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Advocate Heath Care Network v. Stapleton – Supreme Court Blesses Hospital Systems' Interpretation of ERISA's Church Plan Exemption

Roberta Vespremi & Mara Slakas Brown

Introduction

A little more than four years ago, plaintiffs began filing a wave of putative class-action lawsuits against pension plans sponsored by religiously-affiliated non-profit hospitals, challenging their designation as "church plans" under the Employee Retirement Income Security Act of 1974[1] (ERISA), among other things. Before wending its way to the United States Supreme Court this past term, the controversy would encompass more than three dozen lawsuits filed across the nation with billions of dollars at stake. In *Advocate Health Care Network v. Stapleton*,[2] the Court resolved a significant threshold issue of whether the church-plan exemption under ERISA extends to pension plans that were not established by a church. In a unanimous ruling, the Court held that per the statutory language, a pension plan need not be established by a church to qualify for the church-plan exemption. The ruling, while providing critical guidance, has left several open issues, such as the definition of "church" and what it means to be "controlled by" or "associated with" a church, that will no doubt be litigated for years to come in the lower courts.

Many religiously-affiliated nonprofits, including hospitals, have a pension plan that is operated as a "church plan" exempt from ERISA funding, disclosure, and

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1 29 U.S.C. § 1001 et seq.

2 137 S. Ct. 1652 (2017).

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Advocate Heath Care Network v. Stapleton – Supreme Court Blesses Hospital Systems' Interpretation of ERISA's Church Plan Exemption

Roberta Vespremi & Mara Slakas Brown

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other requirements. These lawsuits challenge those church-plan designations, even for plans that have received specific approval to operate as church plans from the Internal Revenue Service (IRS) or the U.S Department of Labor (DOL). In the lawsuits, plaintiffs primarily argue that a church plan must be established by a church, and seek to make hospitals contribute hundreds of millions of dollars into their pension plans and to pay premiums to the Pension Benefit Guaranty Corporation (PBGC), as well as seeking other monetary and nonmonetary relief.

The church-plan exemption, enacted by Congress to prevent government entanglement with religious institutions, excuses from ERISA requirements pension plans established or maintained by a non-profit entity controlled by or associated with a church.[3] Plaintiffs contend that the church-plan exemption should be narrowly construed and argue that employees are harmed by the exemption because church plans are not subject to ERISA's minimum funding standards; not required to provide ERISA-required notices, including notices about benefit freezes and reductions, and plan funding; and are not guaranteed by the PBGC.

What Is ERISA's Church-Plan Exemption?

ERISA's church-plan exemption is a product of Congress's concern that ERISA's requirements together with the governmental monitoring ERISA requires could lead to intrusions into "the confidential relationship that is believed to be appropriate with regard to churches and their religious activities."[4] When initially adopted in 1974, the church- plan exemption only applied to plans established and maintained by churches and other houses of worship.[5] Amendments in 1980 broadened the scope of the church-plan definition to cover plans established and maintained by non-profit entities "controlled by" or "associated with" a church, through the addition of Section 1002(33)(C)(ii)(II)'s definition of "employee."[6] ERISA's current definition of a "church plan" provides, in relevant part, that a plan established and maintained for its employees by a church "*includes a plan maintained by an organization,* whether a civil law corporation or otherwise, *the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits* or welfare benefits, or both, for the employees" *of an organization,* whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and *which is controlled by or associated with a church* or a convention or association of churches.[7]

The Supreme Court's Ruling in *Advocate Health Care Network v. Stapleton*

On June 5, 2017, the Supreme Court issued an 8-0[8] decision in *Advocate Health Care Network v. Stapleton*,[9] providing clarification about whether a plan must be both established and maintained by a church to qualify for the church-plan exemption..

Advocate Health Care Network addressed three separate actions, where the Third, Seventh, and Ninth Circuits had affirmed district court rulings in favor of pensioners that interpreted ERISA to require that a pension plan be established by a church to qualify for the church-plan exemption.[10] The Court granted petitions for writs of certiorari for the applicable hospital system in each of the cases and consolidated them in

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3 ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2).

4 S. Rep. No. 93-383, 93rd Cong., 1st Sess. 81 (1973).

5 ERISA § 3(33), 29 U.S.C. § 1002(33)(C) (1974).

6 Pub. L. No. 96-364 § 407.

7 ERISA § 3(33), 29 U.S.C. § 1002(33)(C) (emphasis added).

8 Justice Neil Gorsuch did not take part in the Court's decision.

9 137 S. Ct. 1652 (2017).

10 Kaplan v. Saint Peter's Healthcare System, 810 F.3d 175 (3d Cir. 2015); Stapleton v. Advocate Health Care Network, 817 F.3d 517 (7th Cir. 2016); Rollins v. Dignity Health, 830 F.3d 900 (9th Cir. 2016).

December 2016.[11] The Court agreed to consider the narrow issue of "whether a church must have originally established such a plan for it to" qualify as a church plan.[12]

The Court held that pension plans maintained by church-affiliated organizations whose principal purpose is the administration or funding of the plan may be exempt from ERISA's requirements, regardless of whether they were established by a church. Writing for the Court, Justice Kagan relied heavily on ERISA's text, and found that while the exemption's original language contemplated plans be both established and maintained by a church, Congress's later amendment "piggy-back[ed]" to the original language acted to expand the church-plan definition.[13] The Court reasoned that if Congress intended a more restrictive definition for the church-plan exemption, it could easily have drafted language reflecting the same.[14] Moreover, requiring a church plan to be both established and maintained would violate "the so-called surplusage canon" as it would wholly disregard certain language of the expanded definition.[15] The Court found further support in the definition's function – establishing a plan is a "one-time historical event," but maintaining the plan is where the "primary ongoing responsibility" lies (and where plan participants face potential liability).[16]

Although agreeing with the majority's statutory interpretation, Justice Sotomayor's concurrence included reservations about the reach of the Court's decision.[17] She wrote that in particular, the majority decision "troubled" her because it may deny ERISA's protection to "scores of employees" who "work for organizations that look and operate much like secular businesses."[18] She further noted that it was not clear whether, if acting today, Congress would exempt pension plans established by "some of the largest health-care providers in the country" that "[d]espite their relationships to churches," "operate for-profit subsidiaries"; "employ thousands of employees"; "earn billions of dollars in revenue"; and "compete in the secular market with companies that must bear the cost of complying with ERISA."[19] Finally, she observed that such organizations "bear little resemblance to those Congress considered when enacting the 1980 amendment to the church-plan definition" and that "[t]his current reality might prompt Congress to take a different path."[20]

What Nonprofits Should Consider After *Advocate Health Care Network*

While *Advocate Health Care Network* has provided reassurance, each non-profit entity that maintains a church plan should:

- Assess its current relationship with a church to determine the strength of that relationship and whether the entity should continue to claim a church-plan exemption if bonds have diminished and cannot be solidified;
- Assess plan administration and, in particular, whether the plan is maintained by a committee or in another structure that could meet the principal-purpose organization requirement; and
- Review liability insurance policies to determine whether there is applicable coverage should litigation arise.

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11 *See* Saint Peter's Healthcare System v. Kaplan, 137 S. Ct. 546 (Dec. 2, 2016); Advocate Health Care Network v. Stapleton, 137 S. Ct. 546 (Dec. 2, 2016); Dignity Health v. Rollins, 137 S. Ct. 547 (Dec. 2, 2016).

12 *Advocate Health Care Network,* 137 S. Ct. at 1656.

13 137 S. Ct. at 1658.

14 *See* 137 S. Ct. at 1659.

15 137 S. Ct. at 1659.

16 137 S. Ct. at 1661.

17 137 S. Ct. at 1663.

18 137 S. Ct. at 1663.

19 137 S. Ct. at 1663.

20 137 S. Ct. at 1663.

The California Supreme Court Provides Guidance Regarding Discovery in PAGA Actions

George W. Abele, Blake R. Bertagna & Zach P. Hutton

Introduction

In *Williams v. Superior Court*,[1] the California Supreme Court recently addressed the scope of discovery in "representative" actions filed under the Labor Code's Private Attorneys General Act[2] (PAGA). PAGA authorizes employees to stand in the shoes of the State of California to recover civil penalties for alleged Labor Code violations impacting other "aggrieved employees." Because PAGA actions are representative actions – not class actions[3] – employers and employees have long disputed how broadly a PAGA plaintiff could cast the discovery net.

The supreme court's decision extends certain rules applicable to discovery in class actions to PAGA actions. Specifically, California courts have held that the contact information of the group a class-action plaintiff purports to represent is generally discoverable. In *Williams*, the court held that the same general rule of discoverability applies in PAGA actions.

Although the decision was a victory for the plaintiffs, a close analysis of the case reveals some strategies for employers as well.

Discovering Contact Information in Class Actions

To briefly state the contextual background for the *Williams* decision, the discoverability of the names and contact information of putative class members in traditional class actions has been heavily litigated. A string of notable decisions has addressed reconciling the right of discovery of the parties seeking class contact information against the right of privacy of the individuals whose information is sought.

In *Pioneer Electronics (USA), Inc. v. Superior Court*,[4] the California Supreme Court held that a trial court in a consumer class action properly ordered disclosure of class contact information under a procedure that allowed class members to object to disclosure of that information. To balance the right to discovery against California's constitutional right of privacy,[5] the court applied an analytical framework developed in *Hill v. National Collegiate Athletics Association*.[6] In doing so, the court reasoned that "no serious invasion of privacy would ensue," as the information was not "particularly sensitive" (as compared to personal medical history or finances), and the putative class members would be given the opportunity to object to the release of their own personal identifying information.[7]

In *Belaire-West Landscape, Inc. v. Superior Court*,[8] a California Court of Appeal followed *Pioneer* in the context of a class action for unpaid wages. In *Belaire*, the appellate court affirmed the trial court's order granting a motion to compel the disclosure of names and contact information for all current and former employees who did not object to disclosure of that information. The court closely followed *Pioneer* in concluding that the information, "while personal, was not particularly sensitive, as it was contact information, not medical or financial details" and holding that "[d]isclosure of the contact information with an opt-out notice would not appear to unduly compromise either informational privacy or autonomy privacy in light of the opportunity to object to the disclosure."[9] As a result of this decision, the opt-out notice that is sent to potential class members commonly is referred to as a "Belaire-West notice."

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1 3 Cal. 5th 531 (2017).

