WAGE AND HOUR CASE NOTES

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SUMMARY JUDGMENT INAPPROPRIATE WHERE EMPLOYER DID NOT TELL EMPLOYEES ABOUT AND PROVIDE SUITABLE SEATING AT WORK STATION

Meda v. Autozone, Inc., 81 Cal. App. 5th 366 (2022)

This decision provides much-needed clarity on the summary judgment standards governing suitable seating cases.

Plaintiff worked as a sales associate at an Autozone store for five months. She assisted customers at the parts counter and also worked the cash register. She estimated that she could perform about half of her work while seated. Both work stations were elevated and she could not sit at them using a normal desk chair; instead she needed a raised chair or stool. Autozone provided two raised chairs in the store, but plaintiff alleged that Autozone did not have a formal policy regarding employee seating. The chairs were kept in an area away from the cash registers and parts counter, and plaintiff believed she could not use them except as a disability accommodation.

Plaintiff filed a Private Attorney Generals Act (PAGA) lawsuit against Autozone for its alleged failure to provide suitable seating under section 14 of Wage Order 7-2001, which provides: ""All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." Autozone moved for summary judgment, arguing that plaintiff was not "aggrieved" under PAGA, because it provided her with two raised chairs that she could have used. The trial court granted summary judgment, but the Court of Appeal reversed, finding there was a triable issue of fact as to whether Autozone had "provided" suitable seating under the Wage Order.

The Court of Appeal held that where an employer has not expressly advised its employees that they may use a seat during their work and has not provided a seat at a workstation, the inquiry whether an employer has "provided" suitable seating is fact-intensive and involve a multitude of factors. In such cases, a grant of summary judgment to the employer is likely inappropriate.

COMPETING PAGA PLAINTIFF WHO OBJECTED TO PAGA-ONLY SETTLEMENT COULD NOT APPEAL SETTLEMENT APPROVAL IN FEDERAL COURT BECAUSE SHE WAS NOT A "PARTY"

Callahan v. Brookdale Senior Living Communities, Inc., 42 F.4th 1013 (9th Cir. 2022)

The Ninth Circuit handed a win to employers seeking to engineer reverse auctions in PAGA cases.

Callahan was represented in this action by Capstone Law APC. She filed a class action lawsuit against her former employer, Brookdale. One day before filing, she filed a PAGA notice with the Labor and Workforce Development Agency (LWDA), but did not allege a PAGA claim in her original complaint. Brookdale removed to federal court, and filed a notice of related case indicating that six related cases were already pending.

Callahan's case was not litigated. Instead, the parties stipulated that her class claims be dismissed; her individual claims be sent to arbitration; and that she be permitted to file a PAGA claim.

Callahan and Brookdale participated in a mediation and filed a notice of settlement. Three days later, a competing PAGA plaintiff named Neverson filed a notice of intent to intervene and object to the settlement. Before seeking settlement approval, Callahan filed an amended PAGA notice and an amended complaint so that her case encompassed all

of the claims and all of the defendants named in the six previously-filed PAGA cases, including Neverson's.

Shortly after Callahan and Brookdale filed a joint motion for approval of the PAGA settlement, which was for $920,000, Neverson moved to intervene. The district court denied the motion and approved the settlement. Neverson appealed.

The Ninth Circuit held that the district court did not err in denying the motion to intervene. With respect to Neverson's argument that she was entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2), the court held that Neverson failed to prove the fourth element, which requires "that the applicant's interest must be inadequately represented by the parties to the action." Neverson and Callahan had the same interests in the litigation: to obtain PAGA penalties. Because their interests were the same, Neverson was required to make a "compelling showing" to demonstrate inadequate representation.

Neverson failed to make such a "compelling showing." The court rejected Neverson's argument that the settlement amount was too low because she failed to provide any basis for her own penalty calculations. Neverson also provided "no factual basis" for her assertion that Callahan miscalculated the maximum PAGA penalties.

With respect to Neverson's argument that the trial court abused its discretion in denying her permissive intervention, the Ninth Circuit agreed with the district court that the "discretionary factors governing intervention" weighed against intervention. Callahan and Neverson represented the same legal right and interest in the PAGA action. Allowing Neverson to intervene would not significantly contribute to the factual development of issues, since Callahan had access to all discovery obtained in Neverson's case.

Because the trial court did not err in denying intervention, Neverson was not a "party" to the Callahan case, and had no right under federal law to appeal the order approving the PAGA settlement. The Ninth Circuit noted that California's procedural rules differ from the federal rules, and that a competing PAGA plaintiff may become a party with standing to appeal under California law through intervention *or* by filing an appealable motion to vacate the judgment after a PAGA settlement is approved.

The Ninth Circuit made clear it was not stating a bright-line rule that intervention was *never* appropriate in overlapping PAGA cases. Instead, permissive intervention *may* be proper if the objecting plaintiff makes a more compelling showing than Neverson. Competing PAGA plaintiffs, who want to challenge a settlement in an overlapping case, should consider submitting a damages model and declaration from an expert in support of an argument that the settlement amount is too low.

