July 2016

California Bar Examination

Performance Test B
INSTRUCTIONS AND FILE

WONG v. PAVLIK FOODS, INC.

WONG v. PAVLIK FOODS, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

LAW OFFICES OF JEFFREY SU
4130 Hellman Court, Suite 104
Riverdale, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant
FROM: Jeff Su
DATE: July 28, 2016
RE: Wong v. Pavlik Foods, Inc.

Our client, Arnold Wong, was until recently the head bookkeeper and payroll administrator at Pavlik Foods, Inc., a large meat processor here in Riverdale. He was fired last week and has asked us to represent him in a suit against Pavlik to recover unpaid wages. I know we can sue to recover his unpaid wages and associated civil penalties for him individually.

In the course of the interview, Mr. Wong revealed information suggesting that Pavlik has for a number of years engaged in widespread wage and hour violations with respect to its meat processing employees.

According to Mr. Wong, Pavlik averages about 400 wage earners a year working in those occupations. It strikes me that we may have an opportunity to file a significant class or representative action on behalf of all those employees, and Mr. Wong is willing to be the class representative. There are two possibilities: (1) a class action under Columbia Business Code section 17200, called the Unfair Competition Law ("UCL"), and (2) a representative action under Columbia Labor Code section 2699, known as the Private Attorney General Act ("PAGA"). Each

possibility presents some legal impediments that I need your help in working through.

Please draft a memorandum explaining the following:

1. Will the facts available to us support certification of a class of current and former employees for recovery of back wages under the UCL?

2. What argument can be made that Wong can bring a representative claim under PAGA on behalf of current and former employees for *back wages* without having to satisfy class certification requirements?

3. As to what monetary relief we can obtain, the following questions remain:

    (a) Under the UCL, who may recover civil penalties?

    (b) Under PAGA, are there any prerequisites we need to satisfy before we can file suit?

    (c) Under PAGA, do the employees get to keep all the civil penalties we might recover?

In drafting your memorandum, do not include a statement of facts, but be sure to use the facts in reaching and supporting your conclusions.

TRANSCRIPT OF INTERVIEW OF ARNOLD WONG

July 25, 2016

JEFF SU: Hello, Mr. Wong – Arnold. I'm glad you could come in to see me today. You can give me the details of what we talked about briefly in our telephone conversation a few days ago. So let's start at the beginning.

ARNOLD WONG: Well, Bruce Pavlik, the boss at Pavlik Foods, fired me last week because I kept questioning him about some of the payroll practices at the company.

SU: How long had you worked for Pavlik and what was your job there?

WONG: I worked there since about November 1996 – something like that. My job was always head bookkeeper, and then in the last few years I was also the payroll administrator. You know, calculating the weekly payrolls, making up the payroll summaries, and giving them to Mr. Pavlik so he could pay the employees – actually, he'd give the payroll to the different department heads, who would actually hand out the pay to the employees.

SU: Tell me a little about Pavlik's business.

WONG: It's a meat processing plant. They get the carcasses from local suppliers – beef, lamb, and pork – and butcher it for the market. They ship all over the states – some frozen, some fresh.

SU: Okay. You told me on the phone that you wanted me to help you get some unpaid wages that Pavlik owes you, right?

WONG: Yeah. I was supposed to be paid fifteen dollars an hour. In the last year or so, work got so busy that I worked straight through my one-hour lunch period, eating lunch at my desk. When I would turn in my timesheet, Mr. Pavlik would

deduct that hour and not pay me for it, telling me that I was supposed to take a lunch period and it wasn't his fault if I didn't.

SU: Is that it? Just non-payment for your lunch period?

WONG: No. I almost always worked nine or ten hours a day and most of the time, except around the year-end holidays, I worked six days a week – Sunday was my only day off. Sometimes he would give me a few dollars extra for, as he'd say, my "devotion" to work. But he never paid me for overtime like the law requires – at time and one-half.

SU: Were those the things that, when you questioned him about, he fired you for?

WONG: That was part of it. But I was also always being questioned by the plant workers about why they were being shorted. I mean, in the last couple of years I pointed out a number of things about payroll that I thought were wrong.

SU: Like what sorts of things?