2 Cal. Lab. Code § 2698 et seq.

3 *See* Arias v. Superior Court, 46 Cal. 4th 969 (2009).

4 40 Cal. 4th 360 (2007).

5 Cal. Const., art. I, § 1.

6 7 Cal. 4th 1 (1994).

7 *Pioneer Electrics,* 40 Cal. 4th at 372-73.

8 149 Cal. App. 4th 554 (2007).

9 149 Cal. App. 4th at 561-62.

The following year, a series of decisions further upheld and cemented the opt-out procedure endorsed by *Belaire-West*.[10]

Against this backdrop, the California Supreme Court addressed the proper scope of contact information discovery in PAGA actions.

Background in *Williams*

After working at a retail store in Costa Mesa, California for approximately one year, the plaintiff, Michael Williams, filed only a PAGA action – not a class action – for various alleged wage-and-hour violations committed by his former employer, Marshalls of CA LLC. The plaintiff eventually served interrogatories seeking the name, address, and telephone numbers of Marshalls' nonexempt employees in California during the liability period (numbering approximately 16,500 employees).

Marshalls objected, and Williams moved to compel. The trial court ordered Marshalls to produce contact information for the employees only at the plaintiff's Costa Mesa store and denied contact information for any other employees subject to the plaintiff being deposed and showing that his substantive statewide claims had merit.

The court of appeal denied a writ of mandate filed by the Williams to vacate the trial court's order, effectively affirming the trial court.[11] The appellate court's decision is divided into two primary rulings. First, the court held that the request for statewide discovery was premature since no discovery had been conducted in support of the plaintiff's allegations. Accordingly, it approved of the trial court's "incremental" approach, first requiring Williams to provide some support for his own claims before broadening the scope of discovery statewide.[12] Second, the appellate court held that the employees' right to privacy under the California Constitution outweighed Williams' need for the contact information. Again focusing on the plainiff's purported evidentiary burden, the appellate court observed that Williams' need for the discovery at th[at] time [wa]s practically nonexistent" since he had yet to "establish he was himself subjected to violations of the Labor Code."[13]

The Supreme Court Reverses

The California Supreme Court reversed. The introduction of the Court's decision distills its rationale into the following findings:

- The right to discovery in California is broad.
- In the class-action context, California courts have generally ruled that class contact information is discoverable without any requirement that the plaintiff first prove his or her case or otherwise show good cause for class discovery.
- The nature of PAGA does not justify treating PAGA actions differently from class actions in the limits of class discovery.
- On the record in this case, there was no basis to deviate from the general rule in favor of discoverability.

In reaching these conclusions the supreme court evaluated, and rejected, three arguments made by the employer.

First, Marshall argued that the request for contact information statewide was overbroad because it extended beyond Williams' particular store and job classification. The court disagreed because the complaint alleged on its face that Marshalls had committed Labor Code violations pursuant to systematic companywide policies against all nonexempt employees in California, and therefore, the request for contact information was relevant. The court opined that the discovery rules permit discovery to identify other aggrieved employees and secure admissible evidence of the violations and policies alleged in a lawsuit.[14]

Second, Marshalls unsuccessfully contended that the request was unduly burdensome because Williams

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[10] *See* Lee v Dynamex, Inc., 166 Cal. App. 4th 1325, 1338 (2008) (employee was entitled to disclosure of the names and contact information of similarly situated employees in a class action alleging that the employer unlawfully reclassified employees as independent contractors); Puerto v. Superior Court, 158 Cal. App. 4th 1242, 1251, 1259 (2008) (requiring employees to be sent an "opt in" letter before their contact information could be disseminated to the plaintiffs in a wage and hour violations case was an abuse of discretion); Crab Addison v. Superior Court, 169 Cal. App. 4th 958, 970, 974 (2008) (rejecting an employer's contention that the court should impose an "opt in" notice requirement because its employees had a heightened expectation of privacy as to their contact information based on forms they signed regarding the release of this information).

[11] Williams v. Superior Court, 236 Cal. App. 4th 1151, *review granted, depublished by* 5 Cal. 5th 531 (2015).

[12] 236 Cal. App. at 1157.

[13] 236 Cal. App. at 1159.

[14] Williams v. Superior Court, 3 Cal. 5th 531, 543-44 (2017).

sought private information without first demonstrating he was aggrieved or that others were aggrieved. Focusing on California's discovery scheme, the court observed that the Labor Code imposes no obligation on a party propounding interrogatories to establish good cause. The court also noted that requesting contact information is a legitimate step in discovering facts about the plaintiff's claims and identifying witnesses. The court also rejected Marshalls' argument because those opposing discovery on the basis of undue burden are obligated to produce evidence to support their position, and the court found no such evidence in the record before it.[15]

Third, Marshalls argued that the request resulted in an invasion of the privacy of third parties under the California Constitution. Before focusing on the merits of the argument, the supreme court ruled that the appellate court had erred by addressing privacy without conducting an analysis under the *Hill* framework.[16] Instead, the court noted, the appellate court mistakenly applied the "compelling interest" test as set forth in a trio of appellate court cases.[17] The court disapproved of the three appellate court cases relied upon, as well as a considerable number of additional cases, "[t]o the extent [they] require a party seeking discovery of private information to always establish a compelling interest or compelling need, without regard to the other considerations articulated in *Hill* . . . ."[18] The supreme court then followed the other precedents discussed above, such as *Pioneer*, *Belaire-West*, *Lee*, *Crab-Addison*, and *Puerto*, in holding that the other employees did not have a significant privacy interest in their contact information and "any residual privacy concerns can be protected by issuing so-called *Belaire-West* notices affording notice and an opportunity to opt out from disclosure."[19]

Potential Limits on the General Rule of Discoverability

Although *Williams* extends the general rule governing discoverability of putative class member information in class actions to PAGA actions, employers will contend that it does not displace the principle that widespread discovery is *not* automatic. In other contexts, California courts have repeatedly confirmed that "[p]recertification class discovery is not a matter of right[20] and have limited and denied requests for precertification class discovery.[21] Therefore, while there may be a presumption in favor of discoverability, as with any presumption, it is subject to rebuttal.

In *Williams*, the supreme court identified several strategies that employers might use to rebut that presumption:

- First, the court makes clear that its decision is specific to the factual record developed in that case. It highlighted that it could not uphold the trial court's order "on the record here," and that the employer had failed to meet its "burden of supplying supporting evidence."[22] In other words, on a different record (e.g., with an evidentiary record supporting objections based on scope, undue burden, and/or privacy), the result may differ.[23]
- Second, employers may consider alternative compromises such as a partial disclosure or shifting of costs. The *Williams* Court stated: "Where the objection is one of undue burden, trial courts should consider alternatives such as partial disclosure or a shifting of costs before settling on a complete denial of discovery."[24]
- Third, employers often present an argument that PAGA is unconstitutional. The supreme court explicitly acknowledged that this argument was not addressed in its decision, leaving open the potential for this attack in future cases.[25]

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15 3 Cal. 5th at 545-46.

16 3 Cal. 5th at 553-54.

17 3 Cal. 5th at 555-56 (citing Planned Parenthood Golden Gate v. Superior Court, 83 Cal. App. 4th 347 (2000); Johnson v. Superior Court, 80 Cal. App. 4th 1050 (2000); Lantz v. Superior Court, 28 Cal. App. 4th 1839 (1994).

18 3 Cal. 5th at 555.

19 3 Cal. 5th at 553.

20 Starbucks Corp. v. Superior Court, 194 Cal. App. 4th 820, 825 (2011).

21 *See Starbucks*, 194 Cal. App. 4th at 829-830 (reversing order permitting precertification discovery); Cryoport Sys. v. CNA Ins. Co., 149 Cal. App. 4th 627, 634 (2007) (affirming dismissal of putative class action where "the potential class members' interests in th[e] particular lawsuit are minimal"); First Am. Title Ins. Co., 146 Cal. App. 4th 1564, 1577 (2007) (affirming denial of precertification discovery).

22 *Williams*, 3 Cal. 5th at 549-50.

23 To the extent plaintiffs seek other types of employee information, such as payroll records, employers will contend that an entirely different set of considerations, interests, and outcomes apply.

24 *Williams*, 3 Cal. 5th at 550 n.5.

25 3 Cal. 5th at 559 at n.11.

In addition, the supreme court highlighted several other approaches that employers might take:

- Employers may move for a protective order to limit discovery.[26]
- Employers could file a motion to "establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice," as authorized by California's discovery rules.[27]
- Employers can allege an appropriate affirmative defense, such as lack of standing, to challenge the breadth of a proposed class through a dispositive motion.[28]

Therefore, while *Williams* confirmed that the general rule of discoverability applies in PAGA actions, the breadth of the decision – and application to particular cases – likely will be the subject of ongoing litigation.

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Zach Hutton is a member of the Employment Law Department of Paul Hastings. His practice spans all aspects of employment law, including discrimination and harassment, wrongful termination, family and medical leaves, and wage and hour issues. He has successfully represented employers in numerous class actions, individual plaintiff cases, labor arbitrations, and administrative hearings. Mr. Hutton also provides advice and compliance guidance on complex wage and hour issues to clients in a variety of industries.

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26 3 Cal. 5th at 559 n.10.

27 3 Cal. 5th at 550-51.

28 3 Cal. 5th at 495.

Wage & Hour Advisor: California Court of Appeal Orders Administrative Wage Claim to Arbitration

Aaron Buckley

Introduction

On August 21, 2017, the California Court of Appeal issued a decision confirming that employment arbitration agreements can require arbitration not only of employment claims filed in court, but also of administrative "Labor Commissioner" wage claims filed with the California Division of Labor Standards Enforcement (DLSE).

