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Court of Appeal, First District, Division 1, California.

Thomas R. SARGENT,
Plaintiff and Respondent,
v.
BOARD OF TRUSTEES OF the CALIFORNIA STATE UNIVERSITY et al., Defendants and Appellants.

A153072, A154926
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Trial Court: Superior Court of the County of Sonoma, Trial Judge: Hon. Nancy Case Shaffer (Sonoma County Super. Ct. No. SCV-255399)

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Opinion

Humes, P.J.

***1** Respondent Thomas Sargent is a health-and-safety technician at Sonoma State University (SSU or the University), which is part of the California State University (CSU) system. He sued CSU and his supervisor Craig Dawson (appellants) for the way he was treated after raising environmental concerns at the University. A jury found in his favor on claims alleging unlawful retaliation and on a claim under the Labor Code Private Attorneys General Act of 2004 (Labor Code, § 2698 et seq., PAGA), which was premised almost entirely on violations of the California Occupational Safety and Health Act of 1973 (Labor Code, § 6300 et seq., Cal-OSHA). Among other relief, he was awarded more than $2.9 million in PAGA penalties and more than $7.8 million in attorney fees. These consolidated appeals are from the judgment (A153072) and the award of fees (A154926).

Appellants offer several theories in arguing that CSU is not subject to PAGA as a matter of law, but we are not persuaded by them. We first reject their theory that Education Code section 66606.2 bars PAGA claims against CSU. We then reject their theory that CSU is categorically immune from PAGA penalties because it is a public entity. On this point, we hold that viable PAGA claims can be asserted against CSU, but only when the statutes upon which the claims are premised themselves provide for penalties. Here, Sargent brought some viable PAGA claims, but he ultimately failed to establish CSU's liability for them because the jury found that he was not personally affected by the underlying statutory violations. Thus, we reverse the award of PAGA penalties.

In the unpublished portion of our opinion, we conclude that the trial court did not err in precluding certain evidence offered to defend Sargent's retaliation claims, and we affirm the trial court's award of attorney fees.

I.

Factual and Procedural Background

Sargent began working for the University in February 1991 as an environmental health-and-safety technician. SSU's environmental health-and-safety office is responsible for the University's asbestos management program, and Sargent was the campus's licensed asbestos consultant.

Sargent presented abundant evidence at trial, most of which is not challenged on appeal, about how he was treated after raising concerns about environmental hazards at SSU. The evidence focused primarily on how he was treated after raising two concerns: the first was about an incident in which lead paint chips were dispersed with a leaf blower near an entrance to a campus building, and the second was about the presence of asbestos in a different campus building.

The leaf-blower incident occurred in summer 2012, when the University was planning to clean a roof. Some of the paint on the roof was loose and flakey, and the gutters were filled with debris. Sargent conducted tests that revealed lead in the paint,

and he told Dawson about the results. After receiving bids from a company to remove or stabilize the loose paint and to clean the debris, Dawson decided to clean the gutters in-house to save money. When Sargent learned that the University's plan was to remove the debris with a leaf blower, he told Dawson that the scheme might violate safety regulations, but Dawson countered that Sargent was "going to kill the projects with cost."

***2** The University went ahead with its plan, and some of the blown debris landed around the entryway to the building. An employee in the building asked Sargent to have it cleaned up. Sargent warned the employee that the debris came from an area with lead and to stay out of the area while he retrieved tools to test the debris. By the time Sargent returned, the debris had been blown away from the entryway, down the entryway stairs, and into surrounding ivy and rocks. Sargent collected samples, and testing revealed that the debris contained 7,200 milligrams of lead per kilogram, or more than seven times what is considered to be hazardous waste.

Sargent notified three government agencies about the incident. Dawson told Sargent that he was not "in any way authorized to contact regulatory agencies on this issue," and he directed Sargent to inform him if an agency responded. Dawson also told him not to share health and safety information with coworkers.

Sargent nonetheless sent an email about the incident to various people at SSU. An employee union filed a grievance after some of its members expressed concern that the incident may have improperly exposed them and children in a day camp program to lead. After receiving Sargent's complaints about the incident, the Division of Occupational Safety and Health (DOSH)[1] issued citations and a notice of penalty. The Department of Emergency Services also issued a citation.

After the leaf-blowing incident, Sargent was disciplined and placed on a performance-improvement plan. He thereafter received the lowest performance ratings that Dawson ever gave him, and he was excluded from meetings about abatement projects with third-party consultants.