PLAINTIFF WHO RESOLVED INDIVIDUAL CAL. LAB. CODE CLAIMS VIA 998 OFFER NOT BARRED BY CLAIM PRECLUSION FROM BRINGING SUBSEQUENT PAGA ACTION AGAINST SAME EMPLOYER ON SAME VIOLATIONS

Howitson v. Evans Hotels, LLC, 81 Cal. App. 5th 475 (2022)

The question in this case was whether an employee who submits a PAGA notice, and then settles her *individua*l Cal. Lab. Code claims in a lawsuit that does not assert a PAGA claim, may later file a PAGA lawsuit against the employer, or whether such a lawsuit is barred by claim preclusion. Spoiler: the employee wins.

Howitson worked as a room service server at Evans Hotels. She filed a PAGA notice against Evans with the LWDA. Sixty-five days elapsed with no response. Howitson then filed her first Lawsuit against Evans, alleging individual Labor Code claims but no PAGA claim. Evans then served Howitson with a Cal. Code Civ. Proc. § 998 offer to compromise, which provided that judgement would be entered in favor of Plaintiff "in her *individual* capacity," and that the judgment would extinguish her "*individual* claims" asserted in the First Lawsuit. The trial court then entered judgment for Howitson "in her *individual* capacity." (Emphasis original.)

About 10 days after Howitson accepted the 998 offer, she filed her second lawsuit against Evans, alleging a PAGA claim based on the same facts as in her first lawsuit. Evans demurred, arguing that claim preclusion (res judicata) barred the second lawsuit from proceeding.

The trial court sustained the demurrer, but the Court of Appeal reversed. For claim preclusion to apply, three factors must be met: 1) the second lawsuit must involve the same cause of action as the first lawsuit; 2) there must have been a final judgment on the merits in the first lawsuit; and 3) the parties in the second lawsuit must be the same as the parties in the first lawsuit, or in privity with them. The Court of Appeal ruled that the first and third factors were not met.

With respect to the first factor, the Court concluded that the harm suffered by Howitson in her first lawsuit was not the same as the harm suffered by the State of California, the real party in interest in her second lawsuit. In her first

lawsuit, Howitson alleged that she was owed unpaid wages personally, and sought damages to make her whole. By contrast, in her second lawsuit, the harm alleged was to the general public and to the State itself. As a deputized State proxy, Howitson sought only civil penalties to deter future violations of the Labor Code, and did not seek unpaid wages or other victim-specific relief. Because the "primary rights" of the plaintiffs in the first and second Lawsuits were different, claim preclusion did not apply.

With respect to the third factor, the Court ruled that the parties were not the same or in privity with each other. In the first lawsuit, Howitson herself was the real party in interest, and sought compensation on her own behalf. In the second lawsuit, the State was the real party in interest, not Howitson personally, even though PAGA gave her statutory standing to enforce the Labor Code. The Court rejected Evans' argument that Howitson was in privity with the State because the State had no interest in the first lawsuit. Its interests in Labor Code enforcement were entirely distinct from Howitson's personal interest in recovering unpaid wages.

The Court rejected Evans' reliance on *Villacres v. ABM Industries Inc.* 189 Cal. App. 4th 562 (2010), where a settlement that released class action and PAGA claims barred a class member bound by the release from later filing a PAGA lawsuit against the same employer under the doctrine of claim preclusion. The *Howitson* court distinguished the facts, and also questioned whether *Villacres* remained good law to the extent it failed to recognize that the State is always the real party in interest in a PAGA lawsuit.

Howitson may have significant implications in the wake of *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022). Many trial courts have relied on *Viking* to split PAGA claims and send the "individual" component to arbitration while staying the "non-individual" PAGA claim in court pending the outcome of the arbitration. Once the individual arbitration is complete, these courts will need to address whether to give preclusive effect to any of the arbitrator's rulings. *Howitson* will likely provide some guidance to trial courts grappling with these thorny issues.

CAL. CODE CIV. PROC. § 1281.4 DOES NOT AUTHORIZE A TRIAL COURT TO STAY A PAGA ACTION ON THE BASIS OF AN ARBITRATION TO WHICH PLAINTIFF IS NOT A PARTY

Leenay v. Superior Court, 81 Cal. App. 5th 553 (2022)

Leenay filed a PAGA action against Lowe's Home Centers alleging that Lowe's failed to incorporate commissions when calculating premium pay for missed meal and rest breaks. A coordination judge later ordered that six PAGA claims against Lowe's be coordinated, including Leenay's. Meanwhile, 50 employees, none of whom were parties to the PAGA actions, filed individual Cal. Lab. Code claims against Lowe's in arbitration. Pursuant to Cal. Code Civ. Proc. § 1281.4, Lowe's asked the trial court to stay the coordinated PAGA actions pending the conclusion of the 50 arbitrations. The trial court granted the motion and the Court of Appeal reversed.