WONG: Usually, he'd just tell me to do as I was told and not to make an issue of it – it was "none of my business," as he put it. But the things I questioned him about affected not just me, but almost all of the hourly plant workers. When he fired me, he told me that he was getting sick and tired of me questioning him all the time and, since I couldn't mind my own business, he told me to clean out my desk and leave. He didn't even pay me what he owed me for the last week's work.

SU: Well, first of all, how many hourly plant workers does Pavlik have?

WONG: It varies, but over a period of a year, I'd say about 350 to 400. It's hard to keep track because there's lots of turnover. My guess is that a lot of them are in the country illegally.

SU: Do you think the fact that they're illegals has anything to do with the payroll practices?

WONG: Absolutely. Mr. Pavlik can get away with a lot of stuff because the employees are afraid to complain. Anyone who does complain gets fired – that's why there's so much turnover.

SU: Okay. Tell me the kinds of payroll practices that you think were wrong at Pavlik.

WONG: There were so many things. He'd make little side deals with individual employees, so it's hard to say whether any one thing affected more than just a few of the hourly workers – maybe the carcass handlers would get one deal, the skinners another deal, the deboners yet another deal, and so forth for all the different groups in the plant. Each week Mr. Pavlik would hand me some handwritten notes telling me how to figure the pay for some of them and different notes for others.

SU: Well, were there some things that generally affected all the hourly workers?

WONG: Yeah. One thing that was fairly common was that he wouldn't give them pay stubs that explained their pay, and they were always coming to me to try to get me to explain why they were paid one amount rather than what they thought they were entitled to.

SU: What else?

WONG: I can't say there was any one thing that applied to all the workers – as I said, Mr. Pavlik was always changing the deal for different groups. For example, the minimum wage is $8.00 per hour. I know there were some workers, mostly the four- or five-person cleanup crew, who were paid less than the minimum wage. The most valuable workers were the butchers – they usually got paid overtime if they worked overtime, but nobody else did – and almost everyone worked overtime during different periods. I used to get calls from guys that Pavlik had fired wanting to know when they were going to get their final pay. He always made them wait at least a few days, and I know a lot of them never did get their final pay. Sometimes, Mr. Pavlik would pay them in cash about half of what he really owed them and

make them sign a release before he'd give them the money. Time off for lunch was pretty much a hit-and-miss proposition – again, some workers got time off, others didn't. All kinds of stuff like that happened all the time.

SU: Did Pavlik keep time and pay records?

WONG: Yeah, some, but not accurate ones. I know he had a set of books he'd show government officials, but they didn't reflect the real facts. I've kept records of my own and a lot of the handwritten notes he used to hand me about how to figure the pay for different employees. I mean, it varied a lot. I know a lot of the workers also kept records of the hours they worked – they'd show them to me when they complained about not getting paid for all their hours.

SU: Did any government agency ever take action against Pavlik?

WONG: I know a few employees complained to the Labor Board, but I don't think any action was ever taken. The processing plant is way out in Gaston County, so I don't think it was on the Labor Board's priority list.

SU: Well, we'll certainly go after Pavlik for the back wages and penalties he owes you. But would you be willing to be the lead plaintiff to go after Pavlik on behalf of all the other past and present employees?

WONG: What do you mean? What's a lead plaintiff?

SU: There's something called a class action, where one person – a lead plaintiff – can sue as a representative of all the other employees affected by the same types of labor law violations. It would be a major case and would take a lot of work to put together, but I think we could do it if you'd be willing to stand up for all the rest of the workers.

WONG: Yeah, I guess so. That's what started this whole thing because I was speaking up for them. I'd like to be able to get them their money too if there's any way to do it.

SU: All right. Give me a few days to do some research, and I'll get back to you. Later, we'll have to talk about the burdens on you if you become the lead plaintiff.

WONG: Sounds good.

