MCLE SELF-STUDY:

THE TOP CASES OF 2022

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INTRODUCTION

The year 2022 not only continued our new normal of a deluge of employment decisions, but it also brought some blockbuster decisions in employment law. Although this cornucopia of decisions contained some important ones helping employers, pro-employee decisions predominated.

ARBITRATION

No case made greater shockwaves this year than *Viking River Cruises, Inc. v. Moriana*.[1] In an 8–1 opinion authored by Justice Alito, the U.S. Supreme Court held that that the Federal Arbitration Act (FAA)[2] preempts the California Supreme Court's central holding in *Iskanian v. CLS Transport. Los Angeles, LLC*[3] that actions brought under the Labor Code Private Attorneys General Act of 2004 (PAGA)[4] could not be divided into individual and representative claims through an agreement to arbitrate. Thus, the employer defendant was entitled to enforce the arbitration agreement between it and a former employee insofar as the agreement mandated arbitration of the employee's individual PAGA claim. The Court further held that the plaintiff employee's non-individual PAGA claims had to be dismissed because "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding."[5] This landmark opinion means that, at least for now, arbitration agreements with waivers of the right to bring representative PAGA claims for violations suffered by other alleged aggrieved employees will be enforced—just like class action waivers. However, Justice Sotomayor's concurrence casts doubt on *Viking River*'s long-term impact. Although she voted with the majority, her concurrence provides a roadmap for plaintiffs' attorneys and lawmakers to circumvent the Court's decision. For example, Justice Sotomayor suggested that California courts could interpret California law or, alternately, the Legislature could amend PAGA, to permit an employee to litigate representative PAGA claims on behalf of other employees, even after the employee lost individual standing once the employee's claims were compelled to arbitration.

While *Viking River* is a substantial win for employers, multiple other arbitration cases are clear employee wins. In *Morgan v. Sundance, Inc.*,[6] a unanimous opinion authored by Justice Kagan, the Supreme Court held that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA. In light of *Morgan*, the California Supreme Court is revisiting its controversial decision in *St. Agnes Med. Ctr. v. PacifiCare of Cal.* (a non-employment case)[7] in which it held that prejudice is a condition of finding that a party, by litigating too long, waived its right to compel arbitration.[8]

Two cases confirm that governmental entities are not bound by the arbitration agreements signed by workers. In *Dep't of Fair Employment and Hous. v. Cisco Sys., Inc.*,[9] the Court of Appeal held that the Department of Fair Employment and Housing (DFEH) (now called the Civil Rights Department or CRD) was not required to arbitrate claims of discrimination and retaliation that it brought against Cisco based on an arbitration agreement the affected employee signed. The court rejected the employer's argument that the DFEH was the employee's proxy in the action and was not acting independently, holding that the DFEH was not a signatory to the agreement between the employer and employee, did not have an agency relationship with the employee, was not his alter ego, and did not assume his obligations.

Similarly, *People v. Maplebear, Inc.*[10] involved an enforcement action brought by the San Diego City Attorney against Instacart (the DBA name of Maplebear, Inc.) under

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the Unfair Competition Law[11] based on Instacart's alleged misclassification of its shoppers as independent contractors. Instacart sought to compel into arbitration the City Attorney's requests for injunctive relief and restitution, arguing that, while the City was not a signatory to the shoppers' arbitration agreements, it was still bound by them because the shoppers were the real parties in interest. The trial court denied the motion and Instacart appealed. The Court of Appeal affirmed, holding that the City was acting in its own law enforcement capacity, seeking to vindicate pubic harms and to protect the public, and that no individual shopper had any control over the litigation.

