WAGE AND HOUR CASE NOTES

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TRIAL COURTS MAY NOT DISMISS PAGA CLAIMS ON MANAGEABILITY GROUNDS; *DONOHUE* PRESUMPTION APPLIES AT TRIAL OF MEAL PERIOD CLAIMS

Estrada v. Royalty Carpet Mills, Inc., 76 Cal. App. 5th 685 (2022)

Plaintiffs were employees at three separate carpet manufacturing facilities operated by Royalty. They alleged class claims for meal and rest period violations, as well as a representative claim under the Private Attorneys General Act (PAGA). Their primary claim was that Royalty required employees to remain on premises during their 30-minute meal periods, and were therefore entitled to premium pay even though Royalty paid them during the time they were on break. The trial court originally certified a class, but decertified it after the presentation of evidence at trial. The trial court dismissed the PAGA claims as unmanageable.

The Court of Appeal published its decision primarily to highlight its ruling that trial courts may not dismiss PAGA claims on manageability grounds. The court disagreed with the ruling in *Wesson v. Staples the Off. Superstore, LLC*, 68 Cal. App. 5th 746 (2021), reh'g denied (Sept. 27, 2021), review denied (Dec. 22, 2021), which held that trial courts may dismiss PAGA claims based on unmanageability. In rejecting *Wesson*, the court noted that PAGA claims are law enforcement actions on behalf of the state, whose purpose is to incentivize private parties to recover civil penalties that otherwise may not have been collected by overburdened state agencies. State labor law enforcement agencies are not required to show manageability when seeking civil penalties, and the Court of Appeal reasoned that private attorneys standing in the shoes of the state similarly should not be required to show manageability. Citing *Arias v. Superior Ct.*, 46 Cal. 4th 969 (2009), the court held that importing the class action manageability requirement into PAGA would hamper the law enforcement purposes of PAGA.

While the manageability holding is likely to receive the most attention, the Court issued a number of other significant rulings. On the procedural front, the court applied the "relation back" doctrine to hold that the claims asserted in the third amended complaint (TAC), filed in 2016, related back to the claims asserted in the second amended complaint (SAC), filed in 2014, allowing plaintiffs to gain an extra two years in the statute of limitations. The SAC was filed by two plaintiffs who worked at Royalty's facilities in Dyer and Derian, but the TAC added a new plaintiff who worked at Royalty's facility in Porterville. The court held that relation back applied because the SAC put Royalty on notice that plaintiffs intended to pursue meal period claims for employees who worked in the Porterville facility, even though neither of the original plaintiffs had standing to bring those claims.

On the substantive law front, the Court held that the trial court's decertification of the meal period claim was improper in light of *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58 (2021), which held that if the employer's time records show noncompliant meal periods and no premium pay, then a rebuttable presumption arises that the employee was not provided a complaint meal period. The Court ruled that this presumption applies at all stages of a proceeding, including trial, and is not limited to class certification and summary judgment. Here, plaintiffs met their burden at trial to raise the presumption because they submitted time records showing late and missed breaks. The trial court should have presumed liability, and shifted the burden to Royalty to show that plaintiffs were provided with compliant meal periods but chose to work instead. The court observed that Royalty could rebut the presumption only by putting on evidence that a "significant number" of employees voluntarily chose to skip meals, creating individualized issues of liability.

Relying on *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1036 (2012), the Court also ruled that Royalty's policy requiring employees to remain on premises during meal periods was unlawful, even though employees were relieved of all duty and Royalty paid them during the time they were on break. Employees must be given "freedom of movement" for meal breaks to be lawful. The court left the door open, however, noting that future employers in other industries may be able to restrict their employees' freedom of movement during meal breaks if they could show why an exception to the general rule would be warranted.

Royalty did notch three notable victories. First, Royalty had secured releases from 232 of 388 class members. Plaintiffs argued that the releases were invalid under Cal. Lab. Code § 206.5, which allows employers to secure releases only if the employer has fully paid all wages "concededly due." Employers may pay less than full wages only where there is a "bona fide dispute" whether the wages are due. The Court held that Royalty had a good faith belief that its on-premises meal period policy was lawful because Royalty relied on a FAQ that appears on the DLSE website suggesting that employers may require employees to remain on premises during meal periods so long as they are relieved of all duty and paid for the time. Accordingly, there was a "bona fide dispute" and the releases were valid.

Second, the Court affirmed the trial court's use of a seven percent prejudgment interest rate for the meal period premiums awarded to the plaintiffs at trial. The Court rejected plaintiffs' contention that the trial court should have used the 10 percent rate applicable to wages, relying on *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal. 4th 1244, 1257 (2012), which held that "a section 226.7 claim is not an action brought for nonpayment of wages; it is an action brought for non-provision of meal or rest breaks."