LAW OFFICES OF JEFFREY SU
4130 Hellman Court, Suite 104
Riverdale, Columbia

INTEROFFICE MEMORANDUM

TO: File
FROM: Jeff Su
DATE: July 25, 2016
RE: Wong v. Pavlik Foods, Inc. – Possible Violations of Columbia Labor Code

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Based on preliminary information I obtained in my interview with Arnold Wong, I did some quick research to track the possible violations of the Columbia Labor Code at Pavlik Foods and the possible penalties that go along with the violations. Here they are:

Section 201: Failure to pay all wages due upon discharge from employment

Section 203: Additional wages up to 30 day's pay (waiting time penalty) for violation of Section 201

Section 206.5: Unlawful to require release from employee as a condition to receiving wages due

Section 226: Requirement for pay stubs showing hours, rate of pay, and wage calculation

Section 226.7: One hour's extra pay due for each missed meal period

Section 510: Requirement to pay time and one-half for overtime after 8 hours a day or 40 hours a week

Section 512: Requirement for meal period of specified length during work shift

Section 1194: Failure to pay minimum wage; liquidated damages up to twice the amount found due

Sections 210, 225.5, 558: These sections impose penalties to be assessed against the employer for violations of the foregoing sections; the penalties are between $50 and $100 per violation, per employee for the first violation, and between $100 and $200 per violation, per employee for subsequent violations.

These are all penalties for Labor Code violations. They can be recovered by the Labor Commissioner, who is the head of the Division of Labor Standards, which, in turn, is a subdivision of the Labor and Workforce Development Agency of the State of Columbia. The penalties listed above, as well as penalties specifically provided for in PAGA, are all recoverable under PAGA.

In addition, the UCL provides for a civil penalty of $2,500 per violation, but I'm not sure how that works or who can recover it.

Hard to say, at this early stage, what the aggregate back wages and penalties could be, but certainly in the millions if Wong's information pans out.

July 2016

California Bar Examination

Performance Test B

LIBRARY

WONG v. PAVLIK FOODS, INC.

LIBRARY

EXCERPTS FROM THE COLUMBIA BUSINESS CODE

(Unfair Competition Law)

Section 17200. As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice.

Section 17203. The court may make such orders or judgments as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Procedure.

Section 17204. Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

Section 17206. Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of Columbia by the Attorney General.

EXCERPT FROM THE COLUMBIA CODE OF PROCEDURE

(Class Actions)

Section 382. When the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

EXCERPT FROM THE COLUMBIA LABOR CODE

Section 558.

(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in this code shall be subject to 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.

(3) Wages recovered pursuant to this section shall be paid to the affected employee.

(b) If upon inspection or investigation the Labor Commissioner determines that a person had paid or caused to be paid a wage for overtime work in violation of any provision of this chapter, or any provision regulating hours and days of work in this code, the Labor Commissioner may issue a citation and obtain and enforce a judgment to recover the unpaid wages.

(c) The civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.

PRIVATE ATTORNEY GENERAL ACT
(Columbia Labor Code)

Section 2699.

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of the Labor Code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(c) For all provisions of this code except those for which a civil penalty is specifically provided, the civil penalty for a violation of these provisions is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

(d) An aggrieved employee may recover the civil penalty described in subdivision (c) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(e) Civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and 25 percent to the aggrieved employees.

Section 2699.3.

(a) A civil action by an aggrieved employee pursuant to Section 2699 alleging a violation of any applicable provision of the Labor Code shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 33 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.

ARENTZ v. ANGELINA DAIRY, INC.

Columbia Supreme Court (2009)

The sole issue in this case is whether an employee who, on behalf of himself and other employees, sues an employer under the Unfair Competition Law (Business Code Section 17200, et seq.) for Labor Code violations must satisfy class action certification requirements, but that those requirements need not be met when an employee's representative action against an employer is seeking civil penalties under the Private Attorney General Act of 2004 (Labor Code Section 2699).

Jose A. Arentz sued his former employer, Angelina Dairy. In the first cause of action in the First Amended Complaint, Plaintiff alleged violations of the Labor Code *on behalf of himself as well as other current and former employees of Defendant.* The claim is that Defendant had violated the Labor Code by failing to pay all wages due, to provide itemized wage statements, to maintain adequate payroll records, to pay all wages due upon termination, to provide rest and meal periods, to offset proper amounts for employer-provided housing, and to provide necessary tools and equipment. In this cause of action, Plaintiff sought to recover under the Private Attorney General Act all statutory penalties associated with the Labor Code violations.

The second cause of action alleged violations of the Unfair Competition Law *on behalf of himself as well as other current and former employees of Defendant* based on Defendant's failures to credit Plaintiff for all hours worked, to pay overtime wages, to pay wages when due, to pay wages due upon termination, to provide rest and meal periods, and to obtain written authorization for deducting or offsetting wages.