Two Court of Appeal cases confirmed that recent amendments to the California Arbitration Act meant to ensure timely payment of arbitration fees, as codified in Cal. Code Civ. Proc. §§ 1281.97 to 1281.99, are not preempted by federal law. *Gallo v. Wood Ranch USA, Inc.*[12] held that the FAA does not preempt these provisions setting forth procedures for sharing payment of arbitration-related fees and costs and providing remedies for non-compliance because they further the objectives of the FAA. *Espinoza v. Superior Court*[13] also confirmed that this statutory provision is not preempted by the FAA, and that the deadline for employers to pay arbitration fees must be applied strictly, with no exceptions for inadvertence, substantial compliance, or lack of prejudice.

RETALIATION

Cal. Lab. Code § 1102.5 protects employee whistleblowers and their family members. It has an employee-friendly burden of proof, laid out in Cal. Lab. Code § 1102.6: "[O]nce it has been demonstrated by a preponderance of the evidence that an activity proscribed by [s]ection 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by [s]ection 1102.5."

Despite this clear framework, some appellate courts had imposed the *McDonnell Douglas* burden-shifting test[14] when evaluating section 1102.5 claims, disregarding section 1102.6. In *Lawson v. PPG Architectural Finishes, Inc.*,[15] a unanimous decision written by Justice Leondra Kruger, the California Supreme Court held that the *McDonnell Douglas* burden-shifting test *does not apply* to Cal. Lab. Code § 1102.5 claims. Rather, section 1102.6 provides the governing framework for the presentation and evaluation of such claims. *Lawson* promises to make it easier for plaintiffs to prevail, both at summary judgment and at trial. However, that has not yet been demonstrated to be the case.[16]

There have been three published California appellate decisions and one published Ninth Circuit case to date applying *Lawson*. In *Scheer v. Regents of the Univ. of Cal.*[17], the Court of Appeal held that *Lawson's* reasoning applied to the California Whistleblower Protection Act,[18] as it contains language that is virtually identical to that in Cal. Lab. Code § 1102.6. In *Vatalaro v. County of Sacramento*,[19] the Court of Appeal affirmed summary judgment in a section 1102.5 case in which the trial court had applied the *McDonnell Douglas* burden-shifting test, as it held that, applying *Lawson*, the employer had presented sufficient undisputed clear and convincing evidence to satisfy its burden under section 1102.6. In *Francis v. City of Los Angeles*[20], the Court of Appeal affirmed a judgment in favor of a defendant employer who had prevailed at trial, holding that there was no substantial evidence of an adverse employment action under section 1102.5, such that nonsuit should have been granted. Finally, in *Killgore v. SpecPro Prof'l Servs., LLC*,[21] the Ninth Circuit reversed summary judgment with respect to a plaintiff-employee's Cal. Lab. Code § 1102.5(b) and wrongful termination claims, holding that the trial court erred when it deemed disclosures unprotected because they were made in the normal course of the plaintiff's job duties to a supervisor who did not necessarily have the authority to investigate, discover, or correct the violations, and when it found that the plaintiff did not have a reasonable belief that he was disclosing a violation of law. (It affirmed summary judgment as to the Cal. Lab. Code § 1102.5(c) claim because the plaintiff was fired before he had a chance to refuse to act unlawfully.)

DISCRIMINATION AND HARASSMENT

The U.S. Supreme Court and the Ninth Circuit both confirmed the rights of service members under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[22] *Torres v. Texas Dep't of Pub. Safety*[23] involved a Texas state trooper and Army Reservist who suffered constrictive bronchitis as a result of his exposure to toxic burn pits while on active duty

in Iraq. Unable to return to his old job, he asked to be accommodated by being placed in a different position, but his employer denied the request. He sued under USERRA. Texas moved to dismiss the suit, invoking sovereign immunity. The trial court denied the motion, the appellate court reversed, and the matter made its way to the Supreme Court. In a 5-4 decision—one of the last authored by Justice Breyer—the Court held that states could indeed be sued under USERRA. The States, upon entering the union, agreed that their sovereignty would yield to federal power to build and maintain the Armed Forces. As such, Congress was authorized to exercise its power to permit private lawsuits against States under USERRA.

