NO. 19-_____

In the Supreme Court of the United States

FRANCISCA GUILLEN,
INDIVIDUALLY AND AS CLASS REPRESENTATIVE,

Petitioners,

v.

DOLLAR TREE STORES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was error not to instruct a jury on the law set forth in almost 20-years of opinions of California's Department of Labor Standards Enforcement holding that California's pay stub statute, Labor Code section 226, requires that where an employer elects to furnish electronic wage statements, the employer must provide easy access to all electronic wage statements for the preceding three years, and whether this question must be analyzed according to how the California courts would decide it with particular reference to California's rule that labor statutes be construed for the protection of employees?

2. Where the employees' ease of access to their electronic wage statements was an issue of fact for the jury, does a district court have the discretion to exclude evidence of the ease of access to wage statements for employees of the defendant employer's related companies?

PARTIES TO THE PROCEEDINGS

Petitioner Francisca Guillen, an individual, on behalf of herself and all others similarly situated was the plaintiff and class representative of a certified class in the district court proceedings and appellant in the Court of Appeals proceedings.

Respondent Dollar Tree Stores, Inc. was the defendant in the district court proceedings and appellee in the Court of Appeals proceedings.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

Case No. 17-56779

Francisca Guillen, an Individual, on Behalf of Herself and All Others Similarly Situated v. Dollar Tree Stores, Inc., a Virginia Corporation; Does, 1-100, Inclusive

Opinion Date: April 30, 2019

United States District Court
Central District of California

Case No.: cv-15-3813-MWF (PJWx)

Francisca Guillen, an Individual, on Behalf of Herself and All Others Similarly Situated v. Dollar Tree Stores, Inc., a Virginia Corporation; Does, 1-100, Inclusive

Verdict Date: November 7, 2017

Entry of Judgment After Trial Date: November 15, 2017

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PETITION FOR WRIT OF CERTIORARI

Francisca Guillen, for herself and the certified class, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit filed on April 30, 2019 is included herein at App.1a. A jury verdict was rendered in the United States District Court for the Central District of California on November 7, 2017 (App.8a) and entered into judgment on November 15, 2017 (App.5a).

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit's memorandum opinion was filed on April 30, 2019. App.1a.

The district court had jurisdiction under 28 U.S.C. §§ 1332(d) and 1441(b), following removal from the Superior Court for the County of Los Angeles, State of California.

STATUTE INVOLVED

California Labor Code § 226. App.22a.

STATEMENT OF THE CASE

Petitioner Francisca Guillen worked as a non-exempt employee at one of respondent Dollar Tree Stores, Inc.'s retail stores in California. Until April 2008, Dollar Tree gave employees a hard copy wage statement, *i.e.*, a paper pay stub, regardless of whether the employees received a paper payroll check or opted for direct deposit. Then Dollar Tree implemented a policy whereby employees who chose electronic wage payment (direct deposit or a pay card) were no longer given paper pay stubs as required by Labor Code section 226 but instead were limited to using a store cash register to view their wage information.

Under the new policy, an employee wanting to view his or her wage information was forced to go to a store that was open, find an unused cash register and, in front of the public and coworkers, press a key to bring up the sign-on screen for the pay stub application, enter an employee ID number and password, and a list of the last five pay stubs came up which the employee could view on the cash register and print on the cash register tape.

This was part of Dollar Tree's plan both to shift employees to direct deposit and save the company the cost of printing, shipping and distributing paper

checks and pay stubs. Employees were not told, however, that by choosing direct deposit they were giving up their right to paper pay stubs. Dollar Tree then used a carrot-and-stick approach; employees who wanted to go back to traditional paper wage statements were not allowed to have direct deposit.

The policy change only applied to the most economically vulnerable, that is, low-earning store employees and not to corporate employees. Corporate employees were given the convenience and easy access of twelve months of payroll data wherever and whenever they wanted simply by logging onto Dollar Tree's website.

Store-level employees thus were barred from obtaining or viewing their wage statements via the internet, even though Dollar Tree admitted it could be done and there was no significant cost difference between that and the in-store cash register method. Dollar Tree proceeded on the remarkable assumption that store employees might not have ready access to the internet, and so restricting them to accessing their wage data from cash registers was most convenient for those employees.

As a result of this policy, store-level employees were deprived of the ability to readily access their pay stub data to, *e.g.*, determine whether they were credited with all hours worked or received proper payment for overtime and holiday pay, the very concerns Labor Code section 226 was designed to address.

