WAGE AND HOUR CASE NOTES

AUTHOR*

Lauren Teukolsky

APPLYING *ADOLPH V. UBER*, PAGA PLAINTIFFS HAD STANDING TO PURSUE CLAIM ON BEHALF OF OTHERS

***Barrera v. Apple American Group LLC*, 95 Cal. App. 5th 63 (Cal. Ct. App. 1st Dist. 2023)**

This is one of the first appellate decisions to apply the recent blockbuster holding in *Adolph v. Uber Techs., Inc.*,[1] in a PAGA case.

Defendants in this matter are related companies that own and operate 460 Applebee's restaurants in California and elsewhere. Plaintiffs worked for Applebee's as a kitchen manager and cook. They filed a PAGA-only action in April 2021, before the U.S. Supreme Court decided *Viking River Cruises, Inc. v. Moriana*.[2] After the trial court initially denied its motion to compel arbitration, Applebee's filed a renewed motion based on *Viking River*.

The arbitration agreement at issue did not contain an explicit PAGA waiver, but provided that all claims filed in arbitration must be brought on an individual basis. Applebee's limited its motion to plaintiffs' individual PAGA claims and did not seek to compel arbitration of the non-individual PAGA claims. The trial court ruled it did not have jurisdiction over the renewed motion and denied it on that basis.

The court of appeal reversed in part and affirmed in part. Because the arbitration agreement limited claims that could be brought in arbitration to individual claims per *Viking River*, the court held that PAGA claim must be split into its "non-individual" and "individual" components, and the individual claims must be sent to arbitration.

It found the plaintiffs did not lose standing to pursue the PAGA claim on behalf of others because they met the two statutory requirements for PAGA standing in that they:

1. were employed by the alleged violator; and
2. allegedly suffered one or more Labor Code violations.

The court in *Barrera* further concluded that in accord with the California Supreme Court holding in *Adolph v. Uber*, nothing more is required to maintain PAGA standing.

Applebee's requested that the court of appeal stay the PAGA claim on behalf of others, pending the arbitration of the individual claims. However, the court declined to enter a stay, instead remanding the stay question to the trial court to decide in the first instance.

EMPLOYERS LIABLE FOR EXPENSES INCURRED BY EMPLOYEES ORDERED TO WORK AT HOME

***Thai v. International Business Machines Corp.*, 93 Cal. App. 5th 364 (2023)**

This case represents a win for employees who worked from home during the COVID-19 pandemic and had to spend their own money on equipment and other items needed to perform their jobs.

Plaintiff Paul Thai is an IBM employee. In March 2020, Governor Gavin Newsom issued an order directing all non-essential employees to work from home because of the COVID-19 pandemic. Following the government's instructions, IBM directed Thai and his coworkers to work from home. Thai needed internet access, phone service, a headset, and a computer to perform his job. IBM provided these items to its employees in its offices, but refused to reimburse Thai and his coworkers after they spent their own money on these items to work from home.

California Labor Code section 2802, which requires employers to reimburse employees for necessary work expenses, is designed to prevent employers from shifting their operating expenses onto their employees.

IBM argued that it was not required to reimburse Thai because the *government* had caused him to spend his own money on work items, not IBM. The trial court agreed, ruling that because IBM was acting in response to government orders, there was an intervening cause precluding direct causation of Thai's losses by IBM.

The court of appeal reversed. It held that the trial court improperly read section 2802 to require reimbursement only for expenses directly caused by the employer. The court surmised this reading inserts into the analysis a "tort-like causation element that is not rooted in the statutory language." It noted that the statutory provision plainly requires employers to reimburse an employee for all expenses that are a "direct consequence of the discharge of [the employee's] duties."

The court further explained that the obligation does not turn on whether the employer's order was the proximate cause of the expenses. It underscored that section 2802 simply allocates the risk of unexpected expenses—such as those caused by the COVID-19 pandemic—to the employer, not the employee.

DRIVERS WHO DID NOT CROSS STATE LINES EXEMPT FROM ARBITRATION UNDER THE FAA

***Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023)**

This case represents a win for transportation workers who do not cross state lines and want to stay out of arbitration.

In December 2021, the Ninth Circuit ruled that drivers (D&S Drivers) who transport pizza ingredients from Domino's supply center in Southern California to its franchisees within state lines are "transportation workers" exempt from arbitration under section 1 of the Federal Arbitration Act.[3] The court relied on *Rittmann v. Amazon.com, Inc.*,[4] which held that Amazon drivers who transported goods that had traveled interstate "for the last leg" to their eventual destinations were transportation workers exempt from the FAA even though they did not cross state lines. The D&S Drivers similarly transported mushrooms and other goods that had traveled interstate "for the last leg" to Domino's franchisees in Southern California.