OTO, L.L.C. v. Kho[1]

Ken Kho worked as an auto mechanic for OTO, L.L.C., which was doing business as One Toyota of Oakland (hereafter One Toyota).[2] Several months after his employment termination, Kho filed an administrative wage claim with the DLSE.[3] The DLSE held an unsuccessful settlement conference, attended by both Kho and One Toyota.[4] Kho later requested a so-called "Berman hearing" on his claim.[5]

On the morning of the Berman hearing, One Toyota's attorney faxed a letter to the DLSE, requesting that the hearing be taken off calendar because, just a few days earlier, One Toyota had filed a petition to compel arbitration in the superior court.[6] The DLSE declined to take the hearing off calendar.[7] One Toyota's counsel then appeared at the hearing, served Kho with the superior court petition and summons, and left.[8] The hearing officer proceeded with the hearing in One Toyota's absence, and later awarded Kho over $158,000 in unpaid damages, liquidated damages, interest, and penalties.[9]

In its superior court action against Kho, One Toyota then filed a motion to vacate the DLSE's award based on the agreement entered into by One Toyota and Kho during his employment to arbitrate "any claim, dispute, and/or controversy" by either party against the other.[10] The court granted One Toyota's motion to vacate the award after concluding the DLSE abused its discretion by proceeding with the hearing after having been notified that One Toyota had filed a petition to compel arbitration that could moot the DLSE proceeding.[11]

But the superior court denied One Toyota's petition to arbitrate, finding a high level of procedural unconscionability connected with the execution of the arbitration agreement, based on evidence that Kho had not been given time to review the agreement, was provided no explanation of it, and was not provided with a copy after he signed it.[12] The court also found the agreement to be substantively unconscionable because it deprived Kho of the advantages of the DLSE's Berman hearing procedures, which provide for a relatively quick, inexpensive method for resolving wage claims without the necessity of hiring counsel.[13] One Toyota appealed the denial of its petition to compel arbitration, and the DLSE appealed the order vacating its award to Kho.[14]

The appellate court began its analysis of One Toyota's appeal by reviewing the relevant authority. In a 2011 decision, *Sonic-Calabasas A, Inc. v. Moreno*[15] (*Sonic I*), the California Supreme Court held an arbitration clause that has the effect of waiving an employee's statutory right to Berman procedures to be substantively unconscionable.[16] But two years later in *Sonic-Calabasas*

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1 No. A147564, 2017 Cal. App. LEXIS 723 (Aug. 21, 2017).

2 2017 Cal. App. LEXIS 723, at *2.

3 2017 Cal. App. LEXIS 723, at *2.

4 2017 Cal. App. LEXIS 723, at *2.

5 2017 Cal. App. LEXIS 723, at *3.

6 2017 Cal. App. LEXIS 723, at *3.

7 2017 Cal. App. LEXIS 723, at *3.

8 2017 Cal. App. LEXIS 723, at *3.

9 2017 Cal. App. LEXIS 723, at *3.

10 2017 Cal. App. LEXIS 723, at *3-4.

11 2017 Cal. App. LEXIS 723, at *7-8.

12 2017 Cal. App. LEXIS 723, at *6-7.

13 2017 Cal. App. LEXIS 723, at *7.

14 2017 Cal. App. LEXIS 723, at *8.

15 51 Cal. 4th 659 (2011) (*Sonic I*).

16 *Kho*, 2017 Cal. App. LEXIS 723, at *16 (citing *Sonic I,* 51 Cal. 4th at 686).

A, Inc. v. Moreno (*Sonic II*),[17] the Supreme Court of California acknowledged that *Sonic I*'s holding of *per se* unconscionability was inconsistent with the United States Supreme Court's intervening decision in *AT&T Mobility v. Concepcion*[18] and overruled *Sonic I*.[19] The Kho appellate court concluded that under *Sonic II*, courts must enforce arbitration agreements that waive an employee's right to a Berman hearing so long as the arbitration clause provides an "accessible and affordable arbitral forum."[20]

Turning to the arbitration agreement signed by Kho, the appellate court determined the degree of procedural unconscionability was "extraordinarily high" based on the fact that it was presented to him at his work station on a take-it-or-leave-it basis three years into his employment with One Toyota, with no opportunity to ask for an explanation from One Toyota as to its contents.[21]

The court then examined whether the agreement was substantively unconscionable, focusing on *Sonic II'* s dual requirements of accessibility and affordability.[22]

The court determined the arbitration procedure was affordable in light of One Toyota's acknowledgment that under existing law it would be required to pay all costs of arbitration.[23] The court found no merit in the DLSE's argument that the agreement was unconscionable because it did not expressly inform Kho that One Toyota would pay for the arbitration. Noting that "the agreement was intended to apply to a wide variety of legal claims," the court was "not surpris[ed]" that the law regarding cost-sharing as to any particular claim was not addressed.[24] The court found it sufficient that the agreement recognized there were statutory and common law exceptions to the general rule of cost-splitting.[25] The court also found unpersuasive Kho's argument that an arbitration would be unaffordable because it would require Kho to retain counsel. The court rejected Kho's contention based on three factors: 1) the *Sonic II* court did not require arbitration agreements to provide "free counsel" to be enforceable; 2) absent certain circumstances, a claimant's right to representation in the *de novo* portion of wage litigation is not absolute, but in the discretion of the labor commissioner; and 3) a claimant could represent themselves in an arbitration if counsel is unaffordable.[26]

The court also determined the agreement met the requirement of accessibility, finding nothing in the arbitration procedure that would make it inaccessible to Kho, noting that arbitration procedures were typically no more burdensome than civil litigation.[27] Having satisfied *Sonic II*'s affordability and accessibility requirements, the court held the agreement was not substantively unconscionable.[28]

Having determined the agreement was not substantively unconscionable, the appellate court reversed the trial court's order denying Toyota One's petition to compel arbitration, despite the agreement's procedural unconscionability. In doing so, the court relied on longstanding precedent requiring both procedural and substantive unconscionability to prevent enforcement of an arbitration provision.[29]

The appellate court affirmed the trial court's order vacating the DLSE's award to Kho, holding Kho waived his right to a Berman hearing by entering into the arbitration agreement.[30]

Conclusion

This case improves the ability of California employers to enforce arbitration provisions in disputes involving wage claims, and thereby makes employment arbitration agreements more attractive to employers.

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17 57 Cal. 4th 1109 (2013) (*Sonic II*).

18 563 U.S. 333 (2011).

19 *Kho*, 2017 Cal. App. LEXIS 723, at *17 (citing *Sonic II,* 57 Cal. 4th at 1141).

20 2017 Cal. App. LEXIS 723, at *17-18 (citing *Sonic II,* 57 Cal. 4th at 1146).

21 2017 Cal. App. LEXIS 723, at *21-23.

22 2017 Cal. App. LEXIS 723, at *23.

23 2017 Cal. App. LEXIS 723, at *25-26.

24 2017 Cal. App. LEXIS 723, at *26-27.

25 2017 Cal. App. LEXIS 723, at *27.

26 2017 Cal. App. LEXIS 723, at *27-28.

27 2017 Cal. App. LEXIS 723, at *30-31.

28 2017 Cal. App. LEXIS 723, at *31.

29 2017 Cal. App. LEXIS 723, at *31-32 (citing Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 910 (2015)).

30 2017 Cal. App. LEXIS 723, at *36-17.

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CASE NOTES

AGE DISCRIMINATION

Merrick v. Hilton Worldwide, Inc., No. 14-56853, 2017 U.S. App. LEXIS 15374 (9th Cir. August 16, 2017)

On August 16, 2017, the U.S. Court of Appeals for the Ninth Circuit held that an employee failed to raise a triable question of fact as to whether the employer discriminated against him on the basis of age.

Charles Merrick ("Merrick") was terminated from his position as Director of Property Operations at the Hilton La Jolla Torrey Pines Hotel ("the Hotel") as part of a reduction-in-workforce ("RIF"). Due to declining revenues, the Hotel underwent a series of RIF's. In May 2012, Hilton ordered a number of properties, including the Hotel, to reduce payroll expenses by 7–10% by August 2012. The mandate was outlined in a document titled Management Reduction in Workforce ("2012 RIF") Timeline—May 2012 and provided that reduction decisions should be heavily weighted at the senior level. In response to the 2012 RIF mandate, Hotel General Manager Patrick Duffy ("Duffy") met with Director of Human Resources Michelle Lucey ("Lucey") and Director of Finance Marjorie Maehler ("Maehler") to discuss how to achieve the required payroll cuts. They prepared a spreadsheet that included each employee's department, job title, start date, years of service, and salary. The spreadsheet did not include the employees' ages, but more than half of them were over 40. For business reasons, the decisionmakers preferred to avoid eliminating positions (1) with direct guest contact, (2) with significant team member impact (e.g., supervisors of large departments), and (3) that directly generated additional revenue for the Hotel. In light of the other recent layoffs, they also preferred to achieve the required payroll cut by eliminating a single position, if possible. Ultimately, the decisionmakers decided to recommend Merrick's position, for elimination. Merrick's termination letter advised him that he was eligible to pursue internal job opportunities, and the Human Resources Department provided him a list of open positions within the company. Merrick asked to stay on at the Hotel as Assistant Director of Property Operations, in place of Michael Kohl ("Kohl"), but the Hotel refused. Merrick originally raised several claims against Hilton. The district court granted summary judgment on all claims. Merrick appealed only on his age discrimination claims before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit noted that to establish a prima facie case of age discrimination, Merrick had to show that he was (1) at least forty years old, (2) performing his job satisfactorily, (3) discharged, and (4) either replaced by substantially younger employees with equal or inferior qualifications or discharged under circumstances otherwise giving rise to an inference of discrimination. The court stated that the first three elements were undisputed: Merrick was 60 years old when he was permanently laid off, and his termination was not based on his performance. But Merrick was not required to show that he was "replaced" by Kohl. Hilton did not contend that any of Merrick's duties were eliminated following the RIF or that it no longer had a need for his skills; in fact, it acknowledged that Merrick's duties were outsourced or assumed by other employees. Therefore, Merrick had satisfied the elements for establishing a prima facie case of discrimination.

The Ninth Circuit further stated that Hilton produced evidence showing that it acted for a legitimate, nondiscriminatory reason while terminating Merrick, and therefore, the burden shifted back to Merrick to show that Hilton's articulated reasons were pretextual. Merrick suggested that Hilton's failure to transfer him to the Assistant Director position violated policy and revealed Hilton's discriminatory motive in terminating him. However, the court stated that Hilton's general guidelines for RIFs merely provided that qualified employees could apply for transfer to available positions. The position of Assistant Director was not "available" because it was held by Kohl. Further, Merrick acknowledged in his deposition that Hilton gave him a list of open positions when he was terminated. Thus, Merrick's argument was not supported by the record and failed to create a triable question of pretext. Merrick's contention that Hilton misstated the role of Remington, a subsidiary of the Hotel's joint owner, in capital improvement projects was not supported by the record. Therefore, Merrick's claim regarding the decisionmakers' evaluation of his performance was no more persuasive. Finally, the decisionmakers' choice to rely on their own perceptions about guest interaction and impact, rather than on customer survey data, reflected a business judgment. The decisionmakers chose to give

priority to retaining positions that involved face-to-face interaction with guests over those positions that impacted guests in other ways. The wisdom of that judgment was not subject to review by it, nor did it suggest that Hilton's stated reasons for terminating Merrick were pretextual.