Belaustegui v. Int'l Longshore & Warehouse[24] is a case involving USERRA's escalator provision. The plaintiff in the case was an entry-level longshore worker who left his job to serve in the Air Force. After nine years of active duty, he returned to his civilian job and requested a promotion to the position he claimed that he likely would have attained if he had not served in the military. When his employer denied the request, he filed suit alleging discrimination under the USERRA. The district court granted the employer's motion for summary judgment, but the Ninth Circuit reversed, holding that the hours credits and elevation rights set forth in the applicable collective bargaining agreement qualified as "benefits of employment" protected under USERRA.

In *Dep't of Corrections & Rehab. v. State Pers. Bd.*,[25] the Court of Appeal explained that, if at trial the plaintiff makes out a prima facie case of discrimination and the defendant employer fails to produce evidence of a legitimate, nondiscriminatory reason for the challenged conduct, the plaintiff employee automatically prevails based on the legally mandatory presumption of discrimination and is not required to proceed to the third stage of the analysis and prove causation.

Kaur v. Foster Poultry Farms LLC[26] involved an employee who sued her employer for discrimination, failure to accommodate, failure to engage in the interactive process, failure to prevent discrimination, and retaliation under the Fair Employment and Housing Act (FEHA), as well as retaliation under Cal. Lab. Code § 1102.5. She previously filed an unsuccessful Cal. Lab. Code § 132a claim before the Workers' Compensation Appeals Board (WCAB). The trial court granted summary judgment after it determined that her failure to prevail on her section 132a claim barred her disability and retaliation-related claims (it also found that she failed to exhaust her administrative remedies with respect to her race/national origin claims). The Court of Appeal reversed, holding that the WCAB's decision denying her discrimination claim did not have collateral estoppel effect on disability-related claims under FEHA. It also held that while the plaintiff timely exhausted her administrative remedies as to her race/national origin claims with respect to her direct supervisor, she failed to do so with respect to conduct by two other supervisors.

PROCEDURAL MATTERS

Malloy v. Superior Court[27] addressed the application of FEHA's venue provision[28] in situations where employees work remotely. It held that, in such cases, the employee can bring a lawsuit in the county where the remote work was performed or would have been performed but for the unlawful practices.

Dep't of Fair Employment & Hous. v. Superior Court[29] provided guidance as to when an individual could proceed in litigation using a pseudonym. In that case, the affected employee had alleged that he was denied opportunities and disparaged because he was Indian and came from the lowest caste, while two of his supervisors were also Indian and came from the highest caste. The DFEH filed suit, and it moved for an order allowing the employee to proceed under a fictitious name out of concern that his family members in India could be subjected to violence if their caste affiliation became known, could hinder his ability to obtain future employment, and might lead to social ostracism. The trial court denied the motion, declining to consider the impact on the employee's family in India, and deeming the potential denial of future employment opportunities and risk of harassment speculative. The DFEH petitioned for a writ of mandate. The Court of Appeal granted the petition. It held that a party's request for anonymity should be granted "only if the court finds that an overriding interest will likely be prejudiced without use of a pseudonym, and that it is not feasible to protect the interest with less impact on the constitutional right of access,"[30] and that, in applying this standard, the trial court committed error by expressly declining to consider the employee's concern about safety of family members in India.

WAGE AND HOUR

This was another bumper year for wage-and-hour decisions. Because of space constraints, we highlight only a few.

In *Jauregui v. Roadrunner Transport. Servs., Inc.*,[31] the plaintiff filed a putative class action in state court against Roadrunner Transportation Services on behalf of all current and former hourly workers in California alleging numerous wage and hour violations. Roadrunner removed the case to federal court, invoking the Class Action Fairness

Act (CAFA).[32] The plaintiff filed a motion to remand on the ground that Roadrunner had failed to establish the requisite $5 million jurisdictional minimum for the amount in controversy under CAFA. In support of its opposition, Roadrunner provided a declaration from its senior payroll lead that the amount in controversy exceeded $14.7 million. The district court granted the motion to remand after independently evaluating Roadrunner's calculations. It found that Roadrunner had sufficiently demonstrated the claimed amount in controversy for only two of the seven claims and, as for the remaining five claims, the district court assigned a value of $0 where it disagreed with Roadrunner's calculations. The Ninth Circuit reversed, holding that it was error for the district court to assign a $0 amount to most of the claims simply because the lower court disagreed with one or more of the assumptions underlying Roadrunner's estimates.

