



Daily Journal photo

Michael Rubin

Partial PAGA overturn may be reversed in 2023 cases

By Craig Anderson
Daily Journal Staff Writer

The reverberations of a U.S. Supreme Court decision in June that partially overturned a California labor law, the Private Attorneys General Act, will continue in 2023 with a distinct possibility that the ruling will be effectively overturned in most cases.

The multiple cases wending their way through the court system pit plaintiffs against employers who have forced workers into arbitration and hope to squelch the PAGA law, which allows them to sue on behalf of the state and share the proceeds.

The Supreme Court decision appeared to be a victory for employ-

ers. Justice Samuel A. Alito Jr., an appointee of President George W. Bush, ruled that a plaintiff does not have standing in state court to represent her former co-workers once she is out of a lawsuit after her individual claim is sent to arbitration.

But thus far, the ruling hasn't usually translated into real victories for employers. Instead, the vast majority of state court judges have taken the advice of Justice Sonia M. Sotomayor, an appointee of President Barack Obama, that "California courts, in an appropriate case, will have the last word." *Viking River Cruises v. Moriana*, 20-1573 (S. Ct., filed May 10, 2021).

Superior court judges have reject-

ed defense motions to dismiss PAGA claims for a plaintiff's co-workers 92% of the time even as they have referred individual claims to arbitration, according to records compiled by Lauren K. Teukolsky of the plaintiff's firm Teukolsky Law APC. Just six PAGA cases have been dismissed in state court in what she referred to as the "full Alito."

Employers have had a lot more success in federal court, where judges have dismissed PAGA claims six of 11 times, she added. But the vast majority of cases — 75, Teukolsky said — have been considered in state court.

Both sides will get more guidance
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PAGA cases may veer from US high court ruling

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soon when the state Supreme Court decides one key question, whether a plaintiff who filed a Private Attorneys General Act claim on behalf of his co-workers has standing to do so.

Most judges have stayed “non-individual” PAGA claims while waiting to see what the state high court does in *Adolph v. Uber Technologies*, S274671 (Cal., filed May 20, 2022), Teukolsky added.

on his own behalf in court, he does not meet the ‘aggrieved employee’ requirement for his non-individual PAGA claims, which should therefore be dismissed.”

In a statement on Monday, Evangelis wrote: “We look forward to the California Supreme Court’s review and the opportunity it presents to confirm that the U.S. Supreme Court’s decision in *Viking River* requires arbitration of the plaintiff’s

now on remand to the 2nd District Court of Appeal, where Rubin said he is asking the court to overrule the U.S. Supreme Court based on state contract principles.

“We’re asking the Court of Appeal, on remand from the U.S. Supreme Court, to conclude that *Viking River*’s agreement with [plaintiff] Angie Moriana cannot be construed as requiring her to arbitrate any part of her PAGA claim,” Rubin wrote in an email.

‘To ensure that neither party can coerce the other into a resolution which was not within the scope of the original agreement, this court must follow the Supreme Court’s lead in permitting arbitration for individual PAGA claims and individual PAGA analyses.’

— Steven M. Duvernay, Benbrook Law Group

Arguments in the case are expected to take place this spring.

Plaintiffs’ attorneys — led by Altshuler Berzon LLP partner Michael Rubin — argue that Alito got California law wrong and that the state Supreme Court two years ago to allow employees to pursue a PAGA lawsuit even if they settle their own individual claims. *Kim v. Reins International California Inc.* (2020) 9 Cal. 5th 73.

Theane Evangelis, a Gibson, Dunn & Crutcher LLP partner who represents Uber, counters that because Erik Adolph, a former driver, “cannot allege a personally sustained violation or seek any relief

individual PAGA claim.”

Steven M. Duvernay, an attorney with the Benbrook Law Group who represents a small business group, filed an amicus curiae brief Monday, arguing that a lower court decision in favor of Adolph must be overturned.

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The *Viking River Cruises* case is

Little Mendelson PC shareholder Keith A. Jacoby, who represents *Viking River Cruises*, countered in a brief last month that the Federal Arbitration Act “frustrates all conflicting state laws,” including PAGA.

Eric B. Kingsley, a partner with Kingsley & Kingsley APC, said he expects a favorable ruling in *Adolph v. Uber*, which may prompt defense lawyers to reassess the virtues of arbitration for some of their California clients.

“You might see a sea change in corporate boardrooms,” he said in a phone interview.

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