Finally, the Ninth Circuit stated that Maehler's inclusion in the RIF decision-making team, even if a deviation from the RIF guidelines, did not constitute "specific" and "substantial" evidence of a discriminatory motive. The deviations from the 2012 RIF mandate did not create an inference of discrimination. Merrick's other claims were derivative of his California Fair Employment and Housing Act age discrimination claim, and so necessarily failed along with that claim.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law,* § 41.32, *Age Discrimination in Employment Act of 1967* (Matthew Bender).

ARBITRATION AGREEMENT—UNPAID WAGES

Esparza v. KS Industries, L.P., No. F072597, 13 Cal. App. 5th 1228, 2017 Cal. App. LEXIS 674 (August 2, 2017)

On August 2, 2017, a California appellate court ruled that an employee's claims for unpaid wages were not for civil penalties within the meaning of Lab. Code § 2699.3(a) and thus the matter was a private dispute subject to arbitration pursuant to 9 U.S.C. § 2 and the terms of the parties' arbitration agreement.

In January 2012, Richard Esparza ("Esparza") completed an application for employment with KS Industries, L.P. ("KS Industries"). The application included an arbitration provision, which stated that all disputes and claims arising out of the submission of the application shall be arbitrated. The amended complaint as to damages alleged Esparza was entitled to recover "unpaid wages, civil penalties, interest, attorneys' fees and costs" as well as statutory penalties for each aggrieved employee calculated on the number of pay periods in which a violation occurred. Esparza also alleged the right to recover an amount sufficient to recover unpaid wages under Lab. Code § 558 and under Lab. Code § 1197.1. The prayer for relief sought costs, attorney fees and "civil penalties and wages" pursuant to the Private Attorneys General Act of 2004 ("PAGA") for the violations of the listed Labor Code sections. KS Industries filed a motion to compel arbitration and stay the proceedings. The trial court denied the motion to compel, denied the request for a stay of proceedings, and struck the words "statutory penalties" from the amended complaint based on Esparza's contention that he only sought PAGA civil penalties and no individual damages. KS Industries appealed before a California appellate court, contending that the federal statute applied to Esparza's claims seeking victim-specific relief and, therefore, federal preemption prohibited applying a rule of state law that would render the arbitration agreement unenforceable as to those claims.

The California appellate court stated that the basic question presented in this appeal: Are some of the claims being pursued subject to arbitration under the Federal Arbitration Act or, alternatively, do those claims fall within California's rule prohibiting arbitration of representative claims brought under the PAGA?

The California appellate court noted that the Supreme Court reviewed the text of the Federal Arbitration Act and concluded that the act's focus was on private disputes, not disputes between an employer and a state agency—parties with no contractual relationship. The high court stated: "A PAGA claim lies outside the [Federal Arbitration Act's] coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code" [*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348]. The court emphasized the distinction between a dispute between the state and an employer, which was not covered by the Federal Arbitration Act, and a private dispute between the employer and one or more employees Thus, an employee's status as the proxy or agent of the state while pursuing a PAGA representative action is not merely semantic, but reflects the substantive role of the employee in enforcing California labor law on behalf of state agencies and producing (1) a judgment binding on the state, and (2) monetary penalties that largely would go to state coffers [*Iskanian, above*]. The high court closed its analysis of the Federal Arbitration Act and its preemptive effect as follows: "In sum, the [Federal Arbitration Act] aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances. It concluded that California's public policy prohibiting

waiver of PAGA claims, whose sole purpose is to vindicate the [Labor and Workforce Development] Agency's interest in enforcing the Labor Code, does not interfere with the [Federal Arbitration Act's] goal of promoting arbitration as a forum for private dispute resolution" [*Iskanian,above*].

Esparza argued that his claim for unpaid wages constituted a civil penalty based on Lab. Code § 558 (a). Esparza further argued that this "civil penalty" under Lab. Code § 558 constituted a "civil penalty" within the meaning of Lab. Code § 2699 (a) and a "civil penalty" for purposes of the rule adopted in *Iskanian*.[1] The California appellate court disagreed. The court stated that Esparza's argument was based on semantics and not substance. One substantive aspect of the claim was the financial reality that 100% of the "amount sufficient to recover underpaid wages" was paid to the affected employee. In *Iskanian*, the California Supreme Court clearly expressed the need to avoid semantics and analyze substance in determining the scope of representative claims that could be pursued outside arbitration without violating the Federal Arbitration Act. In short, parsing the language in the California statutes does not determine the scope of the federal statute, which ultimately was the legislation that controlled whether a particular claim by Esparza was subject to arbitration.

The California appellate court stated that Esparza's attempt to recover unpaid wages under Lab. Code § 558 was, for purposes of the Federal Arbitration Act, a private dispute arising out of his employment contract with KS Industries. The dispute over wages was a private dispute because, among other things, it could be pursued by Esparza in his own right. The court recognized that private disputes can overlap with the claims that could be pursued by state labor law enforcement agencies. When there is overlap, the claims retain their private nature and continue to be covered by the Federal Arbitration Act. To hold otherwise would allow a rule of state law to erode or restrict the scope of the Federal Arbitration Act—a result that cannot withstand scrutiny under federal preemption doctrine. Therefore, the court concluded that preventing arbitration of a claim for unpaid wages would interfere with the Federal Arbitration Act's goal of promoting arbitration as a forum for private dispute resolution. Esparza's attempt to recover wages on behalf of other aggrieved employees involved victim-specific relief and private disputes. The rule of nonarbitrability adopted in *Iskanian* is limited to claims "that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers."

Accordingly, a California appellate court affirmed in part and remanded for further proceedings.

References. See, e.g., Wilcox, *Labor and Employment Law*, § 90.20[2][c], *Class Arbitration and Class Action Waivers* (Matthew Bender).

[1] Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal. 4th 348, 173 Cal. Rptr. 3d 289, 327 P.3d 129 (*Iskanian*).

"DAY OF REST" LAWS

Mendoza v. Nordstrom, Inc., Nos. 12-57130, 12-57144, 2017 U.S. App. LEXIS 14249 (9th Cir. August 3, 2017)

On August 3, 2017, the U.S. Court of Appeals for the Ninth Circuit held that the district court properly dismissed the hourly, non-exempt former employees' class action against their employer, for violation of California's "day of rest" laws in Lab. Code §§ 551 and 552 because the employees were not "aggrieved" under the requirements of Lab. Code § 2699.3 where neither employee worked more than six consecutive days in any one work week, the employer did not "cause" the employees to work more than seven consecutive days inasmuch as there was no coercion.

Christopher Mendoza ("Mendoza") and Meagan Gordon ("Gordon") (collectively, "plaintiffs") sued Nordstrom, Inc. ("Nordstrom"), alleging that it had violated Lab. Code §§ 551 and 552 by failing to provide them with one day's rest in seven consecutive days on three occasions. While employed at Nordstrom, Mendoza worked more than six consecutive days on three occasions. Gordon worked more than six consecutive days on one occasion, from January 14 to 21, 2011. On two of those days, Gordon worked less than six hours. With respect to the day-of-rest claims, the district court ruled: (1) the day-of-rest statute [Lab. Code § 551] applies on a rolling basis to any consecutive seven-day period, rather than by the workweek; (2) but Lab. Code § 556 exempted Nordstrom from that requirement because each plaintiff worked less than six hours on at least one day in the consecutive seven days of work; and (3) even if the exemption did not apply, Nordstrom did not "cause" Mendoza or Gordon to work more than seven consecutive days, within the meaning of Lab. Code § 552, because there was no coercion; plaintiffs waived their rights under Lab. Code § 551 by accepting additional shifts when they were offered. The court dismissed the action and an appeal followed to the U.S. Court of Appeals for the Ninth Circuit. Noting that "no clear controlling

California precedent existed" with respect to the district court's holdings, the Ninth Circuit certified the following three questions of state law to the California Supreme Court: (1) Is the day of rest required by Lab. Code §§ 551 and 552 calculated by the workweek or does it apply on a rolling basis to any seven-consecutive-day period?; (2) Does the Lab. Code § 556 exemption for workers employed six hours or less per day apply so long as an employee works six hours or less on at least one day of the applicable week, or does it apply only when an employee works no more than six hours on each and every day of the week?; (3) What does it mean for an employer to "cause" an employee to go without a day of rest [Lab. Code § 552]: force, coerce, pressure, schedule, encourage, reward, permit, or something else? The California Supreme Court accepted certification and answered the questions as follows: (1) A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited; (2) The exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If on any one day an employee works more than six hours, a day of rest must be provided during that workweek, subject to whatever other exceptions might apply; (3) An employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest.

The Ninth Circuit stated that, as the supreme court's opinion made clear, the district court answered the first two questions incorrectly. But because the stipulated facts nevertheless demonstrated that neither plaintiff worked more than six consecutive days in any one Nordstrom workweek, each of their individual claims under Lab. Code §§ 551 and 552 failed, and the district court reached the correct conclusion, albeit for the wrong reasons.

The Ninth Circuit was not persuaded that the district court erred in declining to permit plaintiffs to substitute a new Private Attorneys General Act of 2004 ("PAGA") representative. Under the supreme court's now-binding interpretation of these provisions, plaintiffs were not "aggrieved employees." Even if such employees do exist, under the requirements of Lab. Code § 2699.3, they would have to exhaust their claims administratively before bringing a PAGA action of their own. Before trial, the district court asked plaintiffs if they wished to include additional plaintiffs; plaintiffs declined. Only as the trial was beginning did plaintiffs request to present new witnesses who might have been aggrieved. But plaintiffs apparently did not propose to add these people as PAGA plaintiffs and, in any event, plaintiffs ultimately agreed not to demand the witnesses. Even if an additional party could have satisfied PAGA's aggrievement and procedural requirements, plaintiffs had cited no authority—and it had located none—explaining why the district court was obligated to permit the addition or substitution of PAGA representatives.

Accordingly, the Ninth Circuit affirmed the district court's order.

References. See, e.g., Wilcox, *California Employment Law*, § 2.10, *One Day's Rest in Seven* (Matthew Bender).

