



SMALL FIRM, BIG IMPACT

USING THE APPELLATE PROCESS
TO LEVEL THE PLAYING FIELD

Raven Sarnoff

As solo and small firm practitioners, we can feel like the deck is stacked against us. We often oppose much larger firms that have far greater resources. Several years of budget cuts to California courts have magnified this disparity by delaying trials, increasing fees, and eliminating court reporters.

Perhaps the most grievous effect of these budget cuts is the staggering increase to superior court judges' workload. Trial judges have little time to make crucial decisions that can be devastating to our cases and clients. In some cases, the best way for a solo or small firm to level the playing field is to appeal.



While budget cuts have affected courts throughout California, state trial courts have been hit the hardest. Busy trial judges do not have the time appellate justices do to review briefs and hear oral arguments, nor do they generally have the law clerks and legal research attorneys appellate justices do. Also, three or more appellate justices review a particular case, each with more time than a trial judge to research and review the briefing and legal issues and render a decision.

Whether to appeal is a tough decision for a small firm with limited resources. . . . However, when you are confident that the trial court’s decision was wrong, and that decision is crucial to your clients’ case, an appeal may be the only way to obtain justice.

Of course, whether to appeal is a tough decision for a small firm with limited resources. The average civil appeal takes more than a year, is costly, and there is no guarantee of a more favorable result. To the contrary, the appellate court could issue an opinion that creates law adverse to current and future clients, and detrimental to your entire practice. However, when you are confident that the trial court’s decision was wrong, and that decision is crucial to your clients’ case, an appeal may be the only way to obtain justice.

Our firm faced this decision in August 2014, when a San Diego Superior Court judge granted summary judgment against our client in an employment case.

Our client, Deborah Moore, worked at UC San Diego (UCSD) in its marketing department. In September 2010, Moore was diagnosed with a heart condition and was prescribed a LifeVest—a heart monitor and external defibrillator worn outside of one’s clothing, like a vest. The first day Moore wore the vest to work, she told her supervisor, Kimberly Kennedy, about her condition and the purpose of the vest.

Despite Moore telling Kennedy she was “fine” and could do her job, Kennedy said, “The first thing we need to do is lighten your load to get rid of some of the stress.” Kennedy then sent an email to human resources asking what she should do about an employee with “adverse” health issues. A few weeks later, Kennedy told Moore she had “been in touch with HR” to ask “how to handle [Moore] as a liability to the department.” Kennedy then began eliminating Moore’s job duties and demoted her a month after learning of her heart condition.

In December, Moore told Kennedy she would likely need “a few days off work” to have a pacemaker surgically implanted. In February, Kennedy informed HR that she wanted to eliminate Moore’s position because Moore’s job functions had decreased so much that Kennedy could assume them herself. Human resources responded with an email to Kennedy asking her to explain why she sought to retain another employee, instead of Moore, in violation of the seniority policy. Kennedy did not explain this to human resources (or during the litigation). Nor could Kennedy explain why she did not offer Moore other positions she was qualified for, as required by UCSD policy. UCSD ultimately terminated Moore, claiming her position was

eliminated due to “lack of work” and “budget reasons.”

Moore sued for disability discrimination, failure to accommodate, failure to engage in the interactive process, and retaliation under the Fair Employment and Housing Act (FEHA) and interference and retaliation under the California Family Rights Act (CFRA).

At the summary judgment hearing, the judge allowed only fifteen minutes for oral argument. We knew we had little chance of winning, as the tentative ruling was to grant summary judgment. We nevertheless vigorously argued our client’s position, but the judge’s mind was made up. We lost.

The court ignored several disputed issues of material fact, including whether UCSD’s stated reason for termination was a pretext for discrimination and whether Moore intended to take CFRA leave. It also found that Moore was not disabled as a matter of law, despite “heart disease” being listed as an example of a disability in the FEHA statute. The court also excluded witness declarations and deposition testimony evidencing discrimination by Kennedy against several other UCSD employees who took medical or CFRA leave, despite clear authority requiring that such evidence be admitted to defeat summary judgment.¹ In direct contrast, the court *admitted* Kennedy’s self-serving declaration that she allowed employees to return to work after medical leave as evidence that she did *not* discriminate against Moore.