Third, the Court held that the plaintiffs were not entitled to waiting time penalties under Cal. Lab. Code § 203 because Royalty had a good faith belief that its on-premises meal period policy was lawful. Accordingly, Royalty's failure to provide premium pay was not "willful" within the meaning of Cal. Lab. Code § 203, even though Royalty's defense was not ultimately successful.

TRIAL COURT PROPERLY APPLIED EXCLUSIVE CONCURRENT JURISDICTION DOCTRINE TO STAY A SECOND-FILED PAGA SUIT THAT WAS ENTIRELY SUBSUMED BY A FIRST-FILED SUIT

Shaw v. Superior Ct. of Contra Costa Cty., 78 Cal. App. 5th 245 (2022)

Tatiana Paez filed a wage-and-hour class action lawsuit, including a PAGA claim, against BevMo. *Paez v. Beverages & More, Inc.*, Super. Ct. L.A. County, 2019, 19STCV30950 (*Paez*). A year later, Ashley Shaw filed a PAGA-only suit against BevMo based on the same facts and legal theories. Shaw filed a petition to coordinate the two cases and asked that Shaw's counsel be appointed "liaison counsel" for the aggrieved employees. While the coordination petition was pending, the trial court granted BevMo's motion to stay Shaw's second-filed case under the doctrine of exclusive concurrent jurisdiction. Shaw then sought to intervene in *Paez*. The *Paez* court denied intervention on the grounds that *Paez* counsel was adequately representing the Labor and Workforce Development Agency's (LWDA) interests, and Shaw did not have in interest in *Paez* sufficient to justify intervention. The coordination judge denied the coordination petition. Shaw then petitioned by writ.

The Court of Appeal held that the trial court properly applied the doctrine of exclusive concurrent jurisdiction to stay Shaw's second-filed case. Exclusive concurrent jurisdiction is a judge-made doctrine, under which the court that first asserts jurisdiction over a case assumes it to the exclusion of any later-filed cases based on the same facts and legal theories. Where the rule applies, the later-filed cases should be stayed.

Shaw argued that PAGA does not include a statutory first-to-file rule, and that PAGA accordingly abrogated the judge-made doctrine of exclusive concurrent jurisdiction. Shaw pointed to the False Claims Act (Cal. Gov't Code §§ 12650-12656), another qui tam statute, which contains an express statutory first-to-file rule. She argued that the absence of such language in PAGA evinced a legislative intent to permit multiple overlapping PAGA cases to proceed simultaneously. The Court of Appeal disagreed, concluding that the absence of an express prohibition on the filing of duplicative PAGA actions did not manifest the requisite "unequivocal intent" to displace the rule of exclusive concurrent jurisdiction, particularly in light of the rule's important policies of avoiding conflicting decisions and preventing vexatious litigation and multiplicity of suits.

The Court of Appeal held that application of the exclusive concurrent jurisdiction doctrine was not contrary to PAGA's purpose of augmenting the LWDA's ability to enforce state labor laws. The first-filed suit proceeds, fulfilling PAGA's purpose. If the suit is dismissed, the stay in the second-filed case may be lifted. In passing PAGA, the Legislature did not intend to "waste judicial resources, encourage a multiplicity of duplicative suits, [or] prohibit courts from staying suits that might otherwise lead to inconsistent results."

Finally, the Court rejected the argument that applying the exclusive concurrent jurisdiction doctrine would promote reverse auctions. Defendants are not picking and choosing among plaintiffs when asking a court to apply the doctrine; rather, the first suits proceed and the second one is stayed. The Court recognized that the risk of a reverse auction is "inherent" when a statute permits the filing of overlapping claims, and application of the doctrine did not increase that risk. To mitigate the risk, citing *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 89 (2021), the Court of Appeals emphasized that trial courts must carefully scrutinize PAGA settlements for fairness and ensure that the LWDA's interests have been adequately represented. If *Paez* were to settle, and Shaw believed the settlement was unfair, Shaw could seek to object or set aside an approved settlement.