Separate from the leaf-blowing incident, the evidence at trial also focused on how Sargent was treated after he raised concerns about asbestos in Stevenson Hall, a campus building that houses more than 100 offices, some occupied by multiple people.

In spring 2013, Sargent collected a dust sample from a windowsill in the building, and testing showed there was enough asbestos to contaminate 18,000 square feet. Around this time, Dawson restricted Sargent from asbestos-related work. For the previous 22 years, Sargent had tested for asbestos whenever he considered it to be appropriate, but Dawson began requiring Sargent to ask for Dawson's approval before performing such tests, and Dawson sometimes denied the requests.[2]

At one point, Dawson, his supervisor (the associate vice president for facilities, operations, and finance), the president of the University, and another University official met to discuss asbestos. The vice president was troubled when he learned that Dawson had required Sargent to obtain approval before notifying outside agencies of environmental issues. Dawson explained that he had asked Sargent to speak with him first so that there were "some protocols in place" if Sargent was representing the University. Sargent received six written reprimands in the three months after raising concerns about asbestos at Stevenson Hall.

Sargent initiated these proceedings in May 2014. His third amended complaint alleged five retaliation causes of action under various statutes (Gov. Code, § 8547 et seq. [California Whistleblower Protection Act]; Lab. Code, §§ 1102.5, 6310, 6399.7, 232.5),[3] four causes of action under the California Fair Employment and Housing Act (FEHA, Gov. Code, § 12900 et seq.), and one cause of action for civil penalties under PAGA. The PAGA cause of action was premised on allegations that CSU had violated various provisions of Cal-OSHA (§§ 6311, 6400, 6401, 6401.7, 6402, 6403, 6404, 6406).

***3** After the lawsuit was filed, Dawson maintained that Sargent was not timely completing all his assigned tasks. He started requiring Sargent to document his time using a "time utilization audit." According to Dawson, the purpose was to determine whether Sargent had administrative tasks that could be reassigned to student assistants or others. At first, Dawson required Sargent to document his time in two-hour increments, but he later changed it to 15-minute increments and required Sargent to provide more detail to account for his time. Sargent's union representative learned that no other SSU employee had ever been subject to such a time-accounting requirement.

In September 2014 Sargent filed a PAGA notice to the Labor and Workforce Development Agency to report Labor Code

violations at SSU, and served a copy on the University. The following month, the University delivered Sargent notice of a pending 10-day suspension, which took effect in November.

Environmental concerns continued to arise. In late 2014 or early 2015, Sargent heard that Dawson had directed two people from the facilities department to "dry sweep" lead from a roof. Sargent already had felt "beleaguered" since the leaf-blowing incident, and he told a coworker, "I really can't do this. They're coming to me again to do the stuff, which I've done a lot of. And I just said, I can't do it. Somebody else in the union has to help you guys with these health and safety issues, because I've been defeated at every turn." He felt "frazzled" and found it hard to concentrate on his work, and he "was literally sinking every step of the way, one burden after another, and that was it," he "couldn't take it."

In early 2015, Sargent also learned that the University planned to renovate the provost's office, which would involve demolishing its ceiling. He was concerned that the ceiling might contain asbestos, but Dawson said there was no plan to conduct any dust testing. After raising his concerns, Sargent was placed on a four-week suspension. He subsequently was able to test the ceiling in the provost's office and found that the level of asbestos was high enough that, in his professional opinion, demolishing the ceiling without first cleaning the dust "would have liberated all of that accumulated dust into the ventilation system, and it would have gone into everybody's office."

Sargent resigned in June 2015 because, in his words, "I literally couldn't take it anymore. I wasn't sleeping. I wasn't getting anywhere with the health and safety stuff. They didn't want me there. [Dawson] wanted to fire me. It was the end."

A jury trial began in January 2017. Sargent testified and offered his opinion about SSU's noncompliance with various regulations. Appellants presented the testimony of an expert who opined that the leaf-blowing incident did not create an unsafe condition, and that employees in Stevenson Hall exposed to asbestos-containing materials faced a de minimis risk of developing asbestosis. Another expert testified that Stevenson Hall was "a safe and healthy work environment." And yet another defense expert testified about the reasonableness of Sargent's efforts to find a new job after leaving SSU.

