Calif. Employment Cases Actually Favor Summary Judgement

By **Scott Dixler and Sarah Hamill** (June 25, 2020)

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Summary judgment is a procedural mechanism courts use to cut through the parties' pleadings to determine whether a trial is necessary to resolve their dispute.

Under Section 437c, Subdivision (c) of the California Code of Civil Procedure, a summary judgment motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

California courts' attitudes toward summary judgment motions have shifted over recent years. Summary judgment was once considered a disfavored remedy in California.

California's approach contrasted with that taken by federal courts, which adopted a more permissive view of summary judgment in a trilogy of cases decided by the U.S. Supreme Court in 1986.[1]

In one of those cases, Celotex Corp. v. Catrett, the court explained that summary judgment "procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules," especially because it "isolate[s] and dispose[s] of factually unsupported claims or defenses."[2]

While California courts initially lagged behind their federal counterparts in removing summary judgment from disfavored status, the Legislature amended the summary judgment statute in the early 1990s to bring California more in line with the federal approach.[3]

In 2000, the California Supreme Court held in Guz v. Bechtel National Inc., that an employer is entitled to summary judgment if the evidence does not support a rational inference of discrimination.[4] The following year, in Aguilar v. Atlantic Richfield Co., the California Supreme Court confirmed that the Legislature intended the amendments to California's summary judgment statute to liberalize the granting of summary judgment motions.[5]

And the California Supreme Court recently reaffirmed that summary judgment is no longer disfavored. In Perry v. Blakewell in 2017, the California Supreme Court explained that summary judgment was once disfavored but that it "is now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case."[6]

Nonetheless, even after Guz, Aguilar and Perry, California's courts of appeal still disagree as to whether summary judgment is an appropriate mechanism for resolving employment disputes specifically.

On the one hand, several courts of appeal have held that summary judgment is generally not a suitable vehicle to dispose of employment cases, particularly where — as is often the case — liability turns on the motive of the employer.

Prior to Perry, in 2009, Division Two of the First District Court of Appeal in San Francisco recognized in Nazir v. United Airlines Inc. that summary judgment "is no longer called a 'disfavored remedy,'"[7] but nonetheless reasoned "that many employment cases present issues of intent, and motive, and hostile working environment, [which are] issues not determinable on paper." Such cases, the court cautions, "are rarely appropriate for disposition on summary judgment, however liberalized it be."[8]

Cases decided after both Nazir and Perry have followed in Nazir's footsteps. For example, in Abed v. Western Dental Services Inc., Division One of the First District Court of Appeal echoed Nazir's reasoning that

> although summary judgment is no longer a disfavored procedure, "many employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper ... [and] rarely appropriate for disposition on summary judgment, however liberalized it be."[9]

But other appellate courts have gone a different route, emphasizing the suitability of summary judgment in employment disputes. In Caldwell v. Paramount Unified School District, Division Five of the Second District Court of Appeal in Los Angeles stated that California's "summary judgment law, Code of Civil Procedure section 437c, provides a particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's nondiscriminatory motives for the employment decision."[10]

Similarly, the Third District Court of Appeal in Sacramento recently observed in an unpublished decision that courts routinely "assess evidence concerning an employer's intent or motive on summary judgment."[11]

This split of authority regarding the appropriateness of summary judgment in employment cases risks confounding trial courts and litigants. The risk of confusion is particularly acute because the majority of published and precedential appellate cases decided after Perry have reversed summary judgment granted to an employer on discrimination, harassment, retaliation, hostile working environment and similar claims.[12]

But once unpublished, and therefore nonprecedential, opinions are considered, the vast majority of appellate decisions following Perry have affirmed summary judgments for the employer on those same claims. We have reviewed approximately 130 appellate decisions evaluating employment discrimination and retaliation claims under California's Fair Employment and Housing Act,[13] that were decided after Perry, and 99 of those cases affirmed summary judgment for the employer.

Only 31 reversed summary judgment for the employer. But only two of the 99 cases affirming summary judgment are published, while nine of the 31 cases reversing summary judgment are published.