In *Meda v. AutoZone, Inc.*,[33] the plaintiff sued her former employer for PAGA violations, asserting that it had failed to provide suitable seating to employees at the cashier and parts counter workstations. The employer obtained summary judgment on the ground that the plaintiff had no standing to bring a PAGA action because it satisfied the seating requirement by making two chairs available to its associates (they were placed outside the manager's office). The Court of Appeal reversed and held that "where an employer has not expressly advised its employees that they may use a seat during their work and has not provided a seat at a workstation, the inquiry as to whether the employer has 'provided' suitable seating may be fact-intensive and may involve a multitude of job-and workplace-specific factors," making resolution at the summary judgment stage "inappropriate."[34]

In *Grande v. Eisenhower Med. Ctr.*,[35] the plaintiff was a nurse who worked for Eisenhower Medical Center for one week through a staffing agency. She filed a wage and hour class action lawsuit against the staffing agency on behalf of non-exempt employees placed throughout the state, settled that case for $750,000, and then filed another class action lawsuit against the hospital on behalf of all non-exempt employees placed by *any* staffing agency. The staffing agency filed a complaint in intervention, arguing that Grande could not file suit against Eisenhower because she settled claims against it through her prior action. The trial court ruled that Eisenhower was not a released party under the first lawsuit's settlement agreement, and that there was no claim preclusion. The staffing agency appealed and Eisenhower filed a writ petition. The Court of Appeal affirmed the judgment and denied the writ petition. The staffing agency appealed. The California Supreme Court affirmed. It held that Eisenhower and the staffing agency were not in privity in the prior action such that there was no claim preclusion; that any contractual indemnification agreement between the staffing agency and Eisenhower did not create claim preclusion, as the staffing agency had not been sued as an indemnitor; and that Eisenhower's liability was not derived from agency so as to create claim preclusion.

OTHER

In *White v. Smule, Inc.*,[36] the Court of Appeal held that the existence of an executed integrated employment agreement providing for "at-will" employment that could be terminated "at any time and for any reason" (and stating that "[a]ny promises or representations, either oral or written, which are not contained in this letter are not valid") precluded the employee from pursuing a Cal. Lab. Code § 970 claim based on allegations that the employer made promises of long-term employment.[37] However, the Court of Appeal held that the integrated agreement providing for "at-will" employment did not preclude the employee from pursuing a section 970 claim based on the employer's promises regarding the kind, character, or existence of work the employee was hired to perform–*i.e.*, an employer may still violate section 970 by mischaracterizing job duties, job title, reporting structures, compensation, working hours, benefits, or other terms and conditions of employment.

In *LGCY Power, LLC v. Superior Court*,[38] California resident Michael Jed Sewell worked as a sales representative and sales manager for LGCY Power, which is headquartered in Salt Lake County, Utah. In 2015, Sewell signed a "Solar Representative Agreement," which included noncompetition, nonsolicitation, and confidentiality provisions as well as Utah choice of law and forum provisions. In 2019, Sewell and several other executives and managers left LGCY to form a competing solar sales company. Shortly thereafter, LGCY sued Sewell and the other former employees in Salt Lake County for breach of their employment agreements, breach of fiduciary duty, misappropriation of trade secrets and related claims. Four of the defendants (not including Sewell) filed a joint cross-complaint against LGCY in the Utah court proceeding and then unsuccessfully sought dismissal of LGYC's action against them. Meanwhile, Sewell filed a complaint against LGCY in California Superior Court, asserting breach of contract, unjust enrichment, and California wage claims and sought declaratory relief; after LGCY was unsuccessful in having the California action dismissed, it filed a writ proceeding in the Court of Appeal. The Court denied LGCY's writ petition, holding that Cal. Lab. Code § 925, which generally prohibits non-California choice of law/forum provisions, is an exception to Cal. Code Civ. Proc. § 426.30(a), the compulsory cross-complaint rule that