The jury returned special verdicts in favor of Sargent and against CSU and Dawson. As summarized in the judgment, the jury found in Sargent's favor on three retaliation causes of action, those brought under sections 1102.5, 6310, and 232.5, subdivision (c). The jury also found in Sargent's favor on the PAGA claim based on a violation of section 232.5, subdivision (a)—which prohibits an employer from requiring an employee as a condition of employment to refrain from disclosing information about the employer's working conditions—and violations of various Cal-OSHA statutory and regulatory provisions. Jurors found that CSU had failed to take certain actions to protect employees' health and safety in Stevenson Hall in violation of sections 6401 and 6403; failed to establish, implement, or maintain an effective injury-prevention program in Stevenson Hall (§ 6401.7, subd. (a)); violated various regulations regarding asbestos-containing waste, debris, and other materials in Stevenson Hall (Cal. Code Regs., tit. 8, §§ 1529, subd. (*l*)(3), 5208, subds. (k)(1) & (k)(7)); and either failed to inspect the HVAC system in Stevenson Hall as required or failed to correct any problems in a reasonable time (*id.*, § 5142, subd. (b)(1)). Jurors found that the various Cal-OSHA violations affected up to 231 CSU employees, but not Sargent.

***4** The trial court reserved the issues of Sargent's requests for equitable relief as well as determination of PAGA penalties. The court ultimately ordered Sargent to be reinstated, ordered his negative personnel records to be expunged, and awarded him back pay and benefits.[4] As for the PAGA penalties, the court ordered CSU to pay $100 in "initial violation" civil penalties for its violation of section 232.5 (§ 2699, subd. (f)); $2,004,200 for violations of section 6407; and $900,900 for violations of sections 6401, 6403, and 6401.7, subdivision (a). Total civil penalties against CSU thus were $2,905,200.

CSU and Dawson timely appealed from the judgment (A153072).

Meanwhile in the trial court, Sargent sought his attorney fees. He asked for more than $11.5 million in fees: around $3.9 million, times a 3.0 multiplier for three of the five attorneys for whom fees were sought. In a detailed order spanning 29 pages, the trial court concluded that a 2.0 multiplier for three of Sargent's attorneys was appropriate, and awarded a total of $7,793,030 in attorney fees. CSU and Dawson timely appealed from the award of attorney fees (A154926).

After briefing was complete in both A153072 and A154926, the court consolidated the appeals on its own motion.

II.

Discussion

A. Aggrieved Public Employees Can Bring Certain PAGA Claims Against Their Employers, but Sargent Failed to Prove any Such Claim Against CSU.

1. Education Code section 66606.2 Does Not Exempt CSU from Suit Under PAGA.

Appellants first argue that the Education Code precludes application of PAGA to CSU. The argument is based on the California State University Management Efficiency Act of 1996. (Historical and Statutory Notes, 28 Pt. 3 West's Ann. Ed. Code (2012 ed.) foll. § 66606.2, p. 399.) Under the act, "it is the intent of the Legislature that both of the following occur: [¶] (a) Before legislation that, by its terms, applies to the state or its agencies, departments, or boards, may apply to the California State University, the legislation should be compatible with the mission and functions of the California State University. [¶] (b) The California State University not be governed by any statute enacted after January 1, 1997, that does not amend a previously applicable act and that applies generally to the state or to state agencies, departments, or boards, unless the statute expressly provides that the California State University is to be governed by that statute." (Ed. Code, § 66606.2.) CSU reasons that PAGA does not apply to it because PAGA was enacted after 1997 but does not "expressly provide[ ] that the California State University is to be governed by that statute." (Ed. Code, § 66606.2, subd. (b).)

CSU's interpretation of section 66606.2 is far too expansive. In enacting the statute, the legislature was "[r]ecognizing the unique mission and functions of [CSU] among the departments, agencies, and boards of the state." (Ed. Code, § 66606.2.) By its terms, section 66606.2 applies only to statutes "that appl[y] generally to *the state or to state agencies, departments, or boards*." (*Id.*, subd. (b), italics added.) This language evinces a legislative intent for CSU, because of its unique mission and functions, to be excluded from future statutes directed to the state or state agencies, unless the statutes expressly provided otherwise. It cannot reasonably be read, however, to suggest a legislative intent for CSU to be exempt from all laws of general application unless they expressly include CSU.