The trial court granted Defendant's motion to strike the second cause of action on the ground that Plaintiff failed to comply with the pleading requirements for class actions. Plaintiff petitioned the Court of Appeal for a writ of mandate. That court held that the causes of action brought in a representative capacity alleging violations of the Unfair Competition Law, but not the representative claims under the Labor Code's Private Attorney General Act of 2004, were subject to class action certification requirements. We granted Plaintiff's petition for review.

Plaintiff contends the Court of Appeal erred in holding that to bring representative claims (that is, claims on behalf of others as well as himself) under the Unfair Competition Law, he must comply with class action requirements. We disagree.

In a class action, the plaintiff, in a representative capacity, seeks recovery on behalf of other persons. A party seeking certification of a class bears the burden of establishing that there is an ascertainable class and a well-defined community of interest among the class members. If the trial court grants certification, class members are notified that any class member may opt out of the class and that the judgment will bind all members who do not opt out. A class action cannot be settled or dismissed without court approval.

The Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice." It provides that a private plaintiff may bring a representative action under this law only if the plaintiff has "suffered injury in fact and has lost money or property as a result of such unfair competition" and "complies with Section 382 of the Code of Procedure, which provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." This court has interpreted Section 382 of the Code of Procedure as authorizing class actions. The Unfair Competition Law also provides that "*Any person may pursue*

representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Procedure." Read together, these provisions leave no doubt that a plaintiff seeking to maintain a class action under the Unfair Competition Law must satisfy the stringent requirements for showing community of interest among the represented parties, common issues of law and fact, adequate representation of the class interests by the nominal parties, and sufficient numerosity.

We turn now to the next issue – whether class action certification requirements must also be satisfied when an aggrieved employee seeks civil penalties for himself and other employees under the Labor Code's Private Attorney General Act of 2004 for an employer's alleged Labor Code violations.

In September 2003, the Legislature enacted the Private Attorney General Act of 2004 (Labor Code Section 2698, et seq.). The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

Under this legislation, an "aggrieved employee" may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the "aggrieved employees."

Before bringing a civil action for statutory penalties, an employee must comply with Labor Code Section 2699.3, requiring the employee to give written notice of the alleged Labor Code violations to both the employer and the Labor and Workforce Development Agency, and the notice must describe facts and theories supporting the violation. If the agency notifies the employee and the employer that it does not intend to investigate (as occurred here), or if the agency fails to respond within 33 days, the employee may then bring a civil action against the employer.

Here, Plaintiff's first cause of action seeks civil penalties under the Private Attorney General Act of 2004 for himself and other employees of Defendant for alleged violations of various Labor Code provisions. Defendant challenges the Court of Appeal's holding here that to bring this cause of action, Plaintiff need *not* satisfy class action certification requirements.

The court relied on these three reasons: (1) Labor Code Section 2699, subdivision (a), states that "[n]otwithstanding any other provision of law" an aggrieved employee may bring an action against the employer "on behalf of himself or herself and other current or former employees"; (2) unlike the Unfair Competition Law's Section 17203, the Private Attorney General Act of 2004 does not expressly require that representative actions comply with Code of Procedure Section 382; and (3) a private plaintiff suing under this act is essentially bringing a law enforcement action designed to protect the public.

At issue here is whether such actions *must* be brought as a class action subject to the traditional class certification requirements.

Defendant urges us to construe the Private Attorney General Act of 2004 as requiring that all actions under that act be brought as traditional class actions. We decline.

An employee plaintiff suing, as here, under the Private Attorney General Act of 2004, does so as the proxy or agent of the state's labor law enforcement agencies. The Act's declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. In a lawsuit brought under the Act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies – namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. The employee plaintiff may bring the action only after giving written notice to both the employer and the Labor and Workforce Development Agency and 75 percent of any civil penalties recovered must be distributed to the Labor and Workforce Development Agency. Because collateral estoppel applies not only against a party to the prior action in which the issue was determined, but also against those for whom the party acted as an agent or proxy, a judgment in an employee's action under the Act binds not only that employee but also the state labor law enforcement agencies.