Making the decision to appeal was as easy as it was hard. We felt strongly that the court’s decision was wrong and our client had suffered a grave injustice. But ap-

pealing would be costly, particularly since we thought it necessary to hire appellate counsel to give our client the best chance of success. We consulted with dozens of attorneys in our field, all of whom agreed we should prevail under the law. In the end, we simply could not give up without a fight, and we appealed.

Appeals have become an important part of our small firm’s mission to advocate tenaciously for our clients, and a means to level the playing field with our often better-funded adversaries.

Almost two years after losing the motion for summary judgment, the court of appeal issued its decision, reversing summary adjudication of all but one claim. The appellate court emphasized the onerous standard the moving party must meet to warrant summary judgment and cautioned that disposition by summary judgment should be rare, particularly in employment cases. The court of appeal identified several disputed issues of material fact precluding summary judgment:

The fact that the parties dispute a number of factual issues, including whether Moore was equipped to perform the functions of [the other employee’s] position, whether Kennedy did or did not follow Defendant’s own policies for laying off employees, and whether Kennedy perceived Moore as having a disability, demonstrates why this case is not an appropriate one for sum-



mary judgment and instead should be heard by a jury. There is evidence supporting both parties' positions, and it is not up to the court to weigh conflicting evidence or to assess the credibility of witnesses. Rather, the court's duty is to determine only whether the evidence could support a judgment in favor of the nonmoving party. Here, the evidence is such that a reasonable fact finder could conclude that Defendant's proffered reasons for terminating Moore's employment were unworthy of credence and that Kennedy believed that Moore was a "liability" to the Department as a result of her heart condition, and, based on that conclusion, could infer that the proffered reasons for Moore's termination were not the real reasons for the termination. In other words, a reasonable juror could find that Defendant's stated reason for terminating Moore was pretextual, and that Defendant was instead motivated by a discriminatory purpose. Again, issues of intent and motive are typically *not* appropriate for disposition on summary judgment. (*Nazir, supra*, 178 Cal.App.4th at p. 286.)

Moore v. The Regents of the University of California (2016 WL 3434186)

The court of appeal did not challenge the lower court's finding that Moore was not disabled, but nevertheless retained her claims for failure to engage in the interactive process and failure to accommodate her disability. The court ruled that these claims are viable even where an employee does not have an actual disability, but is regarded by the employer as disabled. The appellate court also declined to address the evidentiary issues

plaintiff raised on appeal, finding reversal appropriate even absent the excluded evidence.

The vindication felt by our firm and our client was well worth the effort and the wait. Of course, we still need to win the trial, but the value to our client of the court of appeal resoundingly finding that her case was not one that merited dismissal without even the opportunity to be heard by her peers cannot be overstated. The court's decision to certify Moore's case for publication has made this outcome even more satisfying, as we hope it helps other litigants avoid summary adjudication, an accomplishment that is ours regardless of whether we ultimately prevail at trial.

Since filing this appeal, we have pursued appeals in other cases. We obtained an alternative writ in our clients' favor on a motion to transfer venue, and we are currently appealing denial of a motion for new trial. Appeals have become an important part of our small firm's mission to advocate tenaciously for our clients, and a means to level the playing field with our often better-funded adversaries.

Raven Sarnoff is a partner at Sarnoff + Sarnoff, an employment litigation firm in Burlingame that represents employees in a broad range of employment matters, including discrimination, harassment, and whistleblower cases.

Note

1. *Johnson v. United Cerebral Palsy/Spastic Children's Found. of Los Angeles* (2009) 173 Cal.App.4th 740, 93 Cal.Rptr.3d 198.

SOLO/ SMALL FIRM