The U.S. Supreme Court then granted certiorari, vacated, and remanded the *Carmona* case for reconsideration in light of *Southwest Airlines Co. v. Saxon*,[5] which held that a ramp worker who loaded and unloaded cargo on and off airplanes that traveled in interstate commerce was an exempt "transportation worker."

According to the Court, the critical question in *Southwest Airlines Co. v. Saxon* is whether the workers are actively "engaged in transportation" of goods in interstate commerce and play a "direct and necessary role in the free flow of goods across borders."[6] In concluding that ramp workers met this description, the Court rejected *Southwest's* argument that the workers themselves must cross state lines to be engaged in interstate commerce. *Saxon* explicitly declined to address whether "last leg" drivers, such as those in the *Domino's* case, would similarly qualify for the exemption.

On remand in *Carmona*, the Ninth Circuit held that nothing in *Saxon* altered its original conclusion that D&S Drivers were transportation workers exempt from the FAA. Noting that *Saxon* had explicitly declined to disapprove *Rittmann*, the Ninth Circuit in *Carmona* held that it was bound by *Rittmann* unless it was "clearly irreconcilable" with *Saxon*.

The Ninth Circuit determined that *Rittmann* was compatible with *Saxon* because the Amazon "last leg" drivers were similar to ramp workers who handled cargo that moved in interstate commerce. Although neither group of workers traveled across state lines, the court found they were an integral part of the flow of goods in interstate commerce. Because *Rittmann* remained good law, the Ninth Circuit's original determination that the D&S Drivers were "transportation workers" exempt from the FAA remained sound.

ROUNDING TIME ENTRIES IMPERMISSIBLE, UNWIELDY PAGA CLAIMS MAY BE LIMITED

***Woodworth v. Loma Linda University Medical Center*, 93 Cal. App. 5th 1038 (2023)**

Employers pay heed: Rounding is on the way out.

Nicole Woodworth was a nurse at Loma Linda University Medical Center. She filed a class action and PAGA case against Loma Linda, alleging numerous wage and hour violations. The trial court granted summary adjudication to Loma Linda on most of the claims. Woodworth appealed.

The court of appeal made three significant rulings.

First, it held that the trial court erred in granting summary adjudication on Woodworth's rounding claim. Loma Linda had a policy of rounding employees' time punches down to the nearest tenth of an hour. In 2012, *See's Candy Shops, Inc. v. Super. Ct.*,[7] held that rounding is permitted if it is facially neutral and applied so that it does not result in underpaying employees over time.

Although several courts have followed *See's Candy*, the California Supreme Court held in a pair of rulings that the *de minimis* doctrine does not apply in California,[8] and employers cannot round time entries in the meal period context.[9] In *Camp v. Home Depot U.S.A., Inc.*,[10] the appellate court broke with *See's Candy* in light of those two rulings to hold that neutral time-rounding rules are not permissible in California. The *Woodworth* holding agreed with *Camp*, thus becoming the second appellate court ruling to invalidate a facially-neutral rounding rule. The court in *Woodworth* held that if an employer can capture the exact number of minutes an employee worked, the employer must pay for all the time worked and cannot use rounding. This holding applies retroactively.

Second, the court of appeal affirmed the trial court's grant of summary adjudication of Woodworth's claim that Loma Linda did not properly implement an alternative workweek schedule (AWS). A validly adopted AWS is an affirmative defense to a claim for overtime compensation, which the employer bears the burden of proving. Loma Linda proffered evidence that it complied with the Wage Order's detailed requirements. It mailed AWS disclosure statements to affected employees and held meetings to discuss the proposed AWS 14 days before the election. The disclosures accurately described the AWS's effect on employee pay and benefits. Loma Linda had a secret ballot election, and more than 2/3 of employees voted for the AWS.

The burden then shifted to Woodward to raise a triable issue of material fact showing that the AWS was not validly adopted. Woodward argued that the disclosures were insufficient because they did not disclose the AWS's effect on meal and rest periods and benefits. The court of appeal rejected this argument, holding that an employer's failure to disclose renders an AWS election "null and void" only if the employee can show a "reasonable probability that disclosure of the information would tend to cause more employees to vote against the AWS." The appellate court found Woodworth failed to make this showing. The trial court's grant of summary adjudication on her AWS claim was therefore proper.

