine jurisdiction and the arbitrator's ruling that the fee dispute was arbitrable is not reviewable for errors of law or fact.

Notices of appeal; adequacy; failure to name appealing party

K.J. v. Los Angeles Unified School District (2020) __ Cal.5th __ (Cal. Supreme)

As part of a negligence action against a school district, the trial court entered a sanctions order against the plaintiff's attorney (Carrillo) based on interference with discovery. The plaintiff, via a different attorney, filed a notice of appeal on a Judicial Council form, which included the case caption and which stated that "1. NOTICE IS HEREBY GIVEN THAT ... K.J., a minor through her guardian ad litem, ... appeals from the ... order in this case, which was entered on ... December 1, 2015." In a preprinted list that allows the appellant to designate the type of judgment or order being appealed from, a box was checked

indicating an appeal of an order pursuant to "Code of Civil Procedure section 904.1(a)(3)-(13)." Attorney Allen signed the notice, which contained no reference to attorney Carrillo.

In its respondent's brief the school district argued for the first time that the appeal should be dismissed because of KJ's lack of standing to challenge an order that only imposed sanctions on Carrillo. Appellant's reply brief conceded that KJ lacked standing to challenge the sanctions order, but argued that in furtherance of the "strong policy in favor of hearing appeals on their merits," the notice of appeal should be liberally construed to include Carrillo as an intended party to the appeal. The brief contended that because the notice sought review of an order that directed only Carrillo to pay sanctions, it was clear that Carrillo was the intended "underlying litigant."

The Court of Appeal dismissed the appeal for lack of jurisdiction. It held that when a sanctions order is entered against an attorney, the right of appeal is vested in the attorney, not the attorney's client, and absent an attempted appeal by the sanctioned party, the sanction ruling is not reviewable. Reversed.

"[T]he timely filing of an appropriate notice of appeal or its legal equivalent is an absolute prerequisite to the exercise of appellate jurisdiction." California Rules of Court, rule 8.100(a)(1)2 requires that, "[t] o appeal from a superior court judgment or an appealable order of a superior court, ... an appellant must serve and file a notice of appeal in that superior court." Rule 8.100(a)(2) further provides that "[t]he notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed." In an article describing the purpose and scope of the original Rules on Appeal, which became effective on July 1, 1943 and contained a provision that is essentially identical to current rule 8.100(a)(2) (see former rule 1(a)), the rules' drafter, B.E. Witkin, explained that the Judicial Council had chosen not to impose any further "requirements ... as to the contents of the notice ... on the ground that ... this basic, jurisdictional notice should be simple, to make it relatively immune from attack on technical grounds."

Rule 8.100(a)(2)'s liberal construction requirement reflects the long-standing "law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what [the] appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." [Citation omitted.] The rule is intended to implement the strong public policy favoring the hearing of appeals on the merits.

Considered together, rules 8.100(a)(1) and 8.100(a)(2) reflect the different standards that govern the filing of the notice of appeal versus the content of the notice with respect to appellate jurisdiction: While the timely filing of a notice of appeal is an absolute jurisdictional prerequisite, technical accuracy in the contents of the notice is not. Once a notice of appeal is timely filed, the liberal construction requirement compels a reviewing court to evaluate whether the notice, despite any technical defect, nonetheless served its basic function – to provide notice of who is seeking review of what order or judgment – so as to properly invoke appellate jurisdiction.

The Court held that a reviewing court must construe a notice of appeal from a sanctions order to include an omitted attorney when it is reasonably clear that the attorney intended to join in the appeal, and the respondent was not misled or prejudiced by the omission. Under that standard, the Court of Appeal should have construed the notice in this appeal to include an appeal by Carrillo.

First, the notice expressly designates the sanctions order as the subject of the appeal; no other orders or judgments are referenced in the notice. Thus, all parties were aware that the sole basis of the appeal was a challenge to the trial court's sanctions order. Second, the trial court's order only assessed sanctions against Carrillo; the order had no effect on K.J.'s rights. The fact that Carrillo served as K.J.'s attorney in the underlying proceedings, and that he was the only party who was affected by the order (and thus the only party who had reason to challenge it), strongly suggests that he was in fact the intended appellant. Third, the record shows that, during the trial court proceedings, Carrillo vigorously challenged the court's authority to issue sanctions against him. The fact that the parties engaged in substantial litigation regarding the issue of sanctions that focused exclusively on Carrillo provides additional indicia that he was an intended appellant. Finally, LAUSD's briefing does not assert that it was misled or prejudiced by Carrillo's omission from the notice of appeal. Nor is any prejudice suggested by the record.