***5** Our reading of the statute is consistent with its legislative history. As part of the legislation that enacted Education Code section 66606.2, the Legislature also amended Government Code section 11000, which defines state agencies. (Stats. 1996, ch. 938, § 7.) That statute defines a "state agency" as "every state office, officer, department, division, bureau, board, and commission." (Gov. Code, § 11000, subd. (a).) The 1996 amendment provides that "[a]s used in any section of this title that is added or amended effective on or after January 1, 1997, 'state agency' does not include the California State University unless the section explicitly provides that it applies to the university." An Assembly bill analysis, which was judicially noticed by the trial court, noted that the Legislature already had created an independent governing board for CSU (Ed. Code, § 66606), instituted a separate authority to construct the physical plant at CSU campuses (*ibid.*), and provided for a separate appointment authority for its employees (*id.*, § 66609). (Assem. Com. on Higher Ed., analysis of Assem. Bill 3132 (1995-1996 Reg. Sess.) p. 2.) Despite the legislative intent to make CSU independent, it would be "swept within the confines" of statutes and "become[ ] enmeshed in a wide array of legislation that *applies generally to all state agencies*." (*Ibid.*, italics added.) Taken together, the amended Government Code statute and new Education Code statute ensured that California State University would not be considered a "state agency" for purposes of newly enacted statutes. These statutes do not, however, provide a blanket "exempt[ion for] CSU from all statutes enacted after January 1, 1997," as appellants argue.

Despite appellants' insistence of the sweeping effect of Education Code section 66606.2, the statute has not been applied to a single piece of legislation since its enactment more than 20 years ago. So far as we are aware, it has been cited in only one appellate opinion, as dicta in a footnote. (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 310, fn. 13, 120 Cal.Rptr.3d 442 [in analyzing Legislature's authority over public-school districts, court noted Legislature would be limited by Ed. Code, § 66606.2 when governing CSU].) It appears that even CSU's trial counsel was not initially aware of the statute. Our record suggests that CSU did not cite the statute until more than a year after the initial complaint was filed in connection with the demurrer to Sargent's third amended complaint. And even then, CSU did not cite the statute when it first filed the demurrer in December 2015 or at the hearing on that motion, but waited until it filed post-hearing supplemental briefing.[5]

We conclude that Education Code section 66606.2 clarifies the Legislature's intent to exempt CSU from new laws directed to state agencies, not to exempt it from all generally applicable new laws. Because PAGA is not a statute that is directed to state agencies, we hold that section 66606.2 does not exempt CSU from its application.

2. PAGA Permits Employees to Pursue Some, but Not All, Labor Code Violations Against CSU.

We next turn to the more difficult question of whether Sargent could maintain his PAGA claims against CSU. As we shall explain, CSU is not categorically immune from PAGA claims on the basis that it is a public entity. Viable PAGA claims can be maintained against public entity employers, including CSU, but only when the laws upon which the claims are premised themselves provide for penalties. PAGA claims cannot be maintained against public entities when the laws upon which the claims are premised do not themselves provide for penalties. This is because public entities are not "persons" under PAGA allowed to bring such claims. Here, even though Sargent brought some viable PAGA claims against CSU, he failed to establish CSU's liability for them because the jury found that he was not personally affected by the statutory violations underlying these claims.

a. Statutory Background.

In enacting PAGA, "[t]he 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." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, 95 Cal.Rptr.3d 588, 209 P.3d 923.) Under the act, an "aggrieved employee" may bring a civil action personally and on behalf of other current or former employees under "any provision of [the Labor Code] that provides for a civil penalty." (§ 2699, subd. (a).) Of any civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency (the Labor Agency), and 25 percent goes to the aggrieved employees. (§ 2699, subd. (i).) "The purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code." (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, 128 Cal.Rptr.3d 854.)

***6** The legislation authorizes two separate types of penalties. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 378–379, 173 Cal.Rptr.3d 289, 327 P.3d 129.) The first type is the one described above, which are penalties for violating Labor Code provisions that themselves provide for civil penalties, and that were previously recoverable only by the Labor Agency or its related entities. (§ 2699, subd. (a); *Iskanian*, at p. 380, 173 Cal.Rptr.3d 289, 327 P.3d 129.) The second type are penalties for violating Labor Code provisions that do not themselves provide for civil penalties. PAGA creates default penalties for these violations. (§ 2699, subd. (f); *Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 86, 196 Cal.Rptr.3d 352 (*Flowers*).)