Third, the court weighed in on PAGA manageability. There is a current split of authority on this issue. In 2022, *Estrada v. Royalty Carpet Mills, Inc.*[11] held that courts may not dismiss a PAGA claim for lack of manageability. A case decided one year earlier, *Wesson v. Staples the Office Superstore, LLC*,[12] held that courts are permitted to dismiss a PAGA claim for lack of manageability. The California Supreme Court granted review in *Estrada* and is expected to resolve this conflict soon. *Woodward* was in keeping with *Estrada*, noting that courts faced with unwieldy PAGA claims may limit the scope of the claims or evidence to be presented at trial, but cannot dismiss the claims entirely.

***NOTE:** This case is also summarized in the discussion of California employment law, beginning on page 5.*

PUBLIC EMPLOYERS NOT REQUIRED TO REIMBURSE EMPLOYEES FOR WORK EXPENSES

***Krug v. Board of Trustees of California State University*, 2023 WL 5543521 (Cal. Ct. App. 2d Dist. 2023)**

This case hands a big win to public employers who want to argue that provisions of the Labor Code do not apply to them.

Patrick Krug is a biology professor at California State University (CSU). When the COVID-19 pandemic struck, CSU ordered its professors to teach remotely. Krug bought a computer and other equipment from his home office, but CSU refused to reimburse him. Krug filed a class action lawsuit alleging that CSU's failure to reimburse employees for the expenses they incurred in working from home violated Labor Code Section 2802, which requires employers to reimburse employees for all necessary work expenses.

The court of appeal held that section 2802 does not apply to public employers such as CSU. It applied a three-part test to determine whether this Labor Code provision applied to governmental agencies. First, the court must look for "express words" referring to governmental agencies. If there are none, the court must next look for "positive indicia" of a legislative intent to exempt governmental agencies from the statute. If no such indicia appear, the court must then ask whether applying the statute would result in an infringement of "sovereign governmental powers."

The court noted that section 2802 contained no express words referring to governmental agencies, and there was no indication of a legislative intent to exempt governmental agencies. The question was thus whether applying the statute would infringe on CSU's sovereign governmental powers.

The court also noted that the Education Code[13] gives CSU broad discretion to procure equipment and establish equipment allowances. This discretion permits CSU to standardize equipment, negotiate price advantages by ordering in bulk, and hire and train support personnel. It opined that requiring CSU to reimburse professors for whatever equipment they bought on their own would infringe on this sovereign authority, so section 2802 should

not apply. Further, subjecting CSU to section 2802's requirement to pay attorneys' fees to a prevailing plaintiff would impose a significant burden on CSU, which is subject to strict revenue and budgetary limitations. Imposing section 2802 liability would divert limited educational funds from CSU's core function. The court held that these infringements on CSU's sovereign powers precluded application of section 2802.

Significantly, the court also underscored that its decision should not be interpreted to mean that section 2802 can *never* apply to CSU—only that it did not apply in this case because Krug's claim fell squarely within the ambit of CSU's vested authority to set the terms for employee expense reimbursement.

PAGA CASE NOT BARRED BY PREVIOUS SETTLEMENT THAT CONTAINED DIFFERENT FACTS

***LaCour v. Marshalls of California, LLC*, 2023 WL 5543622 (Cal. Ct. App. 1st Dist. 2023)**

Robert LaCour was a loss prevention specialist at a Marshalls department store. His employment ended in May 2019. He filed a PAGA-only case against Marshalls on January 4, 2021. Marshalls argued that his PAGA claim was untimely because he had only one year and 65 days to bring the claim, and therefore should have filed it by August 2020 at the latest.

The court of appeals, however, ruled that LaCour's PAGA claim was timely. It noted that the Judicial Council issued Emergency Rule 9 during the COVID-19 pandemic, tolling the statute of limitations for civil claims from April 6, 2020 to October 30, 2020—a rule intended to apply broadly. The court rejected Marshalls' constitutional attacks, holding that Governor Gavin Newsom and the Judicial Council acted properly in adopting the rule in response to COVID-19. It found that because the statute of limitations for the PAGA claim was tolled for about six months by Emergency Rule 9, LaCour's PAGA claim was timely.

Marshalls also sought to strike LaCour's PAGA claim on the grounds that the settlement of an earlier PAGA claim against Marshalls by a different plaintiff, Joan Paulino, had a res judicata effect on LaCour's claim. For res judicata to apply, the court noted that two questions were relevant. First, under the primary rights test, did Paulino plead or could she have pled the same claims that LaCour now sought to pursue? Second, when Paulino settled her PAGA claims, was she acting in privity with LaCour? The court answered "no" to both questions.

In Paulino's case, the PAGA complaint contained "narrow" allegations that employees were not paid for time spent undergoing anti-theft bag checks at the end of their shifts. The complaint tracked the allegations in Paulino's LWDA notice. Paulino was not deputized to pursue any PAGA claims beyond those in her LWDA notice, and therefore could not have pled the same claims as LaCour–that is, that Marshalls failed to reimburse employees for uniforms.