DISABILITY DISCRIMINATION

Alamillo v. BNSF Ry., No. 15-56091, 2017 U.S. App. LEXIS 16267 (9th Cir. August 25, 2017)

On August 25, 2017, the U.S. Court of Appeals for the Ninth Circuit held that an employee who was diagnosed with a sleep disorder after incurring several attendance violations failed to establish a prima facie case of disability discrimination under the California Fair Employment and Housing Act [Gov't Code § 12940 et seq.] because the summary judgment record contained no evidence that his obstructive sleep apnea was "a substantial motivating reason for" the railway's decision to terminate him.

Antonio Alamillo ("Alamillo") worked as a locomotive engineer for BNSF Railway Company ("BNSF"). Due to his seniority, he chose to work on the extra board from January 2012 through June 2012. If an extra board employee failed to answer or respond to three phone calls from BNSF within a single 15-minute period, the employee would be deemed to have "missed a call" and marked as absent for the day. BNSF's attendance policy provided that a fifth missed call during any 12-month period might result in dismissal. Alamillo missed a call on 10 dates in 2012: January 28, January 29, January 31, March 16, March 18, March 20, April 23, May 13, May 21, and June 16. At some point after his final missed call on June 16, Alamillo began to suspect that he was experiencing a medical problem. At a June 19, 2012, meeting with BNSF California Division General Manager Mark Kirschinger ("Kirschinger"), Alamillo mentioned that he intended to undergo testing for a possible sleep disorder. He asked Kirschinger if he could switch to a job with set hours; Kirschinger told him to follow the usual procedures to bid on a regular five-day-per-week

work schedule, but added that the disciplinary process for his previous missed calls would proceed. In an investigation hearing conducted by BNSF, Alamillo discussed his obstructive sleep apnea ("OSA") diagnosis and submitted Kiumars Saketkhoo's medical opinion that not being awakened by a ringing phone is "well within the array of symptoms" of OSA. However, no medical professional opined that the May 21 and June 16 missed calls actually were caused by his OSA. Andrea Smith, BNSF Director of Labor Relations, rendered an opinion that Alamillo should be given a 30-day suspension for the May 13 missed call and be dismissed for the May 21 and June 16 missed calls. Kirschinger approved the dismissal. Alamillo's union appealed his dismissal and prevailed, and he was reinstated to service.

Alamillo filed a suit against BNSF for wrongful termination in violation of public policy, based on underlying violations of the California Fair Employment and Housing Act ("FEHA"). He claimed that BNSF discriminated against him on the basis of his disability, failed to accommodate his disability, and failed to engage in an interactive process with him to determine a reasonable accommodation for his disability. The district court granted summary judgment to BNSF, reasoning that BNSF could not have violated the FEHA because Alamillo's attendance violations took place before he was diagnosed with a disability and before any accommodation was requested. Alamillo appealed before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit stated that Alamillo's claim failed at the first step burden-shifting test established in *McDonnell Douglas Corp. v. Green*[2]—establishing a prima facie case—because the summary judgment record contained no evidence that his OSA was "a substantial motivating reason for" BNSF's decision to terminate him. BNSF did not know that he was disabled when the decision to initiate disciplinary proceedings was made, and Alamillo conceded that BNSF "disregarded" his disability when it decided to terminate him. Even if Alamillo had made a prima facie case of discrimination, his claim would fail at the third step of the *McDonnell Douglas* test.

The Ninth Circuit stated that no reasonable jury could find "the requisite causal link" between Alamillo's OSA and his attendance violations. Alamillo had adduced no evidence that OSA caused the particular missed calls at issue. His physician stated only that not being awakened by a ringing phone falls "within the array of symptoms" of OSA, not that there was direct causation in employee's case. Further, Alamillo's OSA might have been a contributing factor to his attendance violations but only due to his own non-OSA-related carelessness and inattention. BNSF, therefore, did not engage in unlawful discrimination by declining to alter Alamillo's disciplinary outcome based on his OSA diagnosis.

Alamillo argued that BNSF violated its reasonable accommodation duty because it failed to do any of these three things after his final missed call but before the termination decision was made: (1) change to a constant work schedule, (2) choose the non-mandatory termination option in light of the circumstances, and (3) offer leniency in light of the circumstances. The court stated that the first proposed accommodation did not give rise to a reasonable accommodation claim because BNSF actually made that accommodation, switching him, at his request, to a job with regular hours. The second and third proposed accommodations—essentially, that BNSF did not terminate him for prior misconduct—did not qualify as reasonable accommodations under California law. Therefore, Alamillo's reasonable accommodation claim was therefore meritless. The interactive process claim failed for similar reasons. .

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.32, *Disability and Medical Condition Discrimination* (Matthew Bender).

DISCRIMINATION

Day v. LSI Corp., No. 16-15607, 2017 U.S. App. LEXIS 15231 (9th Cir. August 15, 2017)

On August 15, 2017, the U.S. Court of Appeals for the Ninth Circuit held that Day could not prevail on his discrimination claim based on discrete discriminatory act nor could he address hostile work environment claim.

Kenneth Day ("Day") sued his former employer, LSI Corporation ("LSI"), alleging that LSI intentionally discriminated against him by demoting him, attempting to force him to quit his job, making him report to one of his previous employees, and failing to investigate complaints of discriminatory comments. He charged LSI for breach of contract, discrimination, retaliation, and other employment-related claims. The district court granted summary judgment to LSI. Day appealed before the U.S. Court of Appeals for the Ninth Circuit.

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[2] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (McDonnell Douglas).

The Ninth Circuit stated that Day had almost three years of notice on LSI's arguments regarding the statute of limitations and never responded to the arguments when he eventually opposed summary judgment. Thus, Day could not show that he was prejudiced. Furthermore, as Day did not respond to LSI's statute of limitations argument in the district court and raised this challenge for the first time on appeal, he had waived the argument. Thus, the district court correctly held that the statute of limitations barred Day's breach of contract claim with respect to the promotion to Vice President or Fellow, breach of implied covenant of good faith and fair dealing claim, and claim regarding the 30,000 stock grant.

The Ninth Circuit stated that the district court correctly held that Day established a prima facie case of discrimination because there was a genuine dispute as to whether Day suffered an adverse action, as Day's reassignment to a new position reporting to a former employee could represent a demotion. But Day did not succeed in establishing his claim for discrimination based on this act because LSI had a legitimate, nondiscriminatory reason for demoting Day—declining business conditions and a hiring freeze. In response to LSI's offer of nondiscriminatory reasons, Day had to produce specific, substantial evidence of pretext. Day failed to provide evidence that LSI's purported reasons for this adverse action were pretext. Therefore, the district court properly held that Day could not prevail on his discrimination claim based on discrete discriminatory acts.

The Ninth Circuit stated that the district court properly considered whether "the conversation with Huber, the stripping of Day's job duties and supervisory roles without any explanation or justification, and the disputes between LSI and Day regarding the bonus and stock decisions and Vice President title" were sufficiently severe or pervasive. The circumstances that Day alleged contributed to a hostile work environment that did not rise to the level of "severe or pervasive" conditions. Therefore, the district court properly addressed Day's hostile work environment claim and properly granted summary judgment to LSI.

Day argued that LSI destroyed relevant documents and that this spoliation of evidence warranted a reversal of the district court's summary judgment. The Ninth Circuit stated that Day failed to demonstrate that the district court abused its discretion in ultimately determining that a monetary sanction was sufficient, and vacating its prior order imposing a default judgment on one claim and adverse inference jury instructions on the rest of the claims.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.11, *Proof* (Matthew Bender).

RETALIATION

Acosta v. Zhao Zeng Hong, Nos. 15-35322, 15-35323, 2017 U.S. App. LEXIS 15236 (9th Cir. August 15, 2017)

On August 15, 2017, the U.S. Court of Appeals for the Ninth Circuit held that the district court did not err by not instructing the jury to separately determine the owners' respective liability as to restaurant and spa employees where their stipulations that one of them was an employer and that the restaurant and spa operated as a Fair Labor Standards Act enterprise were read to the jury, the jury was instructed to decide whether the other owner was an employer, and the jury's conclusion that the other owner was an employer made clear that it understood its charge.

Huang Jie ("Huang") and Zhao Zeng Hong ("Zhao") (collectively, "defendants") owned and operated J&J Mongolian Grill ("Restaurant") and Spa Therapy ("Spa"). In 2012, following an investigation, the Department of Labor (the "Department") brought suit for violations of the Fair Labor Standards Act ("FLSA"), alleging that the owners failed to pay their employees a minimum wage and overtime, failed to keep adequate records, and retaliated against the employees who cooperated with the Department's investigation. The jury returned a verdict for the Department and awarded $652,859.62 in back wages. After the jury determined that the violations were willful and not in good faith, the district court doubled the damages award pursuant to the FLSA's liquidated damages provision.

Defendants challenged the jury instructions, the special verdict form, and the district court's submission of the questions of willfulness and good faith to the jury. Defendants argued that the district court erred by not requiring the jury to separately determine defendants' liability with respect to the Restaurant employees, on the one hand, and the Spa employees. Defendants asserted that this error infected both the jury instructions and the special verdict form. The Ninth Circuit stated that as a preliminary matter, because defendants failed to challenge the special verdict form at trial, the portion of their argument was waived. Defendants' failure to object was made all the more glaring because, during trial, the district court asked them if the special verdict form's language—in particular, its treatment of

defendants' status as an "employer"—was adequate. Far from objecting to the language, they agreed that the language was acceptable.

The Ninth Circuit stated that defendants' challenge to the jury instructions also failed. First, defendants stipulated that (1) Huang was an "employer" for purposes of the FLSA; and (2) the Restaurant and the Spa operated as an "enterprise" under the FLSA, wherein "related activities" were "performed" by multiple people for a common business purpose. These stipulations were read to the jury. The district court then instructed the jury to decide whether Zhao was also an "employer" under the FLSA. These instructions contemplated that the jury would consider Zhao's role with respect to the Restaurant employees and, separately, with respect to the Spa employees. Ultimately, the jury concluded that Zhao was, in fact, an employer under the FLSA, and that defendants' violations were willful and not made in good faith. In light of these stipulations, instructions, and jury determinations, there could be little doubt that the jury understood its charge: to decide (1) whether Zhao had sufficient contacts with the Restaurant and/or the Spa to be deemed an employer thereof, and (2) whether defendants willfully violated the FLSA in their operation of the same. No further instructions were required. Therefore, defendants had failed to satisfy the demanding plain error standard.