Both types of penalties are implicated here. The jury found that CSU violated three Cal-OSHA statutory provisions that do not themselves provide for penalties (§§ 6401, 6401.7, subd. (a), & 6403). And it found that CSU violated four Cal-OSHA regulatory provisions that do provide for penalties (Cal. Code Regs., tit. 8, §§ 5208, subds. (k)(1) & (k)(7), 1529, subd. (*l*)(3), & 5142, subd. (b)(1)). The jury also found, however, that Sargent did not personally suffer from any of these regulatory violations. Lastly, the jury found that CSU violated section 232.5, subdivision (a), of the Whistleblower Protection Act, but this provision also does not itself provide for a penalty.

b. Analysis.

(1) Sargent was an "aggrieved employee" for one of his PAGA claims.

Appellants first contend that Sargent cannot recover on his PAGA claims because he was not an "aggrieved employee" under PAGA since the jury found that the claims premised on Cal-OSHA were not committed against him personally. Under PAGA, an "aggrieved employee" is defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).) Sargent was such an employee on only one of his PAGA claims (the sole one not

based on Cal-OSHA), for impermissibly requiring that he personally refrain from disclosing information about CSU's working conditions as a condition of employment (§ 232.5, subd. (a)).

The Supreme Court recently clarified that "[e]mployees who were subjected to *at least one* unlawful practice have standing to serve as PAGA representatives *even if they did not personally experience each and every alleged violation*." (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 85, 259 Cal.Rptr.3d 769, 459 P.3d 1123, italics added.) Sargent alleged and proved that he was subjected to at least one unlawful practice for purposes of PAGA, and he therefore had standing as an aggrieved employee under *Kim* to bring all of his PAGA claims.

(2) CSU is subject to PAGA claims based on violations of Labor Code provisions that themselves provide for penalties.

The parties devote most of their PAGA arguments to whether CSU is a "person" for purposes of the statute, and the California Employment Lawyers Association has filed an amicus curiae brief in support of Sargent's argument that CSU fits the statutory definition. These arguments focus mostly on the word in the abstract and ignore that it is used in PAGA to describe one type of penalty, but not the other. In our view, the divergent statutory language matters.

We begin our statutory analysis with section 2699, subdivision (a), which does not refer to a "person." It states that "any provision of this code that provides for a civil penalty to be assessed and collected by the [Labor Agency or related entities] 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." In other words, this provision broadly declares that any employer that is subject to a civil penalty assessed and collected by the Labor Agency is subject to PAGA. Here, Sargent sought PAGA penalties based on violations of Cal-OSHA, and there is no dispute that CSU is subject to Cal-OSHA. (§§ 3300, subd. (a) ["employer" means the state and every state agency], 6304 [under Cal-OSHA, "employer" has same meaning as in § 3300].) Section 2699.3, subdivision (b), sets forth pre-filing requirements for pursuing PAGA claims based on Cal-OSHA, and CSU does not appear to dispute that Sargent complied with those requirements.

***7** Thus, under the plain language of section 2699, subdivision (a), CSU is subject to PAGA claims for violating Cal-OSHA provisions "*that provide[ ] for a civil penalty*." (Italics added.) We reject the notion that CSU, which has long been an employer subject to these penalties in actions brought by the Labor Agency, is somehow not an employer subject to these same penalties in actions brought by aggrieved employees. In short, CSU is subject to liability under PAGA for claims brought by an aggrieved employee alleging violations of Labor Code provisions that themselves provide for civil penalties.

(3) CSU is not a "person" subject to PAGA claims based on violations of Labor Code provisions that do not themselves provide for penalties.

While "person" is not referenced in section 2699, subdivision (a), it is used later in the section, but not until subdivision (f). Subdivision (c) defines "aggrieved employee" as "any person who was employed by the alleged *violator*" (italics added), and subdivision (d) explains how an "employer" can "cure" a violation, with no reference to a "person." Subdivision (e) sets forth the discretion the trial court has in assessing penalties, again with no reference to a "person."

Subdivision (f) then sets civil penalties "[f]or all provisions of this code *except those for which a civil penalty is specifically provided*." (Italics added.) It continues: "(1) If, at the time of the alleged violation, *the person* does not employ one or more employees, the civil penalty is five hundred dollars. ($500.) [¶] (2) If, at the time of the alleged violation, *the person* employs one or more employees, the civil penalty 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." (Italics added.)[6] Taken together, this language establishes that "a person" who violates a Labor Code provision that does not itself provide for a penalty is liable for the specified default penalty. (§ 2699, subd. (f).)