would otherwise have required Sewell to file his cross claims against LGCY in the Utah action. The Court held that Sewell had implicitly satisfied the requirement of section 925 that he request the trial court to void the contract under the statute (Sewell could not void the contract without a judicial determination). Further, the Court determined that the change in Sewell's work duties, title and compensation since section 925 became effective was sufficient to bring the contract within the purview of the statute. Finally, the Court rejected LGCY's assertion that the full faith and credit clause of the United States Constitution required California to recognize Utah's compulsory cross-complaint statute because "different credit is owed to [another state's] statutes versus judgments under full faith and credit precedent."[39]

In *Blue Mountain Enters., LLC v. Owen*,[40] business owner Gregory Owen entered into a multi-contract joint venture agreement in which he transferred shares of his existing construction business into a new entity called Blue Mountain Enterprises. He sold half of the new entity for $16.5 million, of which he kept $3 million, and the rest went into working capital. He then became the CEO of the new entity with a five-year contract. As part of this series of agreements, he agreed not to compete or to solicit customers or employees for three years after his employment ended. After Owen was terminated for cause, he established a competing business. He then poached former employees and sent out a targeted letter to former and current clients boasting "greater perspective, more resources and a much stronger team" than Blue Mountain. Blue Mountain filed suit. The trial court granted Blue Mountain a preliminary and permanent injunction prohibiting Owen from soliciting its customers and prevailed on its motion for summary judgment adjudication of its breach of contract claim. Blue Mountain then sought and obtained fees and costs as the prevailing party based on the fee provision in the employment contract. Owen appealed, and the Court of Appeal affirmed, rejecting Owen's argument that the non-solicitation covenant did not meet the requirements of Cal. Bus. & Prof. Code § 16601 because the restrictive covenant was contained in Owen's employment agreement and there was no explicit transfer of good will. The Court found that Owen's transfer of his personal interest into Blue Mountain (a portion of which was later transferred to Acolyte) was sufficient to qualify for the sale-of-business exemption under section 16601. The Court also rejected Owen's attempt to disavow the customer non-solicitation covenant because it was found in his employment agreement, stating: "Blue Mountain's ability to enforce the non-solicitation covenant is not undone by the fact that this provision is found in one contract in a multi-contract joint venture rather than another." Moreover, the Court concluded that an explicit transfer of goodwill was not required to qualify for the exemption under section 16601; rather, the transfer of goodwill could be reasonably inferred. The Court further concluded that Owen's letter to Blue Mountain customers did more than simply announce his new business. It was deemed to "petition, importune and entreat" the customers to leave Blue Mounter for better opportunities with Owen's new company. Finally, the fees were not unreasonable.

In *Manuel v. Superior Court*,[41] the plaintiff alleged that he was fired from his job as an irrigation technician after he suffered an on-the-job back injury. The employer, in turn, claimed that the plaintiff voluntarily failed to return to work after he was identified by Immigration and Customs Enforcement as being ineligible to work in the United States. His complaint sought back and front pay, but his discovery responses made clear that he was no longer seeking lost wages or reinstatement. The trial court granted the employer's motion to compel discovery responses regarding Manuel's immigration status and work eligibility. Manuel filed a petition for a peremptory writ of mandate, which the Court of Appeal granted. It held that Cal. Lab. Code § 1171.5 precludes discovery regarding immigration status absent a showing by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law, a burden the employer failed to meet.