Because an aggrieved employee's action under the Private Attorney General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. The Act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations, and an action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties. When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. Accordingly, with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the Act.

As Defendant points out, there remain situations in which nonparty aggrieved employees may profit from a judgment in an action brought under the Private Attorney General Act of 2004. This is why: Recovery of civil penalties under the act requires proof of a Labor Code violation, and for some Labor Code violations there are remedies in addition to civil penalties (for example, lost wages and work benefits, unpaid overtime compensation, one hour of additional pay for missed meal periods, etc.). Therefore, if an employee plaintiff prevails in an action under the Act for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment. Nonparty employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations. If the employer had prevailed, however, the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties.

The potential for nonparty aggrieved employees to benefit from a favorable judgment under the act without being bound by an adverse judgment, however, is not unique to the Private Attorney General Act of 2004. It also exists when an action seeking civil penalties for Labor Code violations is brought by a government agency rather than by an aggrieved employee suing under the Private Attorney General Act of 2004, because an action under the Act is designed to protect the public, and the potential impact on remedies other than civil penalties is ancillary to the action's primary objective.

The judgment of the Court of Appeal is affirmed.

SUPERIOR COURT IN AND FOR THE COUNTY OF BELDEN

STATE OF COLUMBIA

ABEL WESTLUND, individually and on behalf of all others similarly situated, Plaintiffs, vs. PALLADIN FARMS, INC., Defendant.	Case No. CIV-39-14430-01 DECISION DENYING CLASS CERTIFICATION

Plaintiff, Abel Westlund, a field foreman previously employed by defendant Palladin Farms, Inc., a row crop producer and packer in Belden County, brought this action to recover unpaid wages for himself and a class of employees described as consisting of "field and packing house workers employed by Palladin Farms during the 1999 and 2000 spring harvests." Alleging numerous violations of the Columbia Labor Code, Plaintiff bases his claim for recovery upon Columbia Business Code Section 17200, et seq.

After conducting discovery on the composition of the class, Plaintiff moved for certification of the described class and for an order allowing him to maintain the action as a class action on behalf of all current and former employees in the class. In the

relevant period – the 1999 and 2000 spring harvests – there were approximately 150 field workers and 75 packing house workers, some employed for the entirety of each of the harvests and others for varying periods of time. Defendant opposed the motion for certification on the general ground that Plaintiff has failed to show that a class action is appropriate.

The complaint alleges that Defendant employed him, the field workers, and the packing house workers in violation of various sections of the Labor Code. For purposes of this motion, the court takes the allegations as being true. Plaintiff asserts that he was the only salaried employee in the proposed class and that Defendant unlawfully withheld portions of his weekly salary purportedly to cover expenses for rental and meals furnished to him.

The claim he asserts on behalf of the field workers is that Defendant routinely short-counted the piecework chits submitted by the fieldworkers, thus depriving them of payments for varying amounts of crops picked and turned in. The claims asserted on behalf of the packing house workers are that some of them were paid less than the minimum wage and that some of them were not paid for time spent at the beginning of each shift for assembling and otherwise preparing crates for the packing process and at the end of each shift cleaning up their work areas.

Defendant, in opposition to the motion for class certification, properly points out that the alleged pay practices involve a wide range of Labor Code sections and affect different employees in different ways, such that the claims are not susceptible of resolution on a class basis, i.e., that there are insufficient questions of law and fact common to the proposed class members.

DISCUSSION

Class actions in this state are authorized under Section 382 of the Columbia Code of Procedure. Our Supreme Court has held that this code section is to be applied and interpreted in the same way as Rule 23 of the Federal Rules of Civil Procedure is applied to class actions brought in the federal courts. See, *Campbell v. Omnibus Industries, Inc.* (Colum. Supreme Ct. 1999).

Rule 23 prescribes the following basic essentials for maintenance of class actions:

(1) Numerosity: The class is so numerous that joinder of all members is impracticable;

(2) Commonality: There are questions of law or fact common to the class;

(3) Typicality: The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) Adequacy of Representation: The representative parties will fairly and adequately protect the interests of the class.

