PETTITKOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN
Celebrating 15 Years of Legal Excellence

EMPLOYMENT LAW UPDATE

Relationship-Driven Results | December 2021

JUDICIAL

California

California Court of Appeal Affirms Summary Adjudication in Employer's Favor in *Wilkin v. Community Hospital of the Monterey Peninsula*

For an employee to succeed on a claim for discrimination in which an employer asserts that the employee was discharged for legitimate, non-discriminatory reasons, the employee must present evidence demonstrating that the employer's proffered reasons were pretextual, and that the discharge was in fact motivated by discrimination. In *Wilkin v. Community Hospital of the Monterey Peninsula*, the California Court of Appeal offered additional clarity on the applicable evidentiary burden by ruling that an employee failed to present sufficient evidence to support a theory that the termination of her employment was motivated by discrimination.

Kimberly Wilkin ("Wilkin") was hired as a registered nurse by Community Hospital of the Monterey Peninsula (the "Hospital") in 2005. Wilkin's attendance record was erratic, and from 2016 through December 2017, she received several verbal and written warnings on the subject.

In March 2017, Wilkin requested and was granted intermittent leave under the Family Medical Leave Act ("FMLA"). While the approved leave permitted Wilkin to take time off one to two times per month, her absences soon exceeded that frequency, and Wilkin sought and received approval to take leave more often.

After Wilkin returned from leave in late September 2017, her attendance was so poor that the Hospital's timekeeping system automatically advanced her disciplinary status to "termination review." None of Wilkin's offending absences were related to her FMLA leave or to any alleged health condition(s). Despite significant and ongoing attendance issues, the Hospital gave Wilkin a final chance to improve, with the understanding that any further absences would result in termination of her employment.

In November 2017, the Hospital became concerned when a patient received medication without any supporting documentation. During its investigation, the Hospital discovered that Wilkin had administered the medication in question and had failed to appropriately document that

Areas of Practice

Appellate

Business Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Trial & Civil Litigation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

administration in accordance with Hospital policies. The Hospital also discovered several other occasions on which Wilkin signed off on the administration of medication yet failed to properly complete appropriate documentation. Following its investigation, the Hospital terminated Wilkin's employment for attendance issues and failure to accurately document administration of controlled substances.

Wilkin filed a lawsuit against the Hospital alleging, among other claims, disability discrimination, claiming that the proffered reasons for her discharge were fabricated. The Hospital filed a motion for summary judgment, arguing that Wilkin was discharged for nondiscriminatory reasons. The motion was supported by excerpts from Wilkin's deposition, disciplinary notices, and records of documentation discrepancies. Wilkin failed to provide any evidence that the Hospital discriminated against her, and the trial court granted the Hospital's motion. The trial court emphasized that a plaintiff must provide substantial evidence that the stated reasons for the termination of employment are inaccurate.

Wilkin appealed, arguing that she had presented sufficient evidence to demonstrate that the Hospital's stated reasons for discharge were pretextual. Under California law, to succeed in an employment discrimination action, a plaintiff must show that she was discharged despite competently performing the job and that circumstances suggest a discriminatory motive. The employer then has the opportunity to produce evidence showing that the discharge was based on a legitimate, nondiscriminatory reason. When a legitimate reason for the discharge exists, the burden shifts back to the employee to demonstrate that the employer's reasons are a pretext for discrimination.

The Court of Appeal agreed with the trial court, affirming the grant of summary judgment based on a finding that Wilkin failed to present any evidence that the Hospital's stated reasons for discharge were pretextual or that there was any connection between the termination of her employment and her alleged disabilities or protected leave.

The *Wilkin* ruling once again affirms the importance of documenting and clearly articulating the bases for adverse employment actions, to the extent possible and applicable. California employers well prepared to justify legitimate business decisions find themselves in far more advantageous positions should litigation arise.

California Court of Appeal Clarifies PAGA Notice Requirements in *Santos v. El Guapos Tacos, LLC*

In *Santos v. El Guapos Tacos, LLC*, the Sixth District Court of Appeal reversed a trial court's ruling, finding that, despite a lack of reference to other aggrieved employees, a prefiling notice to the Labor and Workforce Development Agency ("LWDA") was not deficient, and thus satisfied notice requirements under the Private Attorneys General Act ("PAGA").

