Anthony J. Oncidi is a partner in and the Co-Chair of the Labor and Employment Department of Proskauer Rose LLP, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is +1.310.284.5690, and his email address is aoncidi@proskauer.com. (Tony has authored this column since 1990.)

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By Anthony J. Oncidi

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Court Recognizes "Music As Harassment" While Rejecting "Equal Opportunity Harasser" Defense

Sharp v. S&S Activewear, LLC, 69 F.4th 974 (9th Cir. 2023)

Fed up with hearing "very offensive" songs like Eminem's "Stan" and Too $hort's "B*job Betty" on the job, Stephanie Sharp and several other employees (including one male) filed a hostile work environment claim against their employer under Title VII. Plaintiffs claimed they could not escape the music because it was "[b]lasted from commercial-strength speakers" that were mounted on forklifts and driven around the warehouse where they worked. Plaintiffs claimed the music encouraged male employees to make sexually graphic gestures and remarks and to openly share pornographic videos in the workplace.

The district court dismissed the claim, relying upon what is sometimes referred to as the "equal opportunity harasser" defense, which some employers have argued should shield them from liability where there is evidence that employees outside the protected group have been subjected to the same or similarly objectionable behavior. In short, the trial court found that the claim failed as a matter of law because the music was offensive to both men and women. However, the Ninth Circuit reversed, squarely rejecting the "equal opportunity harasser" defense and holding that harassment need not be directly targeted at a particular plaintiff to support a harassment claim. The court found that the repeated and prolonged exposure to music "saturated with sexually derogatory content" could constitute "music as harassment."

Employee Who Refused To Get Flu Vaccine Was Properly Terminated

Hodges v. Cedars-Sinai Med. Ctr., 91 Cal. App. 5th 894 (2023)

Deanna Hodges, who worked for Cedars-Sinai as an administrative employee with no patient responsibilities, refused to get vaccinated for the flu, contrary to Cedars' policy which required all of its employees to get vaccinated in an effort to limit employee transmission of the flu. The only exceptions were for a "valid medical or religious exemption." Hodges refused to get vaccinated and convinced her physician (who had no expertise in advising whether a person should or should not receive a flu vaccine for "medical reasons") to help her apply for an exemption from the vaccination policy. Cedars' Exemption Review Panel denied Hodges' request for an exemption because it did not meet the CDC's criteria for a medical exemption. Following the termination of her employment, Hodges sued Cedars for disability discrimination, among other things. The trial court granted Cedars' summary judgment motion, and the Court of Appeal affirmed, holding that Hodges failed to establish a disability or the perception by Cedars of a disability. Moreover, Cedars presented a legitimate, nondiscriminatory reason for the termination that was not pretextual: Cedars'

mandatory vaccination policy was a product of its concern about patient safety and the guidance from the CDC and was not related to any disability Hodges purported to have.

Statute Prohibits Employer Retaliation For Report Of Unlawful Activity Even If It's Already Known To Employer

People ex rel. Garcia-Brower v. Kolla's, Inc., 14 Cal. 5th 719 (2023)

The California Supreme Court has held that an employee who makes a whistleblower complaint to his or her employer may bring a retaliation claim under the whistleblower statute (Cal. Lab. Code § 1102.5(b)) even if the subject of the complaint was already known to the employer. The employee, who worked as a bartender, complained to her employer that she had not been paid wages owed to her for three shifts she had worked at Kolla's Inc., a nightclub. Upon receiving the complaint, the owner of the nightclub responded by threatening to report the employee to immigration authorities, terminating her employment, and telling her never to return to the nightclub. The employee then filed a complaint against the nightclub with the California Division of Labor Standards Enforcement (DLSE), and the DLSE concluded that the nightclub had unlawfully retaliated against the employee. When the nightclub refused to pay damages, the California Labor Commissioner sued for various violations, including unlawful retaliation under Section 1102.5(b).

The trial court and the court of appeal rejected the Labor Commissioner's claim for retaliation after finding that the bartender's complaint was not a protected "disclosure" under Section 1102.5(b). The lower courts reasoned that a "disclosure" required "the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made." Because the nightclub presumably knew that it had failed to pay the employee the wages that were due, the employee's complaint did not qualify as a "disclosure" as required by Section 1102.5(b).

In this opinion, however, the California Supreme Court found that the term "disclosure" under Section 1102.5(b) "includes protection for disclosures made to 'another employee who has the authority to investigate… or correct the violation,' without regard to whether the recipient already knows of the violation." Because it was immaterial whether the nightclub had existing knowledge of its failure to pay the employee for wages earned, the nightclub's actions, including its threatening to report the employee to immigration authorities, terminating her employment, and instructing her never to return to work, constituted unlawful retaliation under Section 1102.5(b). *See also Kourounian v. California Dep't of Tax & Fee Admin.*, 91 Cal. App. 5th 1100 (2023) (trial court should not have admitted evidence of employer's alleged retaliation that predated employee's EEO complaint or of employee's EEO complaints themselves, which were inadmissible hearsay).

No Implied Waiver Of Disqualification Of Judge For Bias Or Appearance Of Impartiality After One Year

North Am. Title Co. v. Superior Court, 91 Cal. App. 5th 948 (2023)

During oral argument on a motion, the trial judge accused the employer-defendants of participating in a "name change shell game," a "corporate game of three-card monte" and "trickery" and "scheming" to evade payment of a $43.5 million judgment to plaintiffs in this wage-and-hour class action. One employer (Lennar Title) filed a statement of disqualification of the judge for cause approximately a year after the comments were made. The judge struck the statement of disqualification on multiple grounds, including that the statements in question were made "years before seeking disqualification." The Court of Appeal granted Lennar's petition for a writ of mandate, holding that a statement of disqualification for bias, prejudice, or appearance of impartiality cannot be impliedly waived as untimely under Cal. Code Civ. Proc. § 170.3(b)(2).

No Final Paycheck Due After End Of Temporary Assignment

Young v. RemX Specialty Staffing, 91 Cal. App. 5th 427 (2023)

Vanessa Young worked as an employee of staffing company RemX Specialty Staffing and was temporarily assigned to work at Bank of the West. Young allegedly "verbally abused" a RemX representative on a call about delivery of her paycheck. Young claimed that the RemX representative "basically" fired her from RemX; however, the representative instructed her in a contemporaneous email not to return *to the bank*. Notwithstanding this directive, Young reported to work at the bank and was escorted from the premises by another RemX representative. Young again alleged that this representative "basically implied" she was fired from RemX, but a subsequent email showed RemX only instructed her not to return to work *at the bank*.

Young sued RemX, alleging several causes of action including a PAGA claim. Young's individual claims were compelled to arbitration and the Court of Appeal dismissed the appeal of her class claims. Thus, Young's only remaining claim was for PAGA penalties due to failure to timely pay final wages to a "discharged" employee under Cal. Lab. Code § 201.3. The trial court granted summary judgment to RemX, finding that Young had not been discharged from her employment with RemX when she was instructed not to return to work at the bank. The Court of Appeal affirmed. The Court of Appeal emphasized that a discharge requires the end of an employment relationship and that a discharge can only occur

"when an employee is terminated from work with the temporary services employer, not when the employee is terminated from an assignment with a client." Thus, Young was not discharged when her temporary assignment with the bank ended because she was still employed by RemX. RemX therefore was entitled to summary judgment because Section 201.3 requires a discharge to occur in order to trigger an employer's obligation to pay final wages, and Young was not discharged.

Exemption of Financial Professionals From ABC Test And Retroactive Application Are Constitutional

Quinn v. LPL Fin. LLC, 91 Cal. App. 5th 370 (2023)

Alleging misclassification, John Quinn brought a PAGA action on behalf of a class consisting of securities broker-dealers and investment advisers against his employer LPL Financial. Quinn brought the PAGA action prior to the enactment of AB 2257, which exempted the occupations identified in Quinn's PAGA action from the "ABC test" as set out in *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903 (2018). Instead, exempt occupations are analyzed according to the standard in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989). The parties stipulated that Cal. Lab. Code § 2750.3(i)(2) would apply the exemption retroactively; however, Quinn challenged the constitutionality of the exemption and its retroactivity.

The trial court rejected Quinn's challenge and the Court of Appeal affirmed. First, the court concluded the law survived equal protection scrutiny because the legislature had a rational basis to exempt financial professionals given their higher skill and bargaining power and, therefore, less vulnerability to exploitation by misclassification. This holding joins the equal protection analysis of other courts which have upheld the exemption as applied to real estate agents and freelance writers and photographers. Next, the Court rejected the due process claim, holding that Quinn was not deprived of any right because there is no vested right in application of a particular legal test or presumption. In so holding, the court declined to follow *Hall v. Cultural Care USA*, 2022 WL 2905353 (N.D. Cal. July 22, 2022), which held that application of a different standard would deprive a putative employee of the vested right to wages and therefore could support a due process challenge. The court rejected *Hall's* reasoning because whether Quinn had a vested right depended on whether he *was* an employee, and that question was not decided.

Distributors Not Liable For Unpaid Wages Of Agricultural Workers

Morales-Garcia v. Better Produce, Inc., 70 F.4th 532 (9th Cir. 2023)

Agricultural laborers who picked strawberries for several growers sued the growers' distributors, Better Market Produce and Red Blossom Sales, alleging that the distributors were liable for unpaid wages after the growers went bankrupt. Under Cal. Lab. Code § 2810.3, a company that outsources work to a labor provider may be held liable for a laborer's wages as a "client employer" if the laborer's work is within the outsourcer's "usual course of business." The statute defines usual course of business as "the regular and customary work of a business, performed within or upon the premises or worksite of the client employer." The district court rejected plaintiffs' claims, holding that the determination of whether the farms were part of the distributors' premises required considering the degree of control the distributors exercised over the laborers' location of work. The Ninth Circuit affirmed and distinguished typical control tests which focused on control over workers with the control test applied by the district court which considered the distributors' control of the land, *i.e.*, the premises. The Ninth Circuit agreed that the distributors did not exercise sufficient control over the land despite having an exclusive arrangement with the growers for the land and retaining entry rights for inspection. The Ninth Circuit also rejected plaintiffs' overarching claim that Section 2810.3 extends liability for wages of workers who produce a product necessary to the company's business.

PAGA Debt Not Dischargeable in Bankruptcy

In re Patacsil, 2023 WL 3964908 (Bankr. E.D. Cal. June 9, 2023)

The Private Attorneys General Act (PAGA) permits aggrieved employees to file representative action to recover civil penalties for Labor Code violations. The law allocates 75% of any recovery to the Labor and Workforce Development Agency (LWDA) for "enforcement of labor laws" and "education of employers and employees about their rights and responsibilities" under the Labor Code. Further, according to a recent bankruptcy court opinion, the amounts payable to the LWDA qualify as penalties "payable to and for the benefit of a governmental unit" which makes them nondischargeable in bankruptcy. 11 U.S.C. § 523(a)(7). Thus, employers will remain liable for 75% of the award even after emerging from bankruptcy. Importantly, however, the bankruptcy court held that the other 25% of the penalty (payable to "aggrieved employees") and any statutory attorneys' fees do not satisfy any exception in the Bankruptcy Code and thus are dischargeable in bankruptcy.

Enforcement of PAGA Carve Out Suggests Need For New Revisions To Arbitration Agreements

Duran v. EmployBridge Holding Co., 92 Cal. App. 5th 59 (2023)

In 2014, the California Supreme Court determined that Private Attorneys General Act ("PAGA") claims are immune from

arbitration in *Iskanian v. CLS Transp. Los Angeles, LLC* – which, unsurprisingly, led to an avalanche of PAGA claims being filed as plaintiffs' lawyers scrambled to make their cases arbitration-proof (at least as to those pesky PAGA claims). In response to *Iskanian*, some employers immediately and dutifully revised their arbitration agreements to exclude PAGA claims. Then in June 2022, the United States Supreme Court in *Viking River Cruises v. Moriana* held that the Federal Arbitration Act preempts *Iskanian*'s holding that PAGA actions could not be divided into individual and representative claims brought on behalf of other allegedly "aggrieved employees." Now in this opinion, the Court of Appeal has decided that a law-abiding employer that relied to its detriment upon *Iskanian* and included a broad PAGA carve out in its arbitration agreement *could not* compel to arbitration an employee's individual PAGA claim – even though that claim would have otherwise been arbitrable but for the *Iskanian*-compliant carve out.