DISTRICT COURT ERRED IN ASSIGNING $0 TO EMPLOYER'S CLAIMS FOR DETERMINING WHETHER $5 MILLION CAFA JURISIDCTIONAL THRESHOLD WAS MET

Jauregui v. Roadrunner Transportation Servs., Inc., 28 F.4th 989 (9th Cir. 2022)

Griselda Jauregui filed a wage-and-hour class action in state court against Defendant Roadrunner Transportation Services (Roadrunner) on behalf of hourly employees in California. Roadrunner removed the case to federal court, invoking the Class Action Fairness Act of 2005 (CAFA). CAFA expands federal jurisdiction over large class actions where, *inter alia*, 1) a class consist of more than 100 members who are minimally diverse, and 2) the amount in controversy exceeds $5,000,000.

The district court granted Jauregui's motion to remand, holding it lacked jurisdiction because Roadrunner failed to demonstrate that the amount in controversy exceeded $5,000,000. Roadrunner appealed.

The Ninth Circuit reversed, ruling that the district court's decision evinced a presumption against CAFA jurisdiction, undermining Ninth Circuit precedent that CAFA's provisions should be read with a "strong preference" that interstate class actions should be heard in federal court if properly removed.

The Ninth Circuit held that the district court erroneously analyzed the amount in controversy. Rather than assigning a lower dollar amount to the claims that Roadrunner improperly valued, the district court instead assigned $0 to all such claims, even when Roadrunner provided substantial evidence and analysis for its calculations. For example, when Roadrunner used the wrong hourly rate to value Jauregui's minimum wage claim, the district court improperly assigned $0 to the claim, even though using the lowest minimum wage rate during the relevant time period would have pushed the amount in controversy past CAFA's $5,000,000 threshold.

When the defendant uses an assumption to calculate the amount in controversy that is "unreasonable on its face without comparison to a better alternative, the district court may be justified in simply rejecting that assumption and concluding that defendant failed to meet its burden." However, when an alternative, better assumption is identified, as was the case with the Roadrunner's minimum wage claim calculation, the district court should "consider the claim under the better assumption, not just zero-out the claim." The Ninth Circuit directed the district court to reevaluate the motion to remand in light of its rulings.

TRIAL COURT INSTRUCTION THAT WORKERS NEEDED TO ESTABLISH THEY WERE "HIRED" BEFORE JURY COULD APPLY ABC TEST WAS ERRONEOUS

Mejia v. Roussos Constr., Inc., 76 Cal. App. 5th 811 (2022), reh'g denied (Apr. 19, 2022)

Under the ABC test, as articulated in *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903 (2018), a worker is presumed to be an employee if the "hiring entity" establishes three factors: (A) the worker is free from the hiring entity's control and direction in connection with the work; (B) the work is outside the hiring entity's usual course of business; and (C) the worker is customarily engaged in an independently established trade, occupation, or business.

Jose J. Mejia and his coworkers were unlicensed floor installers. They brought wage-and-hour claims against Roussos Construction, Inc., a general contractor. Roussos maintained that it used three individuals, or "subcontractors," to hire and pay plaintiffs, and that the "subcontractors" were responsible for all labor violations. Plaintiffs argued that the three individuals were "supervisors" who were part of a misclassification scheme employed by Roussos to avoid providing the installers with benefits and complying with labor laws.

At trial, both parties agreed that the jury should be instructed on the ABC test. Roussos argued that before the jury reached the ABC test, it should first determine whether Roussos was the "hiring entity" that had hired plaintiffs, or whether the "hiring entity" was someone else, like the so-called "subcontractors." Plaintiffs argued that they did not have to first establish that Roussos was the "hiring entity" before the ABC test was reached and that *Dynamex* did not establish a "threshold hiring entity test." The trial court sided with Roussos, instructing the jury first to determine whether Roussos was the "hiring entity" before reaching the ABC test. Under the court's instructions, if the jury concluded that Roussos was the hiring entity, only then would the burden shift to Roussos to prove that the three prongs of the ABC test were met. The jury returned verdicts in Roussos' favor on all counts. Plaintiffs appealed.

The appeals court reversed, holding that the ABC test does not include a threshold "hiring entity" test. Although the *Dynamex* court repeatedly used the term "hiring entity" to describe the party with the burden to classify its workers properly, it never suggested that the term was intended to limit the scope of the ABC test. Instead, *Dynamex* makes clear that the ABC test is an application of the broad "suffer or permit" standard, under which people who work for a company without being "formally hired" will be considered "employees" so long as the company knows the people are performing work, and takes no steps to prevent them from working. This highly protective standard would be undermined by requiring workers to show they were "formally hired" by an entity before the ABC test comes into play. The trial court's requirement that plaintiffs do so was prejudicial, and reversible error. The appeals court declined to enter a directed verdict for plaintiffs, instead remanding the case for a new trial.