In deciding whether CSU can be considered such a "person," we look to section 2699, subdivision (b), which provides that "[f]or purposes of this part, 'person' has the same meaning as defined in Section 18." Section 18, in turn, defines "person" as "any person, association, organization, partnership, business trust, limited liability company, or corporation." Appellants contend that CSU does not fit this definition of a person because it is a public entity. (Gov. Code, § 940.6; Ed. Code, §§

66600, 66601.) We agree. While terms such as "association" or "organization" (§ 18) may generally cover an entity such as CSU, section 18 "contains no words or phrases most commonly used to signify ... public entities or governmental agencies." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190, 1178–1179, 48 Cal.Rptr.3d 108, 141 P.3d 225 (*Wells*) [public school districts are not "persons" that may be sued under California False Claims Act, Gov. Code, § 12650 et seq.].) "A traditional rule of statutory construction is that, absent express words to the contrary, governmental agencies are not included within the general words of a statute." (*Wells* at p. 1192, 48 Cal.Rptr.3d 108, 141 P.3d 225; see also *California Correctional Peace Officers' Assn. v. State of California* (2010) 188 Cal.App.4th 646, 653, 115 Cal.Rptr.3d 361 [same, quoting *Wells*]; *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729, 736, 95 Cal.Rptr.3d 53 [established rule that "public entities are not subject to a general statute unless expressly included"].) Under the holding and rationale of *Wells*, CSU is not a "person" within the meaning of PAGA, and it is therefore not subject to PAGA's default penalties.[7]

***8** The authority cited by Sargent does not dictate a contrary result. Sargent points out, correctly enough, that the Unruh Act's definition of "person" (Civ. Code, § 51.5, subd. (a)) is similar to PAGA's. But that legislation prohibits discrimination *against* a "person." (*Ibid.*) Those *subject* to the act include any "business establishment of any kind whatsoever" (*ibid.*), which is much broader than the definition of "person." And while *State of California v. Marin Municipal Water Dist.* (1941) 17 Cal.2d 699, 704, 111 P.2d 651, held that a county water district was subject to a statute defining "person" as "any person, firm, partnership, association, corporation, organization, or business trust," *Wells* is more recent authority.

In arguing that the University is wholly immune from suit under PAGA, appellants misconstrue legislative history. They first point to an Assembly committee's analysis remarking that the fiscal effect of the bill would be "*[p]otential* increased penalty revenue to the General Fund." (Assem. Com. on Appropriations, Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended July 16, 2003, p. 2.) (Italics added.) They argue that this means the Legislature did not anticipate *any* negative fiscal effect from penalties being imposed against state agencies, but we disagree. But even if PAGA suits lead to some penalties being collected from state agencies—i.e., penalties for violating Labor Code provisions that themselves provide for penalties—the general fund would likely still realize "potential increased penalty revenue" considering the amounts it would receive collectively from all employers.

Appellants also point to a Senate committee analysis explaining that the state was not collecting all potential penalties from "businesses" that make up the state's underground economy. (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended April 22, 2003, p. 2.) Appellants suggest that this comment means that the Legislature did not believe that state agencies were violating labor laws. But the same Senate analysis states broadly that the proposed legislation "would allow employees to sue their *employers*," with no limitation on whether the employer was public or private. (*Id.* at p. 1, italics added.)

Finally, we note that while we are aware of no published cases that address whether a public agency is a "person" for purposes of PAGA, employees have successfully sued their public employers under the statute. (*Hawkins v. City of Los Angeles* (2019) 40 Cal.App.5th 384, 387, 252 Cal.Rptr.3d 849 [affirming award of PAGA penalties against city]; *Flowers, supra*, 243 Cal.App.4th at pp. 72, 86, 196 Cal.Rptr.3d 352 [reversing the sustaining of a demurrer to PAGA cause of action for violations of minimum wage requirements].) It appears that in *Flowers*, plaintiffs sought preexisting penalties. (*Flowers*, at p. 86, 196 Cal.Rptr.3d 352.)

Having concluded that Sargent was an aggrieved employee because at least one Labor Code violation was committed against him, and having further concluded that CSU is subject to PAGA claims premised on Labor Code provisions that themselves provide for penalties, we turn to how these rules apply in this case. The trial court concluded that Sargent was entitled to recover under PAGA both preexisting civil penalties (§ 2699, subd. (a)) and default penalties (§ 2699, subd. (f)). The court ultimately awarded only default penalties and declined to award any preexisting penalties because "they would be inherently duplicative."