In *Int'l Union of Operating Eng'rs., Local 39 v. Macy's, Inc.*,[42] Macy's sued Stationary Engineers Local 39 alleging that it engaged in unlawful conduct in connection with picketing activities outside of its San Francisco store, including by mass picketing at the stores five's entrances, blocking two entrances, disturbing the public through loud and boisterous conduct, creating an unsafe environment, and damaging property. Under Cal. Lab. Code § 1138, no labor association or organization involved in a labor dispute can be held responsible for the unlawful acts of individual officers, members or agents unless there is clear proof of actual participation in, actual authorization of those acts, or of ratification of such acts after actual knowledge. Local 39 filed an anti-SLAPP motion, arguing among other things, that the complaint did not satisfy section 1138's heightened standard, which the trial court denied in part (granting it only as to the mass picketing allegation). Macy's amended its complaint, and Local 39 filed another anti-SLAPP motion, which was denied. Local 39 appealed and the Court of Appeal reversed the portion of the trial court's order denying the first anti-SLAPP motion. It held that the trial court failed to apply the heightened standards required under Cal. Lab. Code § 1138, and that Macy's failed to provide evidence of Local 39's actual involvement.

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1. 142 S. Ct. 1906 (2022), *reh'g denied*, No. 20-1573, 2022 WL 3580311 (Aug. 22, 2022).
2. 9 U.S.C. § 1 *et seq.*
3. 59 Cal. 4th 348 (2014).
4. Cal. Lab. Code § 2698 et seq.
5. 142 S. Ct. at 1925.
6. 142 S. Ct. 1708 (2022).
7. 31 Cal. 4th 1187 (2003).
8. *Quach v. Cal. Commerce Club*, 297 Cal. Rptr. 3d 592, 515 P.3d 623 (2022).
9. 82 Cal. App. 5th 93 (2022).
10. 81 Cal. App. 5th 923 (2022).
11. Bus. & Prof. Code § 17200.
12. 81 Cal. App. 5th 621 (2022).
13. 83 Cal. App. 5th 761 (2022).
14. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
15. 12 Cal. 5th 703 (2022) (*Lawson*).
16. *See* Ramit Mizrahi, *Lawson Ushers In A New Era For Employee Whistleblowers . . . Or Does It?*, 36 Cal. Labor & Employment L. Rev. 6, pp. 12-14.
17. 76 Cal. App. 5th 904 (2022), *reh'g denied* (Apr. 13, 2022), *reh'g denied* (Apr. 18, 2022), *rev. denied* (July 13, 2022).
18. Cal. Gov. Code § § 8547 *et seq.*
19. 79 Cal. App. 5th 367 (2022).
20. 81 Cal. App. 5th 532 (2022), *mod. reh'g den.* (July 22, 2022), *rev. filed* (Aug. 31, 2022).
21. 51 F.4th 973 (9th Cir. Oct. 20, 2022).
22. 38 U.S.C. § 4301 *et seq.*
23. 142 S.Ct. 2455 (2022).
24. 36 F.4th 919 (9th Cir. 2022).
25. 74 Cal. App. 5th 908 (2022).
26. 83 Cal. App. 5th 320 (2022).
27. 83 Cal. App. 5th 543 (2022).
28. Cal. Gov't Code § 12965(c)(3).
29. 82 Cal. App. 5th 105 (2022).
30. *Id.* at 111.
31. 28 F. 4th 989 (9th Cir. 2022).
32. 28 U.S.C. §§ 1332(d), 1453,1711-15.
33. 81 Cal. App. 5th 366 (2022).
34. *Id.* at 370.
35. 13 Cal. 5th 313 (2022).
36. 75 Cal. App. 5th 346 (2022).
37. *Id.* at 351, 358.
38. 75 Cal. App. 5th 844 (2022).
39. *Id.* at 869.
40. 74 Cal. App. 5th 537 (2022).
41. 82 Cal. App. 5th 719 (2022).
42. 83 Cal. App. 5th 985 (2022).