The number of potential class members satisfies the numerosity requirement, but the court finds that Plaintiff has failed to establish the remaining requirements for maintenance of this action as a class action. The kinds of wage violations alleged vary from group to group within the proposed class and the factual components necessary to establish the violations are likely to vary from individual to individual. The claim of plaintiff, Westlund, is not at all typical of the types of claims he asserts on behalf of the other members of the proposed class, and, because of those differences, it is not at all clear that Plaintiff will be able to fairly and adequately represent the diverse interests of the proposed class members.

Thus, the court is unable to find that questions of fact and law *common to class members* predominates over questions of fact and law affecting only *individual members*.

For that reason, Plaintiff's motion for class certification is denied.

Date: March 30, 2001

/s/ Alfred P. Simms

Alfred P. Simms

Judge of the Superior Court

TALBOTT v. EUPHONIC SYNTHESIZERS, LLC

Columbia Court of Appeal (2010)

In 2009, plaintiff, Lance Talbott, on behalf of himself and a class of employees, sued his employer Euphonic Synthesizers, LLC for wages unlawfully withheld in violation of the Columbia Labor Code. Plaintiff alleged two causes of action: one for restitution to the class under Columbia Business Code Section 17200, the Unfair Competition Law (UCL), and the other a representative claim under Columbia Labor Code Section 2699, the Private Attorney General Act (PAGA). In each, he sought to recover unpaid wages and statutory penalties.

Plaintiff moved the trial court to allow him to conduct discovery on the class issues relating to the Section 17200 claim, i.e., the names, addresses, job classifications, and wage records of current employees and former employees during the period of the applicable statute of limitations. The court denied the motion and, in addition, ruled that the suit could not be maintained as a class action, for the reason that the wage claims on behalf of the class appeared to lack merit. The trial court also dismissed Plaintiff's PAGA claim for the recovery of unpaid wages on behalf of the class.

We believe the trial court abused its discretion in denying Plaintiff's motion for discovery on the class issues. Whether the class claims lack merit is a question of fact based on the proof that Plaintiff might be able to bring to bear once the identity and circumstances of the class members are determined. Plaintiff should at least have the opportunity to produce the evidence, at which time the question of the merits can be tested.

Plaintiff urges this court also to reverse the trial court's dismissal of his representative PAGA claim for unpaid wages.

The seminal case is *Arentz v. Angelina Dairy, Inc.* (Colum. Supreme Ct. 2009). The Court held there that a plaintiff may maintain a representative action under PAGA to recover civil penalties without having to satisfy the traditional requirements for certification of a class. In response to the defendant's assertion that to allow such a representative action without the safeguards of a class action certification has adverse due process and collateral estoppel consequences upon the unnamed class members, the Court stated:

> Because an aggrieved employee's action under the Private Attorney General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. The Act authorizes a representative action *only for the purpose of seeking statutory penalties for Labor Code violations*, and an action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.

Defendant, Euphonic Synthesizers, asserted in the court below that the italicized language foreclosed any claim that Plaintiff could assert for anything other than civil penalties, i.e., unpaid wages are not penalties, so, claims Defendant, they cannot be a component of any PAGA recovery.

Plaintiff, on the other hand, cites to Labor Code Section 2699 (d), a subsection of PAGA, which states, "Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." Claims for recovery of unpaid wages, argues Plaintiff, are "other remedies" under the Labor Code and, therefore, can

be sought "concurrently with an action taken under [PAGA]." Moreover, Plaintiff cites Labor Code Section 558, which allows the Labor Commissioner, who is the head of the Division of Labor Standards, to issue citations for recovery of *both* unpaid wages and civil penalties.

Plaintiff also argues that the Legislature's intent in enacting PAGA was to confer upon private parties the power theretofore reserved to state labor law enforcement agencies to bring representative actions to enforce Columbia's wage and hour laws. Thus, argues Plaintiff, the logical conclusion to be drawn from the combination of Section 2699 (d) and Section 558 is that PAGA provides private individuals, standing in the shoes of the state labor law enforcement agencies, the representative action mechanism to recover unpaid wages through private enforcement of Section 558.

We believe the trial court misapprehended this question of first impression: whether one who brings a representative suit for civil penalties under PAGA can also maintain, in the same action, claims for unpaid wages for members of the class he purports to represent.

