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UNDER PAGA, EMPLOYEES MAY NOT SEEK PENALTIES FOR LABOR CODE § 558 PENALTIES

PAGA; recovery of civil penalties for unpaid wages: *ZB, N.A. v. Superior Court* (2019) _ Cal.5th _ (Cal. Supreme)

Under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.) an employee may seek civil penalties for Labor Code violations committed against her and other aggrieved employees by bringing – on behalf of the state – a representative action against her employer. (§ 2699, subd. (a).) In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), the Supreme Court held that a court may not enforce an employee's alleged predispute waiver of the right to bring a PAGA claim in any forum. It also found that where such a waiver appears in an employee's arbitration agreement, the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) does not preempt this state law rule.

This case concerns a PAGA action seeking civil penalties under Labor Code section 558. Kalethia Lawson brought the action against her employer, ZB, N.A., with whom she agreed to arbitrate all employment claims and to forgo class arbitration. Before the enactment of the PAGA, section 558 gave the Labor Commissioner authority to issue overtime violation citations for "a civil penalty as follows: [¶] (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages*. [¶] (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages*." (*Id.*, subd. (a), italics added.) The Supreme Court granted review to decide whether *Iskanian* controls, and the FAA has no preemptive force, where an aggrieved employee seeks the "amount sufficient to recover underpaid wages" in a PAGA action.

But to resolve this case, it first had to consider a more fundamental question: whether a plaintiff may seek that amount in a PAGA action at all. The Court of Appeal thought so. It concluded section 558's civil penalty encompassed the amount for unpaid wages, and Lawson's claim for unpaid wages could not be compelled to arbitration under *Iskanian*. It accordingly ordered the trial court below to deny ZB's motion to arbitrate that portion of her claim.

The Supreme Court concluded that the civil penalties a plaintiff may seek under section 558 through the PAGA do not include the "amount sufficient to recover underpaid wages." Although section 558 authorizes the Labor Commissioner to recover such an amount, this amount – understood in context – is not a civil penalty that a private citizen has authority to collect through the PAGA. ZB's motion concerned solely that impermissible request for relief. Because the amount for unpaid wages is not recoverable under the PAGA, and section 558 does not otherwise permit a private right of action, the trial court should have denied the motion. The Court affirmed the Court of Appeal's decision on that ground. On remand, the trial court may consider striking the unpaid wages allegations from Lawson's complaint, permitting her to amend the complaint, and other measures.

Arbitration; electronic signature of documents: *Fabian v. Renovate America, Inc.* (2019) _ Cal.App.5th _ (4th Distr., Div. 1.)

Fabian contracted with Renovate America to install and finance a solar-energy system in her house. She filed a lawsuit against it, alleging that the solar panels in the system had been installed incorrectly. Renovate America filed a petition to compel arbitration, which the trial court denied. Affirmed. While the contract between the parties that Renovate America relied on as part of its motion to compel arbitration indicated that Fabian had signed it, she declared under oath in her opposition that she had never signed the agreement. This placed the burden on Renovate America to prove that the electronic signature on the document was authentic. While Renovate America claimed that the contract had been sent to Fabian and signed via DocuSign, its showing did not include any evidence concerning the process used to verify Fabian's signature, including who sent Fabian the contract, how it was sent to her, how her signature was placed on the document, or how the document was provided to Renovate America. Absent this evidence, the reliance on DocuSign was unsupported and unpersuasive. The declaration of Renovate America's senior director of compliance operations, Anderson, did not fill this evidentiary gap. It merely stated that Fabian had "entered into" the contract on February 28, 2017. Without additional facts to show that the signature on the document was Fabian's, Renovate America failed to show that the parties had entered into a contract that included a valid arbitration clause, and the trial court properly denied the motion to compel arbitration.

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