With respect to privity, the court focused on whether it would be "fair" to bind a nonparty such as LaCour to the result obtained by Paulino in which LaCour did not participate. The court examined whether Paulino and LaCour had similar interests such that Paulino properly acted as LaCour's representative in the first action, and whether LaCour had sufficient notice that she could reasonably expect to be bound by Paulino's action. The court said "no" on both counts and held that, accordingly, it would not be fair to bind LaCour to the result obtained by Paulino.

NOTE: *This case is also summarized in the discussion of California employment law, beginning on page 5.*

PERMISSIVE INTERVENTION FOR PAGA PLAINTIFF WHOSE CASE WAS BEING SETTLED BY A COMPETING PLAINTIFF

***Accurso v. In-N-Out Burgers*, 2023 WL 5543525 (Cal. Ct. App. 1st Dist. 2023)**

Tom Piplack and Brianna Marie Taylor filed a PAGA action against In-N-Out. Five PAGA actions against In-N-Out followed, some in different venues. The fifth-filed case was Accurso's. When Piplack and Taylor learned that Accurso and In-N-Out were headed to mediation, they tried to coordinate global settlement discussions with all six PAGA plaintiffs involved.

Accurso refused and reached a settlement with In-N-Out that excluded the other five plaintiffs. Upon learning a settlement was imminent, Piplack and Taylor and one other plaintiff moved to intervene in Accurso's action. They also requested the trial court stay *Accurso* based on the doctrine of exclusive concurrent jurisdiction, arguing that *Accurso* should be stayed as a later-filed action. The trial court denied the motions, holding that Piplack and Taylor did not meet the threshold requirement for intervention, set forth in the California Code of Civil Procedure section 387, and did not have a cognizable interest in *Accurso*.

The court of appeal reversed, holding that the trial court correctly denied mandatory intervention but

erred in denying permissive intervention. As for mandatory intervention, Piplack and Taylor succeeded in demonstrating they had a significantly protectable interest in *Accurso*, contrary to the conclusion of the trial court. A "personal interest" was not required. As deputized proxies of the LWDA, Piplack and Taylor had a public enforcement charge that qualified as significant protectable interests in the fate of *Accurso*. Any settlement of a PAGA claim within the scope of their proxy authorization could impair that authority. This public interest is sufficient to meet the threshold "interest" requirement for intervention.

However, the court found that Piplack and Taylor failed to meet the burden of demonstrating that Accurso was not adequately protecting their interests. They failed to submit sufficient evidence to support the claim that Accurso was attempting to settle claims outside the scope of the LWDA notice. They did not, for example, present the trial court with the LWDA notices filed in the various cases. And because their intervention motion was filed *before* Accurso asked the trial court to approve a settlement, it was speculative to argue that Accurso was attempting to settle PAGA claims outside the scope of their authority. On this record, the court opined that the plaintiffs failed to meet their burden of showing inadequate representation, which is required for mandatory intervention.

As for permissive intervention, PAGA claimants with overlapping claims, as in the present case, may have something significant to add to the settlement approval process because they can point out deficiencies in the settlement that the parties to the settlement do not have an incentive to identify, such as an overbroad release or inadequate consideration. Piplack and Taylor would not disrupt or expand the scope of the case. They simply asked to stay *Accurso* to coordinate all six actions against In-N-Out, which might ultimately result in saving judicial resources.

The court of appeal ordered the trial court to reconsider the motion to intervene and request for a stay in light of its decision. It observed that the trial court had broad discretion on remand to coordinate the actions—including talking to the judges in the overlapping cases to figure out the best way to proceed.

***NOTE:** This case is also summarized in the discussion of California employment law, beginning on page 5.*

ENDNOTES

* Lauren Teukolsky has been practicing employment law exclusively on behalf of employees for more than 20 years. She has her own firm in Pasadena and handles individual FEHA cases as well as wage and hour class actions. She is a fellow of the College of Labor and Employment Law and was named to the 2023 Super Lawyers "Top 100" List for Southern California. She can be reached at lauren@teuklaw.com.

1. *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023).
2. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).
3. Federal Arb. Act, 9 U.S.C. §§ 1-16.
4. *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020).
5. *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022).
6. *Id.* at 1790.
7. *See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889 (2012).
8. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018).
9. *Donohue v. AMN Services, LLC*, 11 Cal. 5th 58 (2021).
10. *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022).
11. *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685 (2022).
12. *Wesson v. Staples the Off. Superstore, LLC*, 68 Cal. App. 5th 746 (2021).
13. Cal. Educ. Code, §§ 89036 and 89500.