Expert testimony; trial court's gatekeeper function; expert reliance on other experts; exclusion of expert testimony; abuse of discretion

San Francisco Print Media Company v. Hearst Corporation (2020) __ Cal.App.5th __ (First District, Div. 3.)

Plaintiff San Francisco Print Media Company, owner of the San Francisco Examiner (the Examiner), sued the corporate owner, a subsidiary, and employees of the San Francisco Chronicle (the Chronicle), claiming, in sum, that defendants sold a certain type of print advertising in the Chronicle at prices that violated California's Unfair Practices Act (UPA, Bus. & Prof. Code, § 17000 et seq.) and Unfair Competition Law (UCL, § 17200 et seq.). The trial court granted defendants' motion for summary judgment. Affirmed.

The conduct underlying all these causes of action was, in essence, the Chronicle's alleged underpricing of its full-run run-of-press print advertising beginning in 2011, when plaintiff bought the Examiner. During the course of the litigation, defendants had a protracted

discovery dispute with plaintiff, trying to ascertain the specific advertisers at issue in the case. Then, in a December 2016 joint case-management statement, plaintiff asserted its expert, Richard Eichmann, would testify about "costs, causation, and damages" by analyzing all of the Chronicle's print advertising transactions, not just particular transactions, to show the Chronicle sold below cost, and by conducting a statistical analysis to show the economic injury caused by the Chronicle's below-cost pricing and to calculate the Examiner's estimated lost profits. In light of Eichmann's methodology, plaintiff represented that defendants' proposed depositions of particular advertisers were unnecessary and irrelevant. In the same joint case-management statement, defendants responded, based on plaintiff 's representations, that they did not intend to depose the hundreds of advertisers they initially thought they would. Defendants said that after completing expert discovery, they would file a *Sargon* motion challenging the admissibility of Eichmann's expert opinion testimony and a summary judgment motion.

Plaintiff 's expert, Eichmann, an economist and economic consultant, authored his initial report in November 2016. After the defense expert filed a report criticizing Eichmann's analyses on numerous grounds, Eichmann submitted a supplemental report in April 2017 in which he updated his regression analysis and re-evaluated damages. The trial granted the defendant's *Sargon* motion to exclude Eichmann's analyses, and the Court affirmed.

Eichmann's analysis relied on a 2010 "analysis of costs" prepared by John Sillers, then the Chronicle's Director of Finance. Sillers put that analysis together to support his view that the Chronicle "needed to exercise greater rate discipline when selling advertisements." By "rate discipline," Sillers meant a rate floor below which the company would not go in a declining market garnering progressively lower rates. Sillers did his analysis by taking various levels of expenses related to "a print product," compared that to an average rate per page the Chronicle was garnering, then determined what the Chronicle needed to charge on average to break even, meaning revenue would cover production and newsprint expenses. One of Sillers's spreadsheets was headed with the words, "Breakeven Pricing." In the lawsuit, Sillers submitted a sworn declaration and deposition testimony that his analysis had nothing to do with the UPA, with which he was unfamiliar. Sillers explained his analysis was based partially on budget figures as opposed to actual results, and he did not recall his methodology or reasons for some of his decisions. He asserted he did not create or know how he obtained the average prices he used in the analysis, and his analysis was not a template but would require an updated evaluation for addressing subsequent years.

The Court of Appeal held that Eichmann's reliance on Sillers's report created a clear foundational problem. Eichmann's methodology included allocating 100 percent of seven categories of expenses as direct costs of print advertising. While Eichmann had credentials as an economic consultant, he acknowledged he had no understanding of several of the cost categories and did no independent work to determine how those categories should be allocated. Instead, he relied *solely* on Sillers's 2010 analysis to allocate these costs, without knowing the purpose of Sillers's analysis or having any awareness that Sillers testified his analysis had nothing to do with the UPA. The evidence additionally showed that Sillers himself did not recall the methodology he used or the reasons for some of his decisions.

Ultimately, Eichmann's uninformed reliance on Sillers's analysis is not the mark of an opinion rooted in sound logic. And because the record does not reflect the foundations of Sillers's analysis, it is unclear whether his analysis is "of a type that reasonably may be relied upon by an expert in forming an opinion" about fully allocated costs (Evid. Code, § 801, subd. (b)) or whether it even supports Eichmann's opinion about fully allocated costs.


Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of* Advocate *magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*