Lourdes Santos ("Santos") and Carolina Chavez-Cortez ("Chavez-Cortez") (collectively, "Plaintiffs") sued El Guapos Tacos LLC ("El Guapos

Tacos") in August of 2015, asserting a series of claims for alleged wage and hour violations including alleged failures to provide lawful meal breaks, authorize and permit rest breaks, maintain and provide earning statements, pay compensation for all work performed, and timely pay compensation for all work performed. Plaintiffs also sought civil penalties under PAGA. Santos was employed from 2010 through 2013 and Chavez-Cortez from 2011 through 2015.

In order to bring a PAGA claim, a plaintiff must provide the LWDA with notice and provide the employer an opportunity to cure certain violations. The notice must also notify the parties of specific alleged Labor Code violations and provide facts and theories in support of those allegations.

In Plaintiffs' initial notice to the LWDA and El Guapos Tacos, they stated that El Guapos Tacos did not provide proper meal and rest breaks and that El Guapos Tacos was aware of violations because it used a timecard machine that maintained records of alleged violations. As timekeeping records were used for payroll, Plaintiffs contended that numerous violations appeared on the face of applicable payroll documents.

After providing notice to the LWDA and filing a lawsuit, Plaintiffs amended their operative pleading several times. In June 2018, summary adjudication was entered against Santos as to her PAGA claim as a result of her failure to serve notice of an intent to pursue PAGA claims within one year after her employment with El Guapos Tacos ended.

In August 2018, El Guapos Tacos moved for judgment on the pleadings as to the PAGA claim brought by Chavez-Cortez, based on a theory that she had failed to provide adequate notice of her claim(s) to the LWDA. El Guapos Tacos relied on *Khan v. Dunn-Edwards Corp.* in arguing that Chavez-Cortez informed the LWDA neither "of the claims of any other alleged similarly situated but unidentified individuals" nor that she planned to pursue the matter "on behalf of these unnamed individuals." The trial court granted judgment on the pleadings, agreeing that Chavez-Cortez failed to provide fair notice of her intention to pursue claims on behalf of other employees. Absent that omission, the trial court surmised, the LWDA may have chosen to investigate and/or pursue the allegations in a different matter.

The Court of Appeal reversed the trial court's ruling by distinguishing the instant issue from prior similar case law. In *Khan*, the plaintiff only alleged isolated "violations flowing solely from an individual termination" while repeatedly using the terms "my" and "I" in his operative complaint and not mentioning other employees. Chavez-Cortez, on the other hand, referred to two aggrieved employees (even though Santos' claim was outside the statute of limitations), suggested ongoing and widespread meal and rest break violations, and alerted the LWDA to a potentially sizeable group of affected employees by mentioning the widespread use of a time card machine. Moreover, while El Guapos Tacos argued that a PAGA prefiling notice must fail unless it refers to "other aggrieved workers," the appellate court found that other claims failed because of a lack of factual sufficiency, not because of failures to express intent to pursue claims on behalf of other workers.

Areas of Practice

Appellate

Business Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Trial & Civil Litigation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

While the appellate court's ruling did affirm that simply noting legal conclusions without implying systemic issues is insufficient, it held that "a prefiling notice is not necessarily deficient merely because a plaintiff fails to state that she is bringing her PAGA claim on behalf of herself *and others* . . . [since] PAGA claims, by their nature, are only brought on a representative basis."

The *Santos* ruling provides more guidance regarding prefiling notice sufficiency and serves as an anecdotal reminder to California employers to consider pursuing summary adjudication when claims imply violations stemming only from individual circumstances, state only legal conclusions, or use individualistic language that references only the plaintiff.

Appellate Court Affirms that Flight Attendants Based in California are Subject to California Wage and Hour Law

In *Gunther v. Alaska Airlines, Inc.*, California's Fourth Appellate District affirmed a trial court's determination that flight attendants were entitled to California Labor Code compliant wage statements. Fortunately, however, the court also concluded that the trial court erred in awarding heightened penalties under Labor Code section 226.3, because the plain language of the statute provides that heightened penalties apply only when an employer fails to provide wage statements or fails to keep required records, which was not the case here.

