Association of Defense Counsel of Northern California and Nevada

Association of Southern California Defense Counsel

March 13, 2023

Acting Presiding Justice Rosendo Peña, Jr.
Justice M. Bruce Smith
Justice Thomas DeSantos
California Court of Appeal
Fifth Appellate District
State of California
2424 Ventura St.
Fresno, CA 93721

REQUEST FOR PUBLICATION
JURISDICTION EXPIRES: 03/27/2023

Re: Request for publication of decision in *Atalla v. Rite Aid Corporation* (February 24, 2023, Case No. F082794)

Honorable Justices,

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") and the Association of Southern California Defense Counsel ("ASCDC") (together, the "Associations") write jointly to urge the Court to publish its decision in this case.

Interest of the Requesting Organizations

ADC-NCN numbers approximately 700 attorneys primarily engaged in the defense of civil actions. Members represent civil defendants of all stripes, including businesses, individuals, HOAs, schools and municipalities and other public entities. Many of these clients are employers who might encounter a factual situation like that presented in *Atalla*. Members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally. including issues related to allocation of responsibility for workplace safety. ADC-NCN's

Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Although ASCDC and ADC-NCN are separate organizations, they have some common members and coordinate from time to time on matters of shared interest, such as this letter. Together and separately, they have appeared as *amicus curiae* in many cases before both the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients, a broad cross-section of California businesses and organizations.

No party has paid for or drafted this letter.

Why the Court should order publication

In recognizing the common-sense proposition that employers should not be responsible for the non-work activities of employees, the decision meets several of the factors justifying publication.

• The decision "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." (Cal. Rules of Court, rule 8.1105(c)(2).) None of the prior decisions cited involved texting, an increasingly common form of communication.

• The decision "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)) because many employers have employees with pre-existing personal relationships who text each other.

• The decision "[m]akes a significant contribution to legal literature by reviewing ... the development of a common law rule" (Cal. Rules of Court, rule 8.1105(c)(7)), by reviewing past cases establishing the rule that an employer is not liable for an employee's off-site, off-hours, non-work activities.

• The decision "reaffirms a principle of law not applied in a recently reported decision." (Cal. Rules of Court, rule 8.1105(c)(8).) The other decisions cited are all over a decade old. As lines between work life and personal life continue to evolve, it is important to have clear guidance on the limits of duty and liability.

The decision reaffirms the holding of *Myers v. Trendwest Resorts, Inc.* 148 Cal.App.4th 1403 (2007) regarding sexual conduct that occurs off the worksite or after working hours constitutes an actionable unlawful employment practice. Although *Trendwest Resorts* case has been cited in roughly 22 published opinions over the last 15 years, that was usually for other points, and largely not for the key proposition reaffirmed in this case. The manner in which co-workers communicate has radically changed over this time. Employees, supervisors, and managers regularly communicate by text, instant message, social media, Zoom, etc. The decision is of particular importance in establishing that voluminous personal communications (over 500 pages) relating to food, restaurants, dining, vacation, travel, health, family, personal matters and work are highly relevant in the harassment analysis. These communications largely do not involve an individual acting in the capacity of manager, supervisor, or any work related purpose. As suggested in the decision (p. 18), extensive texting relationships occurring outside the workplace and outside of work hours arising out of a friendship should not be the responsibility of the employer.

This is particularly important for employers as they have no control over what employees do or do not do on their own time when outside any arguable control by the employer. Employers should not be held strictly

liable for personal communications of a sexual or otherwise purportedly harassing nature occurring outside the workplace, after hours, which are unrelated to the employer's interests and serve no work related purpose. Nor should employers be faced with defending itself in the less strict standard involving non-supervisory, non-managerial employees.

The decision also provides clarification regarding constructive termination. An employee cannot simply walk off the job and seek legal counsel to maintain a viable claim. The working conditions must be so intolerable or aggravated that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. In this case, the employee did not resign nor was she fired, though the offending supervisor was. Instead, she left work and simply did not return despite Rite Aid's efforts. This scenario, much like off-duty personal communications, has become all too common.

Employers and employees alike deserve the clear guidance this decision provides in the sometimes murky area of social media communications. The Associations request that this Court order publication.

Respectfully submitted,

By: _____

Don Willenburg (SBN 116377)
Gordon Rees Scully
Mansukhani LLP
1111 Broadway, Ste. 1700
Oakland, CA 94607
For ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

By: _ _____

Eric C. Schwettmann (SBN 188784)
Ballard Rosenberg Golper & Savitt LLP
15760 Ventura Blvd Fl 18
Encino, CA 91436-3029
For ASSOCIATION OF DEFENSE COUNSEL OF SOUTHERN CALIFORNIA

PROOF OF SERVICE

Atalla v. Rite Aid Corporation
Case No. F082794

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, LLP, 1111 Broadway, Suite 1700, Oakland, CA 94607; email: espiers@grsm.com. On the date below, I served the within document(s):

LETTER REQUESTING PUBLICATION

☒ VIA E-SERVICE (TrueFiling) on the recipients designated on the electronic service list generated by TrueFiling system.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 13, 2023 at Walnut Creek, California.

/s/ *Eileen Spiers*
Eileen Spiers