On April 20, 2015, Curtis Patton sued Dollar Tree in the Los Angeles County Superior Court alleging, *inter alia*, that Dollar Tree failed to provide accurate itemized wage statements, and failed to provide printed wage statements, or easily accessible electronic wage

statements in lieu of printed wage statements, in violation of Labor Code section 226. The case was brought as a class action and was removed to the district court under the Class Action Fairness Act. Petitioner joined the action as a representative plaintiff by amended complaint. On February 7, 2017, the district court certified a class for the Labor Code section 226 cause of action.

Prior to trial, Dollar Tree moved in limine to exclude evidence regarding "the wage distribution methods used by other employers, including Family Dollar, Dollar General," including on the ground that it was not relevant and would be prejudicial, confusing and misleading to the jury. The motion was directed primarily at petitioner's expert Eric Lietzow, and Julie Sullivan and Armando Maravilla, managers at Dollar General and Family Dollar, respectively. Petitioner argued that the jury was entitled to hear evidence of how other employees are paid in order to properly consider whether Dollar Tree provided "easy access" to the wage statements under a "reasonable person" standard.

The district court granted the motion in limine as to petitioner, Mr. Lietzow, and Mr. Maravilla, deciding they could not testify as to other employers' wage statement programs on the basis that what another employer chose to do was not helpful to the jury. App. 12a, 21a. Ms. Sullivan was withdrawn as a witness.

On October 3, 2017, the parties submitted their Disputed Jury Instructions which included petitioner's proposed special jury instruction no. 64:

> LABOR CODE § 226
> DURATION OF ACCESS TO ELECTRONIC WAGE STATEMENT INFORMATION
>
> Employees who are provided with wage statement information by electronic means must retain the ability to access the information for downloading and printing for a period of no less than three years.
>
> [Authority: Cal. Lab. Code § 226(a); DLSE Op. Ltr. No. 2006.07.06; DLSE Op. Ltr. No. 2002.12.04; DLSE Op. Ltr. No. 1999.07.19; *Derum v. Saks & Co.* (S.D.Cal.2015) 95 F. Supp.3d 1221; *Apodaca v. Costco Wholesale Corp.* (C.D.Cal.) 2014 WL 2533427; *Apodaca v. Costco Wholesale Corp.* (C.D.Cal.) 2012 WL 12336225.]

The district court decided that as a matter of law and despite the consistent constructions in three opinion letters by the Department of Labor Standards Enforcement ("DLSE"), *supra*, California's labor law enforcement agency, section 226 did not require the employer to provide access to three years of electronic wage statements and so refused the instruction. App. 10a.

Trial commenced on November 2, 2017. On November 7, 2017, a seven-person jury reached a verdict in favor of Dollar Tree. App.8a. Judgment was entered on November 15, 2017 (App.5a) and the notice of appeal was filed on November 21, 2017.

On April 30, 2019, the Ninth Circuit filed a Memorandum affirming the judgment. App.1a.

REASONS FOR GRANTING THE PETITION

I. THE REFUSAL TO INSTRUCT THE JURY THAT AN EMPLOYER MUST PROVIDE EMPLOYEES EASY ACCESS TO ELECTRONIC WAGE STATEMENTS FOR THE PRECEDING THREE YEARS IN ACCORDANCE WITH LONG-STANDING INTERPRETATIONS OF CALIFORNIA LAW DEPRIVED EMPLOYEES OF THE BENEFITS OF A STATUTE ENACTED EXPRESSLY FOR THEIR PROTECTION.

It is estimated that millions of California employees in both the public and private sectors receive their wages electronically by direct deposit and payroll debit cards. For instance, 75 percent of the State's employees use direct deposit.[1] California's wage laws have not kept pace and Labor Code section 226, which sets out wage statement requirements, has no provision for electronic wage statements. Instead, the language of section 226 requires that employers furnish employees with "an accurate itemized statement in writing," of wages earned, hours worked, etc., "either as a detachable part of the check . . . paying the employee's wages, or separately when wages are paid by personal check or cash." Cal. Lab. Code § 226(a).

Over the past 20 years, the DLSE,[2] issued opinion letters to harmonize section 226 with now-ubiquitous

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1 https://www.sco.ca.gov/ppsd_empinfo_demo.html (accessed July 26, 2019).