Cal. Code Civ. Proc. § 1281.4, part of the California Arbitration Act (CAA), requires a court to stay an action pending arbitration "of a controversy which is an issue involved" in the action. The CAA defines the term "controversy" to mean a "question arising between parties to an agreement," specifically agreements that may contain arbitration provisions. Once the definition of "controversy" is incorporated, section 1281.4 means that if (1) a court has ordered arbitration of a question arising between parties to an agreement, and (2) the same question arises *between those parties* in a pending action, then (3) the court "shall" stay the action (or enter a stay with respect to the arbitrable issue, if the issue is severable).

Because Leenay was not a party to any of the 50 arbitrations against Lowe's, the trial court erred in staying her action pending the outcome of those arbitrations. Although the arbitration claimants may have been "aggrieved employees" included in the scope of Leenay's PAGA action, "aggrieved employees" are not considered parties to a PAGA action (citing *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009)).

CITY COULD NOT BE COMPELLED TO ARBITRATE MISCLASSIFICATION CASE BECAUSE IT WAS NOT A PARTY TO ARBITRATION AGREEMENTS BETWEEN INSTACART AND ITS WORKERS

People v. Maplebear Inc., 81 Cal. App. 5th 923 (2022)

Instacart is an app-based grocery delivery company that classifies its "shoppers" as independent contractors. The City of San Diego sued Instacart under the Unfair Competition Law (UCL), codified at Cal. Bus. & Prof. Code §§ 17200-17210. The City sought an injunction requiring Instacart to reclassify its Shoppers as employees, as well as restitution in the form of back wages. Instacart requires all shoppers to sign arbitration agreements, and to bring all disputes in arbitration.

Instacart moved to compel arbitration, arguing that even though the City was not a signatory to the arbitration agreements, it was nonetheless bound by them because it sought to vindicate the individual employment law rights of the Shoppers, who were the "real parties in interest." The trial court rejected this argument and the Court of Appeal affirmed.

The City was acting in its own law enforcement capacity to seek civil penalties for Labor Code violations traditionally prosecuted by the State of California. The shoppers were not the "real parties in interest." Instead, the City was the real party in interest pursuing a law enforcement action for the benefit of the general public.

The appeals court relied heavily on *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), in which the Supreme Court held that the EEOC could not be compelled to arbitration in a disability discrimination case even though it sought "victim-specific" relief on behalf of Waffle House's employees, who had signed arbitration agreements. Like the EEOC in *Waffle House*, the City was not a party to an arbitration agreement with Instacart, and no individual Shopper controlled the litigation or was even involved. Even though the City sought some victim-specific relief (i.e., back wages for shoppers), this did not make the case "private" in nature. Instead, as in *Waffle House*, the recovery of monetary relief for victims served an "obvious public function in deterring future violations."

TRIAL COURT IMPROPERLY CERTIFIED CLASS IN MISCLASSIFICATION CASE BECAUSE INDIVIDUALIZED INQUIRIES PREDOMINATED

Bowerman v. Field Asset Services, Inc., 39 F.4th 652 (9th Cir. 2022)

This case is a win for employers opposing class certification motions in federal court.

Field Asset Services, Inc. (FAS) offers pre-foreclosure property preservation services for the residential mortgage industry. FAS does not perform the services itself. Rather, it contracts with vendors, whom it classifies as independent contractors. The vendors filed a misclassification class action lawsuit against FAS, alleging that FAS deprived them of overtime pay and failed to reimburse their business expenses. The district court certified a class of 156 workers, and granted summary judgment to the class after concluding that the vendors were misclassified. The district court then held a bellwether damages trial for 10 class members. FAS appealed.

The Ninth Circuit reversed, holding that the district court erred in certifying the class. Even assuming FAS had a uniform policy of misclassifying its vendors, the company's liability as to any given vendor implicated "highly individualized inquiries" about whether that particular vendor worked overtime or incurred necessary business expenses. Further, even if liability could be shown by common evidence, the vendors could not show that their damages were capable of measurement on a class-wide basis.

The Ninth Circuit further held that the district court erred in granting summary judgment to the vendors. As to the business expense reimbursement claim under Cal. Lab. Code § 2802, the Ninth Circuit held that the multifactor *Borello* test, not the ABC test, applied. A reimbursement claim is established by statute, not a Wage Order, and the ABC test applies only to Wage Order claims. Applying *Borello*, the district court erred in granting summary judgment to the vendors because a reasonable juror could conclude that the vendors were independent contractors.

As to the overtime claims, the Ninth Circuit ruled that the ABC test applied (at least as to those vendors , like Bowerman, who had not formed their own independent companies). Summary judgment was properly granted to the vendors under prong B of the ABC test, which requires that the worker performs work that it outside the usual course of the hiring entity's business. Here, FAS was in the business of providing property preservation services, and the vendors were themselves providing those services. Because companies must prove all three prongs of the ABC test to prevail, FAS had misclassified vendors because it could not establish prong B.

The Ninth Circuit noted that some vendors had their own businesses, and that FAS had contracted with the business, not the vendors directly. For those vendors, the district court was required on remand to determine whether the new business-to-business exception to the ABC test (Cal. Lab. Code § 2776) applied.

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