Accordingly, we reverse and remand with instructions to the trial court to allow Plaintiff to conduct reasonable discovery on the class issues. At that time, the trial court can reconsider its dismissal of Plaintiff's PAGA claim for recovery of unpaid wages in light of the foregoing observations.

1)

LAW OFFICES OF JEFFREY SU
4130 Hellman Court, Suite 104
Riverdale, Columbia

INTEROFFICE MEMORANDUM

TO: Jeff Su
FROM: Applicant
DATE: July 28, 2016
RE: *Wong v. Pavlik Foods, Inc.*

1. Will the facts available to us support certification of a class of current and former employees for recovery of back wages under the UCL?
Certification of a class under the UCL relies upon satisfying the criteria of three statutes. Columbia Business Code sections 17200 et seq., called the Unfair Competition Law ("UCL") provides for the recovery of property taken from propsective plaintiffs by unlawful, unfair, or fraudulent business act or practice ("unfair competition"). Section 17204 sets out the standing requirements for a UCL cause of action: a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. Lastly,
Columbia Code of Procedure section 382 provides for certification of a class "when the question is one of a common or general interest, of many persons ... and it is impracticable to bring them all before the court." Our Supreme Court has interpreted this statutory scheme to establish four criteria: "community of interest among the represented parties, common issues of law and fact, adequate representation of the class interests by the nominal parties, and sufficient numerosity." *Arentz v. Angelina Dairy, Inc.* (Colum. Supreme Ct. 2009).

Numerosity

Under the applicable law, the factual circumstances make a strong case for satisfying the numerosity requirement to certify a class action. A 15-year-old decision from a neighboring county's trial court found without issue that a case involving approximately 225 workers satisfied the numerosity requirement. *Abel Westlund v. Palladin Farms, Inc.*, (Colum. Sup. Ct., Belden Cty. 2001 [CIV-39-14430-01]) (denying class certification motion on other grounds). Mr. Wong estimates there are approximately 350 to 400 employees at Pavlik Foods over the course of a year. He reports a high employee turnover rate, indicating a possibility of even more putative class members than this count. Based upon Mr. Wong's presentation of facts, I cannot foresee an issue satsifying the numerosity requirement.

Commonality

The commonality requirement merely needs our prospective class to share questions of "law *or* fact." See *Id.* (citing *Campbell v. Omnibus Industries, Inc.* for the proposition that Columbia Code of Procedure Section 382 is to be applied and interpreted the same way as Federal Rules of Civil Procedure Rule 23) (emphasis added). For purposes of determining whether we can certify a class under an UCL action, we need only show in this case that the prospective class members all have standing under the UCL.

Because the UCL gives standing in part under "unlawful business practice[s]," we must turn to the Columbia Labor Code to see if there are violations common to our prospective class. Mr. Wong reported that most of Mr. Pavlik's violations of law were not applicable to the entire prospective class. He indicated that some groups were paid less than minimum wage in violation of Section 1194, some groups were denied the lunch break required by Section 512 while others were granted them, he and most other workers were not paid required overtime as required by Section 510 whereas the butchers did receive overtime pay, and only some workers were required to sign a release as a condition of receiving their wages in violation of Section 206.5, whereas other workers including him were

not paid all wages due upon discharge, violating Section 201.

But Mr. Pavlik's failure to issue pay stubs in violation of Section 226 seems to affect the entire prospective class. This itself should satisfy the commonality criteria. The neighboring county court's decision from 15-years ago indicates the risk that the many other issues might not sufficiently be seen as common. However, an appellate court has more recently held that plaintiffs pursuing a class action UCL claim should be permitted to conduct discovery on the issues of class without preliminary consideration as to the merit on those issues. *Talbott v. Euphonic Synthesizers, LLC.* (Colum. App. Ct. 2010). Based upon this recent ruling, I believe that we will be granted the opportunity to at least conduct discovery on the issues of class.

Community of Interest

The *Angelina Dairy* Court has interpreted the UCL class action stautory scheme to require a "community of interest among the represented parties." This is a clear deviation from the Court's replication of the "typicality" requirement from Federal Rules of Civil Procedure Rule 23. *Campbell* (1999). The *Angelina Dairy* Court did not go as far as to define this particular requirement, but based on Mr. Wong's narrative I believe we will be able to show a community of interest in being paid.

