Insights, News & Events

9TH CIRCUIT PUTS MENDOZA V. NORDSTROM SAGA TO REST

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The 9th Circuit Court of Appeals recently affirmed a lower court's dismissal of "day of rest" claims brought by two former hourly employees against retail giant Nordstrom. The court determined that the employees were not aggrieved, a requirement for claims brought under California's notorious Private Attorneys General Act, or PAGA, and further upheld the district court's determination that they should not be permitted to substitute in an alleged aggrieved plaintiff to maintain their PAGA claims. The August 3 decision is good news for California employers and should provide a useful template for defending such cases in the future.

CALIFORNIA'S "DAY OF REST" LAW

Christopher Mendoza and Meagan Gordon were hourly employees for Nordstrom, working in varying capacities. Mendoza filed a putative class action in state court under the Private Attorneys General Act (PAGA) on his own behalf and those similarly situated hourly, non-exempt employees in California. Nordstrom removed the case to federal district court.

The crux of the complaint was Nordstrom's alleged violation of the "day of rest" provisions set forth in Labor Code Sections 551 and 552. Gordon brought her complaint in intervention, alleging the same causes of action.

Service Focus

Wage and Hour

Section 551 provides for "one day's rest [from work] in seven," while Section 552 prohibits an employer from "causing" an employee to work more than six days in seven. An exception to the day of rest requirement applies if the "total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." Employees who work on the seventh day of a workweek are entitled to one and a half times the regular rate of pay for the first eight hours and double time for all hours worked thereafter. In this case, Mendoza worked more than six consecutive days in three instances as a result of a supervisor's or coworker's request that he cover a shift, and Gordon worked more than six consecutive days on one occasion.

CASE GETS SHUTTLED FROM COURT TO COURT TO COURT...

The district court determined that Nordstrom did not cause the plaintiffs to work more than seven consecutive days, and therefore there was no violation of Section 551. It further held that, in each seven-day span referenced in the allegations, the plaintiffs had worked fewer than six hours on at least one day. Thus, the district court concluded that another provision of the law, Section 556, exempted Nordstrom from the alleged violations.

On appeal, the 9th Circuit noted that the California Supreme Court had not yet issued any decisions that would guide the appeals court judges in applying the language of the statutes, which could be interpreted in multiple ways. It certified three questions of state law to the California Supreme Court:

- Is the day of rest calculated based on the employer's defined workweek, or based on any consecutive seven-day period?
- Does the exemption under Section 556 apply if the employee works six hours or less on one day of the workweek, or only when the employee works no

more than six hours per day on any day in the workweek?

- When does an employer "cause" an employee to forego a day of rest?

The California Supreme Court responded by stating that Labor Code Section 551 entitles employees to one day of rest within the employer's defined workweek, rather than one day in every seven days on a rolling basis. It further explained that the exemption in Section 556 applies only when the employee never exceeds six hours of work on any day in the workweek. Finally, it concluded that an employer causes an employee to go without a day of rest when it is by the employer's request or inducement. However, the employer is not prohibited from allowing the employee to work a seventh day if the employee is aware of their right to take a day of rest but makes a free and knowing waiver of that right.

QUESTIONS ANSWERED: THE 9TH CIRCUIT RESPONDS

Upon receipt of the California Supreme Court's answers, the 9th Circuit determined that neither of the two plaintiffs worked more than six consecutive days in Nordstrom's established workweek, and thus, their claims under Sections 551 and 552 failed. As a result, the appeals court ruled that plaintiffs did not have "standing" to assert claims on behalf of similarly situated employees.

The employees argued that the case should nonetheless be remanded back to the district court once again, whereupon a new representative would be substituted in their stead. The request to substitute a new representative was denied by the district court, and the 9th Circuit affirmed. The plaintiffs were not "aggrieved" employees, the court said, and any aggrieved employee who substituted into the claim would have had to first exhaust their administrative options by giving notice to the Labor and Workforce Development Agency (LWDA) pursuant to Labor Code

Section 2699.3. Notably, the plaintiffs didn't raise their request until trial was about to begin.

In affirming the district court's refusal to allow a substitution of plaintiff, the 9th Circuit noted that there was no precedent that required the district court to permit the addition or substitution of PAGA representatives. Although the employees pointed to case law stating that a district court may permit a substitution of a class representative in a class action, the 9th Circuit stated that PAGA claims are fundamentally different than class actions. Moreover, the fact that the district court had discretion to permit substitutions did not require it to exercise that discretion.

WHAT CAN CALIFORNIA EMPLOYERS LEARN FROM THIS DECISION?

On the whole, the *Mendoza* decision is a win for employers. First, it provides confirmation that you can schedule an employee to work as many as 12 sequential days and still be in compliance with Section 551. Therefore, you can operate with a smaller labor force, which is especially important in industries that are facing labor shortages.

Further, the 9th Circuit's decision regarding the discretion of the district court in allowing plaintiffs to substitute a new aggrieved employee is a valuable tool that you might need to use one day if you are faced with similar litigation. Had the court decided otherwise, employers facing PAGA claims could be locked into a battle, even if they proved the claims had no merit as applied to the PAGA representative. Essentially, plaintiffs' attorneys would have been able to endlessly rotate through a company's employees, subbing in willing participants. But with this latest decision, it is clear that the district court is well within its right to decline a substitution if a plaintiff cannot prevail on the merits of their underlying claim.

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