EMPLOYEE NOT ENTITLED TO WAITING TIME PENALTIES WHERE DEFENDANT HAD A REASONABLE, GOOD FAITH DEFENSE TO HER CLAIM THAT WAGES WERE DUE

Hill v Walmart, Inc., 32 F.4th 811 (9th Cir. 2022)

Bijon Hill modeled in ten Walmart photo shoots. Hill was represented by Scout Talent Management Agency. Walmart had a contract with Scout under which it paid Scout a daily flat rate for each day of modeling services, which was to be passed along to Hill, plus a commission. Scout was required to send Walmart invoices, which were payable within thirty days. Walmart and Scout's contract said that Scout and its personnel were independent contractors.

Over the course of one year, Hill modeled in ten photo shoots for a total of 15 days. The shoots were done in sporadic one- or two-day increments. Hill filed suit against Walmart claiming that each shoot constituted a separate instance of employment, and that Walmart "discharged" her at the end of each photo shoot. She alleged that Walmart failed to pay her wages "immediately" upon each discharge, and she was therefore entitled to 30 days of waiting time penalties under Cal. Lab. Code § 203 for each of the ten instances she was "discharged." Hill sought more than $540,000 in penalties.

The Ninth Circuit affirmed the trial court's grant of summary judgment to Walmart. Under Cal. Lab. Code § 201(a), if an employer "discharges" an employee, the employer must "immediately" pay final wages. "Discharge" includes not only involuntary termination, but also releasing an employee after she has completed a job assignment. If an employer "willfully" fails to pay timely final wages, an employee is entitled to up to 30 days of waiting time penalties.

According to the Ninth Circuit, under California regulations, *see* 8 Cal. Code Regs. § 13520, a willful failure to pay wages within the meaning of § 203 means that the employer intentionally fails to pay wages when due. However, a "good faith dispute" that any wages were due will preclude the imposition of waiting time penalties. Employers will be able to show a "good faith dispute" by presenting a defense that would preclude recovery by the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute existed. Defenses presented that are "unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute.'"

Walmart argued that it had a good faith belief that Hill was an independent contractor, and the district court granted summary judgment on this basis. The Ninth Circuit agreed with Walmart that "a good-faith mistake about a worker's employment status is a defense to the imposition of waiting-time penalties pursuant to § 203." The Court held that there was nothing in the record suggesting that Walmart acted in bad faith. For example, there was no evidence that Hill ever brought up late payment issues before filing suit, or that Walmart really believed Hill was an employee. In the absence of bad faith, the remaining question was whether a reasonable jury could find that Walmart's independent contractor defense was unreasonable or unsupported by the evidence.

The Ninth Circuit agreed with the district court that Walmart's independent contractor defense was reasonable as a matter of law. Hill did not allege that Walmart violated a wage order (and the conduct in this case arose in 2016 and 2017, before A.B. 5 was enacted). Accordingly, since the *Dynamex* ABC test applies only where a worker alleges a violation of a wage order, the Ninth Circuit ruled that the *Borello* test would have applied here. Based on the "undisputed material facts," the Ninth Circuit concluded that Walmart had reasonable grounds based on the state of the law in 2016 and 2017 to believe Hill was an independent contractor. Even though Walmart exercised "significant control" over Hill's activities, Hill arranged and paid for her own travel, deducted her travel and other expenses, worked for other modeling companies, and only worked for Walmart for 15 days total in sporadic 1- or 2- day increments. Walmart did not provide Hill with an employee handbook or any of the other trappings of a traditional employment relationship. Because there were "some reasonable grounds" for Walmart to believe that Hill was an independent contractor, the Ninth Circuit held that Walmart had established a good-faith dispute as a matter of law.

ARBITRATION PROVISION CONTAINED IN EMPLOYEE HANDBOOK DID NOT CREATE AN ENFORCEABLE AGREEMENT TO ARBITRATE WAGE-AND-HOUR CLAIMS

Mendoza v. Trans Valley Transp., 75 Cal. App. 5th 748 (2022)

The takeaway from this lengthy decision is that employers who include arbitration agreements in their Employee Handbooks do so at their peril. Employers are far more likely to compel arbitration if they have presented employees with standalone arbitration agreements that require the employee's signature.

Plaintiff Jose Mario Mendoza was a truck driver who worked for FTU Labor Contractors (FTU). He was a Spanish speaker who did not read or write in English. Supervisors spoke to Mendoza in Spanish; they filled out the application for him in English. FTU claimed it provided Mendoza with a Spanish copy of the Employee Handbook; Mendoza denied receiving it. The 63-page employee handbook contained a "Binding Arbitration Policy." Mendoza signed a form acknowledging receipt of the handbook and agreeing to abide by its policies.