Adequacy of Representation

The 15-year-old *Palladin Farms* trial court found that the potential lead plaintiff did not adequately represent the prospective class because he was the only salaried employee in the proposed class, whereas the potential class members were all paid on an hourly basis. Like in the *Palladin Farms* case, Mr. Wong faces similar challenges to being an adequate class representative. He is paid nearly twice the minimum wage, whereas many other potential class members are paid below minimum wage, and varying rates in between. Mr. Wong's work is strictly administrative in nature, whereas all of the proposed class members

would come from labor positions. We may be able to find an adequate representative to serve as our lead plaintiff, but Mr. Wong is certainly not an ideal candidate.

The facts and applicable law indicate we will at least have the opportunity to conduct discovery on the issue of class certification.

2. What argument can be made that Mr. Wong can bring a representative claim under PAGA on behalf of current and former employees for back wages without having to satisfy class certification requirements?

Columbia Labor Code Sections 2699 et. seq., or the Private Attorney General Act ("PAGA"), provide for private Labor Code actions after the Labor and Workforce Development Agency has determined it will not investigate the alleged violations of the Labor Code. In order for Mr. Wong to have standing for bringing a representative claim as an "aggrieved employee," he needs to have been employed by the alleged violator and have had one or more of the alleged violations committed against him.

In the interview, Mr. Wong described having experienced potential violations of the lunch break requirement set out in Section 512, the Section 510 overtime pay requirement, the Section 226 pay stub requirement, and requirement he receive all due wages upon discharge from employment set out in Section 201. Based on these facts, I believe Mr. Wong qualifies as an "aggrieved employee" and potential representative for a PAGA claim.

The lack of a class certification requirement for another representative PAGA claim was challenged in *Angelina Dairy*, where the employer argued that PAGA claims rewarding nonparty members must be impermissible without satisfying class action rules. The *Angelina Dairy* Court rejected this argument, explaining that such an application would defeat the legislative intent of PAGA to protect

nonparty aggrieved employees from being bound by other aggrieved employee's unsuccessful claims.

The law supports Mr. Wong's ability to bring a representative claim for back wages under the PAGA.

3. As to what monetary relief we can obtain, the following questions remain:

(a) Under the UCL, who may recover civil penalties?
Section 17206 reads that any person who violates the UCL shall owe a civil penalty up to $2,500 per violation, "which shall be assessed and recovered in a civil action brought in the name of the people [by] the Attorney General." Unlike the PAGA, the UCL does not expressly provide for private plaintiffs to recover the civil penalties. The PAGA is limited in its scope to the Labor Code, and the only governmental agency it controls is the Labor and Workforce Development Agency ("LWDA").

I don't think we would be successful in bringing the case that the UCL should be handled the same way as the PAGA. The PAGA actually provides a clear-cut division as to the recovered civil penalties between the LWDA and the aggrieved employees, with only 25 percent for aggrieved employees. Indeed, our courts are consistent on the purpose of civil penalties. "[A]n action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *Talbott v. Euphonic Synthesizers* (Colum. App. Ct. 2010) citing *Arentz v. Angelina Dairy, Inc.* (Colum. Supreme Ct. 2009). In the case of the UCL, the Attorney General seems to be exclusively entitled to the $2,500 civil penalty.

(b) Under PAGA, are there any prerequisites we need to satisfy before we can file suit?

In addition to the above-listed requirements for standing as an aggrieved employee, Section 2699.3 of the PAGA requires that aggrieved employee first send a written complaint with specific Labor Code allegations to the LWDA by certified mail. The agency is supposed to inform the employer and the complainant within 30 days that it does not plan to investigate the allegations. The complainant is then entitled to commence a PAGA action.

In the alternative, if the LWDA fails to respond within 33 days of the complaint's postmark date, the complainant is also entitled to commence a PAGA action. Mr. Wong mentioned vaguely that several employees have complained to the "Labor Board," but it is uncertain whether this is a qualifying subdivision o fthe LWDA and what happened with those complaints. We should investigate further to determine if those employees qualify as "aggrieved employees" under the PAGA.

(c) Under PAGA, do the employees get to keep all the civil penalties we might recover?

As explained above, only aggrieved employees are entitled to 25 percent of recovered civil penalties.

Question #1 Final Word Count = 1609

END OF EXAM