The Ninth Circuit stated that defendants failed to object to the instruction of the trial court in regard to the second element of retaliation claim under the FLSA (whether defendants willfully violated the FLSA in their operation). Furthermore, even if it accepted defendants' premise that the instruction was erroneous, any such error was harmless. The evidence in the record made clear that defendants went beyond merely threatening employees with future disciplinary action. In particular, one employee testified that her hours were reduced after she refused to falsify time sheets at defendants' direction, and that she was ultimately fired for refusing to testify favorably on defendants' behalf. On this record and under plain error review, it could not find that the jury instructions, as given, amounted to a "miscarriage of justice." Therefore, the court rejected defendants' challenge to the jury instructions for the retaliation claim.

The Ninth Circuit stated that record was replete with evidence that defendants actively worked to undermine and obstruct the Department's investigation. This evidence undermined defendants' claims of good faith and, in fact, confirmed the district court's conclusion that their FLSA violations were willful.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 5.40 [1][b], *Minimum Wage and Overtime Lawsuits* (Matthew Bender).

Light v. Department of Parks & Recreation, No. D070361, 14 Cal. App. 5th 75, 2017 Cal. App. LEXIS 688 (August 8, 2017)

On August 8, 2017, a California appellate court held that an employee raised a triable issue of a retaliation claim under Gov't Code § 12940 as to whether she suffered an adverse employment action because she alleged that after she refused to tell a supervisor what she discussed with an investigator regarding a coworker's discrimination complaint, the supervisor isolated her, moved her to a different office, verbally and physically attacked her, and told her that she would no longer work for the employer when her assignment was over.

Melony Light ("Light") worked for the Department of Parks and Recreation's ("Department") Ocotillo Wells District ("Ocotillo Wells"). Light was friends with a coworker, Delane Hurley ("Hurley"). Hurley filed a complaint with the Department's human rights office alleging sexual harassment; discrimination based on sex, sexual orientation, and marital status; and retaliation. She made specific allegations against Seals ("Seals"). The Department's human rights office sent investigators to Ocotillo Wells in January 2012 to assess Hurley's allegations. Before Light met with investigators, Seals told Light that she and Dolinar ("Dolinar") expected Light and other employees to lie to the investigators. Light was expected to be on Dolinar's "team" and protect her supervisors. Light met with the human rights office investigators. Seals began to distance herself from Light. On February 23, Seals called Light into her office and closed the door. She accused Light of "cutting her down" to other employees. Seals raised her voice and was very animated. She leaned toward Light in a threatening manner and, in Light's view, was "full of rage." Seals recounted Light's history at Ocotillo Wells and verbally abused her. Seals said that she should not have hired Light or given her out-of-class assignments. Light did not "fit in" and did not follow orders. Dolinar told Light that she would not be receiving previously promised training for an office technician position in the Law Enforcement and Emergency Services ("LEES") division at the district. Dolinar said that the Department had put out an advertisement to hire for the position, and because of budget issues only the new hire would be trained. Light applied for the LEES office technician position but was rejected. The Department made an

offer to another applicant for the LEES office technician position, but it ultimately withdrew the offer. The Department did not select another applicant, and it held the position open despite earlier describing it as a "mission critical position." It was readvertised and filled in spring 2014. Around the same time, Dolinar sent an e-mail to all Ocotillo Wells employees announcing that the Department continued to face budget issues. Employee hours would be reduced, and employees not scheduled to work in the summer would no longer be able to use leave credits to cover the minimum number of hours needed to retain health care and other benefits.

Light filed her own complaint with the Department's human rights office. Light alleged that Dolinar had retaliated against her for cooperating with the investigation into Hurley's complaint. She alleged numerous claims against the Department, Seals, and Dolinar, including retaliation, harassment, disability discrimination, assault, false imprisonment, negligent infliction of emotional distress, and intentional infliction of emotional distress. The trial court disposed of several claims at the pleading stage. The Department, Seals, and Dolinar moved for summary judgment on the remaining claims against them. The trial court found that Light had not raised a triable issue of fact on the issue of intentional retaliation for any of these potential adverse employment actions. On the other claim, for failure to prevent discrimination or retaliation, the court concluded it had to fail because Light had not raised a triable issue of fact regarding any actionable discrimination or retaliation The trial court found that undisputed facts showed that Light was not subjected to a threat from harmful or offensive touching, an essential element of assault, and therefore could not maintain that claim. It also found that Light had not been confined in Seals's office for any length of time, without her consent, so her claim of false imprisonment had to fail as well. As to Light's claim for intentional infliction of emotional distress, the court found that Light's exclusive remedy was through the workers' compensation system. To the extent Light alleged retaliatory actions that might be outside the scope of that system, the court's determination that no retaliation had occurred precluded application of that exception. Light appealed the trial court judgments before a California appellate court.

As to the Department, the California appellate court concluded that triable issues of material fact precluded summary adjudication of Light's retaliation claim, but not her disability discrimination claim. Light's claim against the Department for failure to prevent retaliation or discrimination therefore survived based on the retaliation claim. Light had raised a triable issue of material fact, that is, a reasonable trier of fact could conclude that Light suffered an adverse employment action by the Department following her participation in Hurley's discrimination complaint. After Light was interviewed by investigators, and refused to tell Seals what they had discussed, Seals isolated Light, moved her to a different office, verbally and to some extent physically attacked her during the February 23 confrontation, and told her that she would no longer work at the Department when her current out-of-class assignment was over. Dolinar rescinded her offer to train Light for the LEES office technician position, and Light was later rejected for promotion to that position despite having served as an office technician (in an out-of-class assignment) for a number of months. The Department ultimately left the position vacant, despite earlier classifying it as a "mission critical position." The Department then reduced Light's scheduled hours to zero (as Seals had threatened), having eliminated funding several months prior. Taken together, this evidence could lead a reasonable trier of fact to conclude that Light's employment had been materially and adversely affected.

Further, the California appellate court stated that Light's employment was effectively suspended because the Department did not schedule any hours for her. Even setting aside the other actions, the reduction of Light's hours alone could constitute a material and adverse employment action by the Department. Department's adverse employment actions against Light were the result of retaliatory intent or animus. Seals warned her employees that Department management engaged in retaliation. Seals showed contempt for the Department's policies when she asked her employees to lie to human rights office investigators and followed up to see whether they had complied. Seals explicitly threatened Light with retaliation if she did not support Dolinar. During the February 23 confrontation, Seals told Light that she did not follow orders, she would be moved to a different workplace, and her work at the district would end. A later report by the Department's human rights office found that Dolinar had built and allowed a retaliatory culture at Ocotillo Wells, which enabled supervisors and managers to engage in retaliation. This evidence was not merely circumstantial; it was direct evidence that the Department intended to and did retaliate against Light for participating in Hurley's complaint.

As to Seals and Dolinar, the California appellate court concluded that workers' compensation exclusivity did not bar Light's claim for intentional infliction of emotional distress under the circumstances in the instant case. In absence from further guidance from

supreme court, the court was unwilling to abandon the long-standing view that unlawful discrimination and retaliation in violation of Fair Employment and Housing Act falls outside the compensation bargain and therefore claims of intentional infliction of emotional distress based on such discrimination and retaliation are not subject to workers' compensation exclusivity.

However, the California appellate court concluded that Light had raised a triable issue of fact only as to Seals, not Dolinar. Furthermore, the court concluded Light raised triable issues of fact on her assault claim against Seals.

Accordingly, the California appellate court affirmed in part and reversed in part the judgments in favor of the Department and Seals, and affirmed in full the judgment in favor of Dolinar.

References. See, e.g., Wilcox, *California Employment Law*, § 43.01, *Proving Employment Discrimination Under FEHA* (Matthew Bender).

SHORT-TERM DISABILITY BENEFIT PLAN

Williby v. Aetna Life Ins. Co., No. 15-56394, 2017 U.S. App. LEXIS 15213 (9th Cir. August 15, 2017)

On August 15, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that the short-term disability plan included a discretionary clause, and thus by its terms called for abuse of discretion review; Ins. Code § 10110.6, which invalidates such discretionary clauses in insurance plans, applied even though the disability plan was self-funded. Employee Retirement Income Security Act of 1974, however, preempted Ins. Code § 10110.6 insofar as it applied. Thus, the case was remanded for the district court to review the benefits denial under the correct standard.

Yvette Williby ("Williby") worked for Boeing Company ("Boeing"), which provided a short-term disability ("STD") benefit plan for its employees that paid them between 60–80% of their salary if, because of a disability, they could not perform their usual job responsibilities or other similar work at Boeing. The STD plan was self-funded. Aetna Life Insurance Company ("Aetna") administered the plan. The STD plan expressly provided Aetna with full discretionary authority to determine all questions that might arise, including whether and to what extent a plan participant was entitled to benefits. This provision was known as a discretionary clause. Williby was briefly hospitalized after suffering either a stroke or a stroke-like episode. She found herself experiencing chronic headaches and other problems that caused her difficulty at work. David Edelman ("Edelman") found that Williby suffered from "migraine, acute but ill-defined cerebrovascular disease, and vascular dementia uncomplicated," and on those premises concluded that she should go on disability "pending further testing." Aetna approved Williby for STD benefits from December 20, 2012 through February 28, 2013 based on Edelman's testing and conclusions. Vaughn Cohan, the Aetna-retained neurologist responsible for the denial, reviewed the file, spoke with Edelman, and concluded that Williby could still work because, despite her executive function impairments, her cognitive function was normal overall, the MRI showed no "acute" abnormalities, and she had not undergone formal neuropsychological testing to follow up on Edelman's initial tests. After Aetna terminated Williby's STD benefits, she appealed the decision within Aetna, armed with the additional doctors' reports. Aetna upheld its decision to deny benefits in February 2014, determining that "there was insufficient medical evidence to support continued disability" after February 28, 2013. After Aetna determined that Williby was not disabled and terminated her benefits, Williby brought suit under the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. §§ 1001–1461]. Applying de novo review, the district court held that Aetna improperly denied Williby's claim. Williby appealed before the U.S. Court of Appeals for the Ninth Circuit.