California law requires that employers provide wage statements containing certain information, including, among other requirements, applicable hourly wage rates, the numbers of hours worked by employees, and information sufficient such that workers can "promptly and easily determine" applicable information (Labor Code section 226, subds. (a) and (b).) In *Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732, the California Supreme Court previously explained that for pilots, flight attendants, and other interstate transportation workers, California qualifies as an employee's principal place of work if California serves as the employee's base of work operations, regardless of the employee's place of residence.

Plaintiff Julie Gunther ("Gunther") resided in San Diego, California while serving as a flight attendant for Alaska Airlines ("Alaska"). Alaska is headquartered in the State of Washington, and flies across the United States and internationally. Gunther filed a claim seeking recovery in her individual capacity and on behalf of similarly aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"). The California trial court determined that wage statements provided by Alaska failed to identify: (1) total hours worked; (2) the number of piece-rate units earned; and (3) the corresponding rate of pay for each. Based on this perceived malfeasance, the trial court awarded $4,000 in statutory penalties, $25,010,158 in PAGA penalties, and $944,860 in attorneys' fees.

On appeal, the Court of Appeal stated that to satisfy the standard established by *Ward*, Gunther needed to present evidence showing that the aggrieved employees were: (1) based in California; and (2) did not work primarily in any one state. Here, Gunther and all aggrieved employees were

based in California and Alaska's own evidence showed that none of the employees worked primarily in any other one state. Based on this analysis, California law (and, by extension, Labor Code section 226) was held to apply.

Nevertheless, the Court of Appeals also declined to follow *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, in holding that the plain language of section 226 dictates that heightened penalties only apply where the employer either fails to provide a wage statement or fails to keep required records of wage statements. As Alaska provided wage statements to its flight attendants and Gunther dismissed her challenge that Alaska failed to maintain records, the $25 million award based on a heightened penalty standard was reversed and that discrete issue was remanded to the trial court for further review.

While the circumstances in *Gunther* are rather unique given the nature of the aviation industry, California employers that employ individuals across multiple states (including California) should pay particularly close attention to where work is performed. Where necessary, legal counsel should be consulted to ensure that appropriate wage and hour standards are applied.

California Court of Appeal Provides Additional Guidance on PAGA Settlement Approval in *Moniz v. Adecco USA, Inc.*

In separate Private Attorneys General Act ("PAGA") representative actions, Rachel Moniz ("Moniz") and Paola Correa ("Correa") sued their former employer Adecco USA, Inc. ("Adecco") to recover civil penalties for Adecco's alleged violations of the Labor Code. Moniz settled her case first, and the trial court approved the settlement. Correa thereafter appealed the trial court's decision, attacking several aspects of the settlement process and approval.

On appeal, the California Court of Appeal for the First Appellate District held that the trial court applied an appropriate standard of review by inquiring whether the settlement was both "fair, adequate, and reasonable" and consistent with the purposes of PAGA. The court thereafter opined on several important issues for employers facing multiple, contemporaneous PAGA suits.

First, the court held that status as a PAGA plaintiff in one action is sufficient to confer standing on that PAGA plaintiff to appeal a judgment following an allegedly unfair settlement in another PAGA action with overlapping claims. This departs from the California Court of Appeal's previous ruling, from only two months earlier in *Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955, in which the court held that a PAGA representative *did not* have appellate standing to challenge a PAGA settlement in a similar lawsuit that would effectively eliminate that plaintiff's own competing PAGA claim. In light of this split in authority, California employers should assume that the California Supreme Court will (eventually) review and offer final clarity on the subject.

Second, the court held that PAGA's statutory scheme and the principles of preclusion authorize a PAGA plaintiff to bind the state to a judgment through

litigation that could extinguish PAGA claims that were not specifically listed in the PAGA notice, as long as the claims involve the same primary right.

Though employers will have to wait for additional clarification from the California Supreme Court on the appellate standing issue, employers should be pleased that the Court of Appeal confirmed a PAGA settlement can release claims not expressly highlighted by a PAGA representative's preliminary notice letter.

Areas of Practice

Appellate

Business Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Trial & Civil Litigation

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Rio Schwarting, Christopher Reilly, Tina Robinson, Zachary Rankin, Christine Robles, Brian Jun, or Christine Dixon at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Rachel Albert, Sevada Hakopian, Catherine Brackett, or Erika Hernandez at (310) 649-5772.