This imbalance between published and unpublished opinions could create the misimpression that summary judgment remains disfavored in employment cases, as the courts in Nazir and Abed held. But the facts on the ground are different — in fact, the majority of employment cases in which an employer won summary judgment in the trial court are affirmed on appeal.

Ultimately, the First District Court of Appeal's decisions in Nazir and Abed — which state that summary judgment is disfavored in employment cases — are doctrinal outliers. The

Third District Court of Appeal recently summarized the majority view, albeit in an unpublished opinion: "[W]hen ... an employer has made a sufficient showing of innocent motive, and the employee has not placed that showing in material dispute, a court may grant summary judgment in the employer's favor."[14]

Because Nazir and Abed are published, precedential decisions, their skeptical view of summary judgment in employment cases will continue to influence trial courts and litigants. Ultimately, the California Supreme Court may be called on yet again to clarify that summary judgment is not a disfavored remedy in any type of case.

Until the Supreme Court does so, litigants in employment disputes will need to contend with case law expressing skepticism toward summary judgment in employment cases years after the Supreme Court took pains to reaffirm that summary judgment is no longer disfavored.

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[1] See Celotex Corp. v. Catrett (1986) 477 U.S. 317 [106 S.Ct. 2548, 91 L.Ed.2d 265] (Celotex); Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242 [106 S.Ct. 2505, 91 L.Ed.2d 202]; Matsushita Elec. Industrial Co. v. Zenith Radio (1986) 475 U.S. 574 [106 S.Ct. 1348, 89 L.Ed.2d 538]; see also Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843-845 (Aguilar) ("In 1986, the United States Supreme Court handed down a trio of decisions" (Celotex, Anderson, and Matsushita) that liberalized the granting of summary judgment motions).

[2] Celotex, supra, 477 U.S. at pp. 323-324, 327.

[3] See Aguilar, supra, 25 Cal.4th at p. 849 ("we believe that summary judgment law in this state now conforms, largely but not completely, to its federal counterpart"); id. at p. 854 ("the purpose of the 1992 and 1993 amendments . . . was to liberalize the granting of motions for summary judgment").

[4] Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 361 (Guz).

[5] Aguilar, supra, 25 Cal.4th at p. 848.

[6] Perry v. Blakewell (2017) 2 Cal.5th 536, 542 (Perry).

[7] Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 248 (Nazir).

[8] Id. at p. 286.

[9] Abed v. Western Dental Services Inc. (2018) 23 Cal.App.5th 726, 739 (Abed); see Cornell v. Berkeley Tennis Club (2017) 18 Cal.App.5th 908, 925 (Cornell) (same); see also Joohong Kim v. Samsung SDS America, Inc. (2019) 2019 WL 5386835, at p. *5 [nonpub. opn.] (same); Niblett v. County of Los Angeles, (2018) 2018 WL 3599256, at p. *4 (Niblett) [nonpub. opn.] (same).

[10] Caldwell v. Paramount Unified School Dist. (1995) 41 Cal.App.4th 189, 203.

[11] Contreras v. United Airlines, Inc. (2019) 2019 WL 5485223, at p. *1 (Contreras) [nonpub. opn.].

[12] See Brome v. California Highway Patrol (2020) 44 Cal.App.5th 786; Ortiz v. Dameron Hospital Assn. (2019) 37 Cal.App.5th 568; Galvan v. Dameron Hospital Assn. (2019) 37 Cal.App.5th 549; Ross v. County of Riverside (2019) 36 Cal.App.5th 580; Mackey v. Board of Trustees of California State University (2019) 31 Cal.App.5th 640; Abed, supra, 23 Cal.App.5th 726; Cornell, supra, 18 Cal.App.5th 908; Light v. Department of Parks & Recreation (2017) 14 Cal.App.5th 75; Husman v. Toyota Motor Credit Corp. (2017) 12 Cal.App.5th 1168. But see Nakai v. Friendship House Assn. of American Indians, Inc. (2017) 15 Cal.App.5th 32; Featherstone v. Southern California Permanente Medical Group (2017) 10 Cal.App.5th 1150.

[13] Gov. Code, § 12900 et seq.

[14] Contreras, supra, 2019 WL 5485223, at p. *1; see Guz, supra, 24 Cal.4th at p. 361 ("an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory").