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CAUTIONARY TALE OF INDIVIDUAL LIABILITY FOR PENALTIES AND FEES UNDER PAGA

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By Theresa Mak

In a decision that will create additional anxiety for business owners and employers about lawsuits under Private Attorneys General Act of 2004 (“PAGA”), the California Court of Appeals held that an individual can be personally liable for civil penalties for failure to pay overtime and minimum wages regardless of whether the individual is deemed the employer or an “alter ego” of the employing entity. *Marco Antonio Atempa et al. v. Paolo Pedrazzani*, No. D069001 (September 28, 2018).

Facts of the Case

Defendant Pedrazzani was the owner, president, secretary and director of Pama, Inc., which did business as Via Italia Trattoria, a restaurant in Encinitas. Plaintiffs Marco Antonio Atempa and Keilyn Reyes worked for Via Italia as a dishwasher and cook. Both stopped working there in mid-2013.

In July 2013, Plaintiffs filed action against Pama and Pedrazzani. Plaintiffs alleged causes of action against Pama, the employer, for: failure to pay overtime wages; failure to pay minimum and regular wages; failure to provide accurate wage statements; unfair business practices; waiting time penalties; failure to maintain personnel and payroll records; and failure to provide compliant meal and rest periods. In addition, Plaintiffs alleged a cause of action against both Pama and Pedrazzani for civil penalties under PAGA for failure to pay overtime under Labor Code Section 558 and minimum wages under Section 1197.1.

After a nine-day bench trial, the trial court ruled in Plaintiffs’ favor on every cause of action. Specifically, as to the eighth cause of action for civil penalties under PAGA, the court ruled against Pedrazzani and Pama, jointly and severally, and awarded \$1,937 in civil penalties to Atempa for overtime violations under Section 558; \$2,036 in civil penalties to Reyes for overtime violations under Section 558; and \$31,074 in civil penalties to Plaintiffs on behalf of themselves, the State of California and all aggrieved employees for both overtime and minimum wage violations. Thereafter, the court awarded Plaintiffs \$315,014 in attorney’s fees and costs under PAGA’s attorney fees provision as well as interest and costs against Pedrazzani and Pama.

Pedrazzani and Pama appealed the court’s judgment as well as the postjudgment order awarding Plaintiffs attorney fees and costs. During the pendency of the appeal, Pama filed for bankruptcy resulting in the dismissal of Pama’s appeal. Therefore, at the time of the Appellate Court’s decision, only Pedrazzani’s appeal was pending.

Relevant Statutes

At the outset, the Appellate Court noted the following language in the relevant statutes:

- Labor Code section 558(a) provides that “[a]ny employer or *other person acting on behalf of an employer* who violates, or causes to be violated, a section of this chapter” requiring the payment of all overtime wages “*shall be subject to a civil penalty....*” (558(a), italics added.)
- Section 1197.1(a) similarly states that “[a]ny employer or *other person acting either individually or as an officer, agent, or employee of another person*, who pays or causes to be paid to any employee a wage less than minimum fixed by an applicable state or local law ... *shall be subject to a civil penalty....*” (1197.1(a), italics added.)
- Finally, PAGA provides that any civil penalties that may be collected by the LWDA, including Labor Commissioner, for a violation of PAGA may also “be recovered through a civil action brought by an aggrieved employee” and any such employee “who prevails in any [PAGA] action shall be entitled to an award of reasonable attorney’s fees and costs....” (2699, subd. (a) and (g)(1).

Personal Liability for Civil Penalties Under PAGA Does Not Hinge on Employer or Alter Ego Status

On appeal, Pedrazzani argued that the trial court erred in ruling that he is personally liable for the civil penalties, interest, costs and attorney’s fees because Pama, not Pedrazzani, was the employer, and there had been no allegations or findings either that he was the alter ego of Pama or that he acted outside the scope of his agency for Pama. Pedrazzani did not dispute that he is a “person” under Sections 558 or 1197.1 or regarding the trial court’s interpretation of those statutes. Rather, Pedrazzani argued that the court’s ruling holding him liable as an individual directly conflicts with the common law associated with alter ego liability or corporate agency and the California Supreme Court’s decisions in *Reynolds v. Bement* (2005) 36 Cal. 4th 1075 and *Martinez v. Combs* (2010) 49 Cal.4th 35. In those decisions, the Supreme Court ruled that an employer’s agent who was acting within the scope of his/her employment could not be held liable for underpayment of wages under 1194.

The Court rejected Pedrazzani’s arguments. First, the court held that the language in Sections 558(a) and 1197.1(a) referring to “other person[s]” is unambiguous: it means that an individual may be held liable for civil penalties under those sections “regardless of the identity or business structure of the employer.” The Court emphasized that Pedrazzani’s liability for civil penalties is “not based on a finding that he was Plaintiff’s ‘employer,’ but rather that he was a person other than the employer who violated or caused to be violated certain overtime pay and minimum wage laws pursuant to Sections 558(a) and 1197.1(a). The Court was careful to note that its ruling in favor of individual liability applies only to civil penalties under Sections 558(a) or 1197.1(a), not to the recovery of wages: “[a]s a general rule, a corporate employer’s officers/agents are not personally liable for the employer’s failure to pay employees contractual or statutory wages, overtime compensation, vested vacation time, or unreimbursed business expenses....”

The Court explained that the California Supreme Court’s decisions in *Reynolds* and *Martinez* are inapposite to Pedrazzani’s appeal because those decisions dealt with whether an agent acting within the scope of his or her employment could be held individually liable as the employer. Here, Pedrazzani is liable not as the employer, but rather as an “other person” as contemplated in Sections 558(a) and 1197.1(a).

Finally, the Court held that there was no need for the trial court to apply the alter ego doctrine because Pedrazzani is liable for the violations that he committed as the “other person acting on behalf of” of the employer, not as an alter ego of the employer. Requiring “an application of the alter ego doctrine before a party other than the corporate employer can be found liable for a civil penalty [under sections 558(a) or 1197.1(a)] – would add an issue and additional proof that the Legislature did not require.”

Civil Penalties Recovered Under PAGA Must Be Distributed 75 Percent/25 Percent.

PAGA requires that that penalties “shall be distributed as follows: 75 percent to the [LWDA] ... and 25 percent to the aggrieved employees.” 2699(i). Although the trial court had ordered that the Section 1197.1(a) civil penalties be distributed according to this formula, it did not do so for the Section 558(a) penalties. The Court held that this was in error as all civil penalties are subject to the 75 percent/25 percent distribution rule and modified the judgment accordingly.

PAGA Authorizes Award of Attorney Fees and Costs to Plaintiffs.

Finally, Pedrazzani argued that he is not liable to Plaintiff for attorney fees and costs, citing *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244. The Court rejected this argument. *Kirby* involved rest break premiums under section 226.7, which does not contain an attorney fees provision and the California Supreme Court in *Kirby* held that certain fee shifting provisions in other statutes did not apply to a recovery under 226.7. Here, by contrast, PAGA expressly authorizes an award of attorney fees and costs. In addition to upholding the trial court’s award of attorney fees and costs, the Court awarded Plaintiff reasonable attorney fees and costs on appeal. The Court also held that Pedrazzani had forfeited appellate court consideration of whether Plaintiff is entitled to postjudgment interest by failing to present any argument or legal authorities on that issue.

Analysis and Recommendations

Although the language of Sections 558(a) and 1197.1(a) contemplates individual liability for certain “persons,” it has not been clear who those “persons” would be. Pedrazzani did not appeal the question of whether he is deemed an “other person,” and the *Pedrazzani* decision broadly suggests that anyone acting on behalf of an employer could be individually liable for civil penalties. Certainly, this decision suggests that a small business owner who largely runs the operations on his or her own would qualify as a “person” under those statutes. The question remains whether individual employees such as a manager or a payroll processor could be individually liable as an “other person.”

Note that notwithstanding the California Supreme Court’s decisions in *Reynolds* and *Martinez* —holding that agents of the employer acting within his or her scope of employment are not personally liable for underpayment of wages — and the *Pedrazzani* Court’s reiteration of the same limitation on personal liability, the California Legislature has enacted the “A Fair Day’s Pay Act,” effective January 1, 2016, to expand personal liability for the underpayment of wages and non-wages. A Fair Day’s Pay Act added Labor Code Section 558.1, which permits individual liability for certain persons, provides that any employer or “other person acting on behalf of an employer” who is “a natural person who is an owner, director, officer, or managing agent of the employer” may be liable for violating, or causing to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or Sections 203 (waiting time penalties), 226 (wage statements), 226.7 (meal and rest breaks), 1193.6 (minimum wage or overtime), 1194 (minimum wage), or 2802 (business expenses).

California Employers should evaluate and continuously monitor their pay practices to ensure that they are compensating employees for all time spent on compensable work activities and at the legally-required rates. This includes ensuring the accurate calculation of the applicable minimum wage and regular rates.

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If you have any questions about this case or how it may affect your practices, please contact any GBG attorney.

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