We conclude, however, that the entire award of PAGA penalties must be reversed.[8] PAGA penalties cannot be sustained on Sargent's claims premised on statutory provisions that do not themselves provide for penalties. These include the claims that CSU violated Cal-OSHA by failing (1) to furnish and use safety devices and safeguards (§ 6401), (2) to establish an effective injury-prevention program (§ 6401.7, subd. (a)), and (3) to keep its place of employment safe (§ 6403). They also include the claim that CSU violated section

232.5, subdivision (a), of the Whistleblower Protection Act, the only non-Cal-OSHA statute upon which the PAGA claim was premised.

***9** PAGA penalties also cannot be sustained on Sargent's claims premised on the Cal-OSHA regulations because, even though they provide for penalties, the jury determined that Sargent had not personally suffered from the violations. These include the claims that CSU violated Cal-OSHA by failing (1) to keep all surfaces as free as practicable of asbestos-containing materials (Cal. Code Regs., tit. 8, § 5208, subd. (k)(1)), (2) to properly care for asbestos-containing flooring material (Cal. Code Regs., tit. 8, § 5208, subd. (k)(7)), (3) to comply with proper housekeeping standards with respect to asbestos (*id.*, § 1529, subd. (*l*)(3)), and (4) to inspect and timely repair its heating, ventilating, and air conditioning system (*id.*, § 5142, subd. (b)(1)). Although jurors found that one basis for PAGA liability personally affected Sargent, that violation, again, does not provide for a penalty (§ 232.5, subd. (a)).

B.-C.[**]

III.

Disposition

In A153072, the judgment is affirmed in part and reversed in part. The case is remanded to the trial court with directions to strike from the judgment the penalties awarded under PAGA.

In A154926, the award of attorney fees is affirmed.

Each side shall bear its own costs of appeal.

WE CONCUR:

Justice Margulies, J.

Banke, J.

All Citations

--- Cal.Rptr.3d ----, 2021 WL 836135

Footnotes

[*] Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II B and II C.

1 Although trial witnesses sometimes referred to this agency as “Cal OSHA,” as it is commonly known, the division is formally known as the Division of Occupational Safety and Health, or DOSH. (2 Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2019) ¶ 13:16, p. 13-3.)

2 As part of this litigation, the parties in spring 2016 collected dust samples at Stevenson Hall for testing. In one office, test results showed 28,000 asbestos fibers per square centimeter.

3 All further statutory references are to the Labor Code unless otherwise specified.

4 The jury awarded Sargent $271,895 in past and future economic damages, but he elected the equitable remedy of reinstatement in lieu of those damages. The jury also awarded Sargent $116,000 in noneconomic damages, which were included in the judgment. Other than their claim that appellants are entitled to a new trial because the court allegedly abused its discretion in excluding certain defense testimony, appellants do not challenge the jury's determinations, or the relief awarded, on the retaliation claims.

5 The trial court overruled the demurrer and denied a related motion to strike but did not specifically address the Education Code. CSU and Dawson sought review in this court by way of a petition for a writ of mandamus, which this court denied. (*Board of Trustees of the California State University v. Superior Court* (July 19, 2016, A148570, petn. den. [nonpub. order]).)

6 The final reference to “person” is in subdivision (h), which provides that an aggrieved employee may not bring an action if “a person” is cited for the same section or sections of the Labor Code under which an employee is attempting to recover. This subdivision is not implicated here.

7 In light of this ruling, we need not address appellants’ separate argument that Sargent could not base his claims on Cal-OSHA's “general duty” provisions (§§ 6401; 6401.7, subd. (a); 6403) on the theory that they cannot be maintained derivatively under PAGA. (See § 6317 [citations where employer “has violated ... any standard, rule, order, or regulation established pursuant to this part”]; *In re the Appeal of Gray Line Tours* (Sept. 16, 1975, Cal. Dept. Industrial Relations) 1975 WL 23373 [Division of Industrial Safety may not issue citation under § 6401 because it is not a “standard, rule,

order, or regulation" under § 6317].) These "general duty" provisions do not carry preexisting civil penalties and thus are not recoverable against CSU, whether or not they are actionable under PAGA against other types of employers.

8 In light of this holding, we need not address appellants' argument that the amount of civil penalties awarded exceeded lawful bounds.

** See footnote *, *ante*.

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