The handbook stated that it was "not intended as a contract of employment," and that FTU retained the right to change or withdraw the terms and conditions of Mendoza's employment at any time. Similarly, one of the acknowledgement forms that Mendoza signed stated that the handbook was designed for "quick reference" and did not set forth all of FTU's policies. The form reiterated that the handbook was not intended as a "contract of employment." The handbook itself did not contain any signature lines or other places for Mendoza to sign.
In addition to the acknowledgement forms, Mendoza signed two checklists confirming that he had received the handbook, along with other documents, and that "these items have been explained to me to my satisfaction."

Mendoza did not dispute that he signed the acknowledgement forms and checklists. He submitted a declaration stating that he could not read any of the forms and did not understand them. He also stated that he was unaware of the arbitration provision and did not intend to enter into an agreement to arbitrate.

The trial court denied FTU's motion to compel arbitration and FTU appealed. The parties stipulated that the FAA did not apply because Mendoza was an interstate "transportation worker" who fell within the FAA's Section 1 exemption. Applying the California Arbitration Act, the court analyzed whether a delegation clause that appeared in the arbitration provision meant that the arbitrator, not the trial court, should have determined whether an agreement to arbitrate existed. The court first held that FTU had forfeited the delegation argument because FTU raised it for the first time in its reply brief in support of its motion to compel. Alternatively, the court ruled that even if FTU had not forfeited the argument, the trial court, and not the arbitrator, properly decided questions about contract formation. Even though the delegation clause purported to delegate contract formation issues to the arbitrator, "the question whether the parties entered into an agreement to arbitrate anything at all is for a court to decide."

The court next concluded that the Employee Handbook did not create an explicit agreement to arbitrate. Interestingly, although the court's recitation of the facts focuses heavily on Mendoza's inability to read or write in English, the court's analysis of the contract formation issues does not mention language issues once. Instead, the court engaged in a fact-intensive examination of the Employee Handbook to conclude that it did not create a contract to arbitrate. The arbitration policy was not prominently distinguished from other clauses in the handbook, was not specifically highlighted, did not stand out from other clauses, and there was no place for Mendoza to sign or acknowledge the arbitration provision in writing. Perhaps more significant, the handbook stated that it was intended to be informational only, and that it was not intended to create a contract. All these factors persuaded the court that the parties had not entered into an express agreement to arbitrate. For the same reasons, the court also concluded that the handbook did not create an implied contract.

One further takeaway: many of the factors the *Mendoza* court relied on to conclude lack of contract formation could have instead been used to support an argument that the contract was procedurally unconscionable. However, while contract formation issues are for the court to decide, arbitration provisions with proper delegation clauses will typically result in unconscionability issues being decided by the arbitrator. So, for plaintiffs who want to make procedural unconscionability arguments, but face delegation clauses, it may be the better course to frame the issue as one of contract formation rather than unconscionability.

WHERE PAGA PLAINTIFF DISMISSES ALL ARBITRABLE CLAIMS, DEFENDANT MAY NOT CONTINUE TO SEEK ARBITRATION OF A REMAINING NON-ARBITRABLE PAGA CLAIM

Leshane v. Tracy VW, Inc., 78 Cal. App. 5th 159 (2022)

Plaintiffs filed wage-and-hour class action claims, along with a PAGA claim, against their former employer (Tracy). After Tracy moved to compel arbitration, plaintiffs filed a first amended complaint alleging only a single PAGA claim. Tracy continued to seek arbitration, arguing that the elimination of the plaintiffs' claims for individual and classwide damages from the complaint indicated only that the plaintiffs were not actively seeking such relief "at this time" and "in this forum." Tracy argued that plaintiffs could seek to resuscitate their claims in the future, and a "controversy" existed within the meaning of the California Arbitration Act, Cal. Code Civ. Proc. § 1281.2, that required an arbitrator to adjudicate their individual claims.

The trial court rejected Tracy's argument, and the Court of Appeal affirmed, finding that Tracy's true intent was not to use arbitration as a forum for neutral dispute resolution, but rather to have the PAGA claim stayed while seeking a favorable determination from the arbitrator. This ran contrary to *Iskanian*, which prohibits the waiver of PAGA claims through arbitration agreements.

Because the plaintiffs did not maintain an action in any forum based on arbitrable claims, there was no controversy between the parties within the meaning of the California Arbitration Act. Accordingly, the trial court did not err in denying Tracy's renewed motion to compel arbitration after dismissal of the arbitrable claims.

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From the Editors
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