Aetna argued that Ins. Code § 10110.6 did not apply to Boeing's self-funded STD plan because the statute targets only insurers and insurance, which Boeing and its self-funded plan were not. The Ninth Circuit stated that the reach of Ins. Code § 10110.6(a) is limited to "a policy, contract, certificate, or agreement ... that provides or funds life insurance or disability insurance coverage". But Ins. Code § 22 defines "insurance" broadly as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." The text of Ins. Code § 22, and by extension of § 10110.6(a), thus encompasses not only a traditional insurance policy issued by a traditional insurer, but also any "contract that ... indemnifies ... against loss ... arising from a contingent ... event." The court recognized precisely this point in *Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan*,[3] observing that "Ins. Code § 10110.6(a) regulates entities engaged in insurance, even if they are not insurance companies," because it "is directed at insurance, not insurers." Ins. Code § 22 has been interpreted as requiring two

[3] 856 F.3d 686 (2017) (*Orzechowski*).

elements: (1) shifting one party's risk of loss to another party, and (2) distribution of that risk among similarly situated persons. Boeing's contractual promise to pay its employees a portion of their usual salary if a medical problem rendered them unable to work fits this definition, for by offering a self-funded STD plan, Boeing (1) shifted risk of financial loss due to injury from employees to itself, and (2) spread that risk over its workforce. Thus, the STD plan was "insurance" under California law. Boeing's self-funded STD plan was within the scope of Ins. Code § 10110.6.

The Ninth Circuit stated that unlike Boeing's STD plan, the disability plans at issue in *Orzechowski* and *Std. Ins. Co. v. Morrison*[4] were not self-funded; rather, they were funded by insurance policies. For a self-funded disability plan like Boeing's, the saving clause does not apply, and state insurance regulations operating on such a self-funded plan are preempted. ERISA therefore applied to Boeing's self-funded STD plan and preempted Ins. Code § 10110.6's application thereto. The court, therefore, remanded to allow the district court to review the benefits denial anew under the correct standard.

Accordingly, the Ninth Circuit vacated the judgment and remanded the case to the district court.

References. See, e.g., Wilcox, *California Employment Law*, § 41.67, *Retirement or Pension Plans and Benefits*, 80.67, *Claim Procedures* (Matthew Bender).

TERMINATION

Aviles-Rodriguez v. Los Angeles Community College Dist., No. B278863, 2017 Cal. App. LEXIS 746 (August 29, 2017)

On August 29, 2017, a California appellate court ruled that a professor who was denied tenure by a college district brought a timely action alleging racial discrimination, holding that the one-year period for filing a complaint with an administrative agency commenced on his last day of employment.

Guillermo Aviles-Rodriguez ("Rodriguez") was employed by Los Angeles Community College District ("LACCD") as a professor. On November 21, 2013, a tenure review committee voted to deny Rodriguez's tenure. Following a February 26, 2014 review and final vote by the Board of Trustees ("Board"), Rodriguez received a written notice on March 5 that tenure had been denied. Before receiving notice of the Board's final decision, Rodriguez initiated a grievance procedure, the third and final step of which was denied by a grievance review committee on May 21, 2014. Rodriguez allegedly contacted the Department of Fair Employment and Housing ("DFEH") to discuss the filing of a claim alleging racial discrimination including, but not limited to, the denial of tenure, and was advised that he had until one year from the last day of his employment to file a complaint with the DFEH. Rodriguez's employment terminated on June 30, 2014, the last day of the academic year, and on June 29, 2015, he filed his complaint with DFEH. After being issued a right-to-sue letter, Rodriguez filed the instant action against LACCD. Following several demurrers, Rodriguez filed his third amended complaint ("TAC"), the operative complaint. The TAC alleged a single cause of action under the Fair Employment and Housing Act ("FEHA") against LACCD for denial of tenure and termination based on racial discrimination. Relying on the California Supreme Court's decision in *Romano v. Rockwell Internat., Inc.*i,[5] Rodriguez argued that the statute of limitations for filing his administrative claim did not begin to run until the date his employment ended. He further argued that even if the statute began to run before that date, he was entitled to equitable tolling, as he reasonably relied on the advice of DFEH advisor Ramirez to believe he had until June 30, 2015 to file his DFEH complaint. The trial court issued a ruling sustaining the demurrer to the TAC without leave to amend and dismissing the action. In its decision, the court ruled that Rodriguez's failure to file his DFEH complaint "within one year from denial of tenure in November 2013" barred his claim for unlawful "discharge" under the FEHA. The court distinguished *Romano* on factual and legal grounds. It also rejected his claim of equitable tolling. Rodriguez appealed before a California appellate court.

The California appellate court noted that in *Romano*, the supreme court concluded that the purpose of the FEHA would be better served by interpreting the statute of limitations on a wrongful termination claim to run from the date of actual termination, and not from notification of termination. Although *Romano* did not involve a wrongful termination resulting from the denial of tenure, the court read its discussion of both federal and state cases involving the denial of tenure or analogous facts as a clear directive that its holding should be applied in the instant case. In light of *Romano*, the court concluded that the one-year limitations period for Rodriguez to file a timely DFEH complaint began to run from the last day of his employment. As he filed his DFEH complaint within that period, his claim was timely. Therefore, the trial court

[4] 584 F.3d 837 (9th Cir. 2009).

[5] 14 Cal. 4th 479, 926 P.2d 1114, 59 Cal. Rptr. 2d 20 (*Romano*).

erred in sustaining LACCD's demurrer to the TAC. Consequently, the court did not address Rodriguez's claim of equitable tolling.

Accordingly, the California appellate court reversed the judgment of the trial court.

References. See, e.g., Wilcox, *California Employment Law*, § 40.10 [5], *Prohibited Bases of Discrimination* (Matthew Bender).

Neravetla v. Va. Mason Med. Ctr., No. 15-35230, 2017 U.S. App. LEXIS 14401 (9th Cir. August 4, 2017)

On August 4, 2017, the U.S. Court of Appeals for the Ninth Circuit held that an employee could not demonstrate causation for either his discrimination claims under Americans with Disabilities Act or Washington Law Against Discrimination.

Shantanu Neravetla ("Neravetla") was a resident in the Transitional Year residency program at Virginia Mason Medical Center ("Virginia Mason"). He claimed that he was terminated from his residency because his employer perceived him to be mentally ill. The district court granted summary judgment to defendants, Virginia Mason; L. Keith Dipboye MD; Michael Glenn MD; Gary Kaplan MD, on his Americans with Disabilities Act ("ADA") and related state claims. Neravetla appealed before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit noted that to make out a prima facie case for discrimination under the ADA, the plaintiff must show, among other elements, that she is a qualified individual, meaning she can perform the essential functions of her job. Likewise, discrimination under the Washington Law Against Discrimination ("WLAD") requires a showing that the plaintiff was doing satisfactory work. Neravetla demonstrated on multiple occasions that he was neither qualified nor doing satisfactory work. On at least one occasion, Neravetla left the hospital while on call without so much as giving the pager to a colleague. Also, Neravetla could not demonstrate causation for either his ADA or WLAD discrimination claims. The record in the instant case was uncontroverted that Neravetla was terminated solely because he failed to comply with his referral to the Washington Physicians Health Program ("WPHP"). Nor was the referral itself illegal under the ADA. Finally, Neravetla's emotional and belligerent behavior put patients at risk, and his referral to WPHP was job-related and consistent with business necessity.

The Ninth Circuit stated that Neravetla's defamation claim failed at the outset, as he had not identified any specific defamatory statement, nor had he shown that any statement about him was published. It appeared that defendants acted in compliance with a Washington statute requiring that impaired practitioners be reported to a "disciplining authority, an impaired practitioner program, or voluntary substance abuse monitoring program." Washington law expressly immunizes such referrals from civil liability.

The Ninth Circuit stated that Neravetla's intentional interference with business expectancy claim failed, as there was no evidence that defendants intentionally interfered with Neravetla's residency plans. Defendants did not breach the contract governing Neravetla's Transitional Year residency. Even were Neravetla to demonstrate a breach, he had not demonstrated that he suffered contract damages. When Neravetla was referred to WPHP, he was placed on administrative leave with pay. Under Washington law, the mere expectancy of employment was not sufficient to award contract damages for the distant future.

The Ninth Circuit stated that Neravetla could not bring a promissory estoppel claim since relationship with his employer was fully governed by contracts. The doctrine of promissory estoppel does not apply where a contract governs.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.32[2][a], *Americans With Disabilities Act* (Matthew Bender).

WAGE AND HOUR

Frlekin v. Apple, Inc., No. 15-17382, 2017 U.S. App. LEXIS 15372 (9th Cir. August 16, 2017)

On August 16, 2017, the U.S. Court of Appeals for the Ninth Circuit certified the question regarding compensable "hours worked" under California Industrial Welfare Commission Wage Order No. 7 to the California Supreme Court because the answer to this question of California law would be dispositive of the appeal before the Ninth Circuit, and no clear controlling California precedent existed.

Amanda Frlekin, Taylor Kalin, Aaron Gregoroff, Seth Dowling, and Debra Speicher (collectively, "plaintiffs") brought wage-and-hour class action on behalf of current and former non-exempt employees who had worked in Apple, Inc.'s ("Apple") retail stores in California since July 25, 2009. Plaintiffs sought compensation for time spent waiting for and undergoing exit searches pursuant to Apple's "Employee Package

and Bag Searches" policy (the "Policy"). The employees (including plaintiffs) received no compensation for the time spent waiting for and undergoing exit searches, because they had to clock out before undergoing a search. The employees who failed to comply with the Policy were subject to disciplinary action, up to and including termination. The district court certified a class defined as "all Apple California non-exempt employees who were subject to the bag-search policy from July 25, 2009, to the present." Because of concerns that individual issues regarding the different reasons why employees brought bags to work, "ranging from personal convenience to necessity," would predominate in a class-wide adjudication, the district court (with plaintiffs' consent) made clear in its certification order that "bag searches" would be adjudicated as compensable or not based on the most common scenario, that is, an employee who voluntarily brought a bag to work purely for personal convenience. The district court granted Apple's motion for summary judgment and denied plaintiffs' motion for summary judgment. The district court ruled that time spent by class members waiting for and undergoing exit searches pursuant to the Policy was not compensable as "hours worked" under California law because such time was neither "subject to the control" of the employer nor time during which class members were "suffered or permitted to work." Plaintiffs appealed the district court's judgment before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit noted that *Morillion v. Royal Packing Co.*[6] addressed the issue that "whether an employer that requires its employees to travel to a work site on its buses must compensate the employees for their time spent traveling on those buses." The *Morillion* Court held that employees must be compensated for travel time when their employer requires them to travel to a work site on employer-provided buses [*see Overton v. Walt Disney Co.*][7]. Applying *Morillion*, the searches in the instant case were voluntary in the antecedent sense that employees may choose not to bring a bag or package to work. Accordingly, the time spent undergoing the search is not compensable. However, the Ninth Circuit was uncertain whether *Morillion* applied in that straightforward manner. First, unlike *Morillion*, *Overton*, and other cases, the instant case did not involve a question about time spent traveling to a work site. Instead, the case involved an on-site search during which the employee had to remain on the employer's premises. That difference might matter.

The Ninth Circuit stated that much of *Morillion*'s analysis of the relevant legal sources concerned travel time specifically. In the context of travel to a work site, an employer's interest typically is limited to the employee's timely arrival. It is irrelevant to the employer how an employee arrives, so long as the employee arrives on time. So it makes little sense to require the employer to pay for travel time unless, the employer requires the employee to use the employer-provided transportation. For voluntary bus rides, the employer is not exercising "control" over the employee. That analysis of *Morillion*'s might not apply in the same manner to on-site searches because both the level of control and the employer's business interest are greater. Once an employee has crossed the threshold of a work site where valuable goods are stored, an employer's significant interest in preventing theft arises. The employer's exercise of control over the bag-toting employee—albeit at the employee's option of bringing a bag—advances the employer's interest in loss prevention. Therefore, the mandatory or voluntary distinction applied in *Morillion* might make less sense in the instant case. Although the search is voluntary in that the employee could have avoided it by leaving his or her belongings at home, the employer nevertheless exercises control over the employee who does bring a bag or package to work. It was unclear under *Morillion* whether, in the context of on-site time during which an employee's actions and movements were compelled, the antecedent choice of the employee obviated the compensation requirement.

The Ninth Circuit further stated that even if *Morillion*'s rule applied equally to on-site searches, the court was uncertain whether plaintiffs' claim necessarily failed. The policy at issue fell somewhere between the two ends of the spectrum. The case at issue involved only those employees who voluntarily brought bags to work purely for personal convenience. It was thus certainly feasible for a person to avoid the search by leaving bags at home. But, as a practical matter, many persons routinely carry bags, purses, and satchels to work, for all sorts of reasons. Although not "required" in a strict, formal sense, many employees may feel that they had little true choice when it comes to the search policy, especially given that the policy applies day in and day out. Because the court had little guidance on determining where to draw the line between purely voluntary actions and strictly mandatory actions, the court was uncertain on which sides of the line plaintiffs' claim fell. Further, any interpretation of California Industrial Welfare Commission Wage Order No. 7

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[6] 22 Cal. 4th 575, 94 Cal. Rptr. 2d 3, 995 P.2d 139, 147 (2000) (*Morillion*).

[7] 136 Cal. App. 4th 263, 38 Cal. Rptr. 3d 693 (2006) (*Overton*).

("Wage Order") would have significant legal, economic, and practical consequences for employers and employees throughout the State of California, and it would govern the outcome of many disputes in both state and federal courts in the Ninth Circuit. Many cases, in addition to the instant case, had raised the issue of the applicability of California Wage Orders to a variety of employment security checks. Therefore, the Ninth Circuit certified the following question of state law to the California Supreme Court: Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 7?

Accordingly, the Ninth Circuit certified the question.

References. See, e.g., Wilcox, *California Employment Law*, § 1.05, *State Law Governing Wages and Hours* (Matthew Bender).

Hill v. Xerox Bus. Servs., LLC, No. 14-36029, 2017 U.S. App. LEXIS 14488 (9th Cir. August 7, 2017)

On August 7, 2017, the U.S. Court of Appeals for the Ninth Circuit certified to the Washington Supreme Court whether an employee's "production minutes" could qualify as a piecework plan under Wash. Admin. Code § 296-126-021.

Xerox Business Services, LLC and its predecessor companies (collectively, "Xerox") operated call centers where they responded to calls for third-party clients, such as phone companies, hotels, and airlines. Tiffany Hill ("Hill") worked as an employee at the call center located in Federal Way, handling phone calls from Verizon Wireless customers. During Hill's entire tenure and until mid-2014, Xerox paid its call agents under the Achievement Based Compensation ("ABC") Plan. Hill brought a statewide class action lawsuit against Xerox for unpaid wages under the Washington Minimum Wage Act ("MWA") [Wash. Rev. Code § 49.46 et seq.] and the Washington Consumer Protection Act [Wash. Rev. Code § 19.86 et seq.]. This interlocutory appeal involved only Hill's claims under the MWA. The parties disputed whether Hill was an hourly employee or a piecework employee. Hill claimed that she was an hourly employee and therefore Xerox violated the MWA by determining her hourly wage based on a workweek, as opposed to a per-hour, calculation. Xerox, in contrast, contended that Hill was a piecework employee and therefore its work-week calculations were sanctioned by Wash. Admin. Code § 296-126-021. In the district court, Xerox moved for partial summary judgment on this issue, which the district court denied and stated that Xerox was not paying its employees on a piecework basis, and therefore summary judgment was inappropriate. After denying a motion to reconsider, the district court certified Xerox's request for an immediate interlocutory appeal of its denial of partial summary judgment. The U.S. Court of Appeals for the Ninth Circuit granted Xerox's request and the appeal followed.

The Ninth Circuit stated that Xerox's system of labeling minutes as "production minutes" was nothing but a strategy for circumventing the law. As the district court explained, "agents being paid for 'production minutes' are being paid on precise units of time." If a "minute" could be a unit of work, "every employer could pay hourly workers a 'per-minute' rate and thereby avoid the Washington law governing workers paid on a per-hour rate." There was certainly merit to this argument; defining a unit of production as a minute is clearly based on a measurement of time. And, the fact that potentially every employer could use such a system to possibly circumvent wage and hour laws, would be problematic for low-wage workers. On the other hand, as Xerox pointed out, simply stating that the ABC Plan was not a piecework compensation system because it was novel in its application of units of time as production units was an overly simplistic analysis that ignored how the plan actually functioned. To some extent, that characterization elevated the form of the production unit—time—over how it functioned—as a compensable unit of production being sold. Xerox was paid by Verizon on the basis of "production minutes" that its employees spent in assisting Verizon customers. As a result, just like a fruit-seller trying to maximize the amount of fruit he or she had to sell by incentivizing their employees to pick more through a piecework system, Xerox sought to maximize the amount of minutes it could charge Verizon by incentivizing its agents to generate more "production minutes." Although it might seem odd for a unit of work to be simultaneously a measurement of time, this did not necessarily mean it could not be so. In a sense, Xerox's compensation system responded to a modern problem—one in which the "goods" were not always tangible. Xerox cited to several documents demonstrating that "production minutes" were an accepted standard in the call center industry. These documents hardly established an industry standard, but they did nominally support the idea that compensating employees on a per-minute basis arose out of the unique situation facing call centers.

The Ninth Circuit stated that although the parties contentiously argued over an array of issues, the critical issue in the instant case was whether Xerox's compensation plan complied with Washington law. There was no controlling precedent on this issue and its resolution was necessary to resolve Xerox's appeal. Further, this issue potentially affects swaths of workers in the current Washington economy, and elsewhere, and is therefore a matter of important public policy. Therefore, the court certified to the Washington Supreme Court the following question of state law: whether an employer's payment plan, which includes as a metric an employee's "production minutes," qualifies as a piecework plan under Wash. Admin. Code § 296-126-021?

Accordingly, the Ninth Circuit certified the question, submission vacated and proceedings stayed.

References. See, e.g., Wilcox, *California Employment Law*, § 3.05, *Monetary Payments Counting Toward Minimum Wage* (Matthew Bender).

CALENDAR OF EVENTS

2017

Oct. 6	CALBAR Workers' Compensation Section Webinar, *Workers' Compensation Specialization Exam Essay (1-4) Prep Series: Part 1 of 3*	12:00 PM - 1:00 PM
Oct. 7	CALBAR Workers' Compensation Section, *6th Annual Rating Extravaganza*	The State Bar of California, 845 S Figueroa Street Los Angeles, CA (415) 538-2256.
Oct. 13	CALBAR Workers' Compensation Section Webinar, *Workers' Compensation Specialization Exam Essay (5-8) Prep Series: Part 2 of 3*	12:00 PM - 1:00 PM
Oct. 13	CALBAR Litigation Section, *2017 Litigation Summit*	Marriott Union Square 480 Sutter Street San Francisco, CA 94108 (415) 538-2546
Oct. 14	CALBAR Litigation Section, *2017 Appellate Summit*	Marriott Union Square 480 Sutter Street San Francisco, CA 94108 (415) 538-2546
Oct. 20	CALBAR Workers' Compensation Section Webinar, *Workers' Compensation Specialization Exam Essay (9-12) Prep Series: Part 3 of 3*	12:00 PM - 1:00 PM
Oct. 25	NELI: *Affirmative Action Workshop*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

Oct. 26-27	NELI: *Affirmative Action Update - The OFCCP in Transition*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Nov. 7	NELI: *Americans with Disabilities Act Workshop*	Luxe Sunset Blvd. Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Nov. 8	NELI: *California Disability Law Workshop*	Luxe Sunset Blvd. Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Nov. 14	CALBAR Litigation Section, Webinar: *How to Disqualify an Arbitrator in California*	12:00 PM - 1:00 PM
Nov. 18	CALBAR Workers' Compensation Section, *Workers' Compensation Section Fall Conference*	Hyatt Regency Los Angeles International Airport 6225 West Century Blvd. Los Angeles, CA 90045 (415) 538-2256
Nov. 30-Dec. 1	NELI: *Employment Law Conference*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

2018

Mar. 25-28	NELI: *Employment Law Briefing*	Renaissance Indian Wells Resort & Spa 44-400 Indian Wells Lane Indian Wells, CA 92210 (760)773-4444
Apr. 12-13	NELI: *ADA & FMLA Compliance Update*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

July 11	NELI: *California Employment Law Update*	Catamaran Resort 3999 Mission Boulevard San Diego, CA 92109 (858) 488-1081
July 12-13	NELI: *Employment Law Update*	Catamaran Resort 3999 Mission Boulevard San Diego, CA 92109 (858) 488-1081
Aug. 16-17	NELI: *Public Sector EEO and Employment Law Update*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

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