2 The DLSE "is the state agency empowered to enforce California's labor laws . . . ." *Tidewater Marine Western, Inc. v. Bradshaw,*

electronic wage payment methods. Cal. Lab. Code § 226(a); DLSE Op. Ltr. No. 2006.07.06; DLSE Op. Ltr. No. 2002.12.04; DLSE Op. Ltr. No. 1999.07.19. The DLSE consistently advises that employers wishing to switch to electronic wage statements from the paper pay stubs required by section 226(a) must provide employees easy access to electronic wage statements for the preceding three years.

The DLSE's guidance was first set out in a 1999 Opinion Letter as an alternative section 226 compliance scheme subject to certain requirements. In the July 19, 1999 Opinion Letter, the DLSE's Chief Counsel responded to a letter from a California State Senator and an Assemblywoman which itself followed a letter from a payroll services company seeking approval of its proposed electronic wage statement program. The Opinion Letter explained why it rejected the payroll services company's proposal to limit the electronic wage statements available on a website to one year, with year-end summaries for the previous three years.

> Employees who do not opt-out from the system of electronic wage statements may or may not choose to print each electronic statement at the time it is generated. Many employees may decide not to expend the time and energy (however minimal an amount that may be) needed to download and print the data each pay period, and instead, will rely on the data's accessibility in the computer system should they ever feel the need to later obtain a hard copy of prior wage deduction

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14 Cal.4th 557, 561-562 (1996) (citing Cal. Lab. §§ 21, 61, 95, 98-98.7, 1193.5).

> statements. Since this information is required to be maintained by the employer for at least three years, and since California law provides for a three year statute of limitations for actions based on statute, we believe that an employer who elects to comply with Labor Code § 226 by offering electronic wage deduction statements must make all of the information required under that statute available to employees for downloading and printing for no less than three years; a "year-end summary" is not sufficient.

DLSE Op. Ltr. No. 1999.07.19 at 6 (emphasis added).

The DLSE explained, "the purpose behind section 226 is to ensure that employees have the ability to maintain their own set of pay records." DLSE Op. Ltr. No. 1999.07.19 at 5. However, if the employer wants to use electronic wage statements, it has to accept that some employees will not print them out and instead, "rely on the data's accessibility in the computer system should they ever feel the need to later obtain a hard copy of prior wage deduction statements." *Id.* at 6.

There followed the December 4, 2002 Opinion Letter in response to an inquiry from the American Payroll Association which recited the same requirement:

> The proposal [set out in the 1999 Opinion Letter] accepted by the DLSE required that the employer who elects to comply with Labor Code § 226 by offering electronic wage deductions statement make all of the information required under that statute available to

> employees for downloading and printing for no less than three years as required by the statute.

DLSE Op. Ltr. No. 2002.12.04 at 3.

The 1999 and 2002 Opinion Letters were superseded by a 2006 Opinion Letter. However, the 2006 Opinion Letter repeated the same requirement:

> The apparent intent of both forms of wage statements described in Section 226(a) is to allow employees to maintain their own records of wages earned, deductions, and pay received. The Division in recent years has sought to harmonize the "detachable part of the check" provision and the "accurate itemized statement in writing" provision of Labor Code section 226(a) by allowing for electronic wage statements so long as each employee retains the right to elect to receive a written paper stub or record and that <u>those who are provided with electronic wage statements retain the ability to easily access the information</u> and convert the electronic statements into hard copies at no expense to the employee.

DLSE Op. Ltr. No. 2006.07.06 at 2-3 (emphasis added); *see also Derum v. Saks & Co.* 95 F.Supp.3d 1221, 1226-1227 (S.D.Cal. 2015) (adopting 2006 Opinion Letter's analysis regarding electronic wage statements, including the requirement that "those who are provided with electronic wage statements <u>retain the ability to easily access the information</u> and convert the electronic statements into hard copies at no expense to the employee.") (emphasis added).

The DLSE's choice of the word "retain" meaning "[c]ontinue to have (something); keep possession of," and "to keep or continue to have something,"[3] made plain that one-off access to an electronic wage statement or even the five electronic wage statements in Dollar Tree's program is not sufficient compliance with section 226. Rather, the DLSE plainly intended that the employees continue to have "the ability to easily access the information." If the DLSE meant to refer only to one wage statement, the phrase would not make any sense. The DLSE could have said that the employee must have easy access to an electronic wage statement, full stop. By adding the words "retain" and "the information," the DLSE plainly intended continuing access to the three years of wage statements which section 226 already and independently mandates the employer must keep. Cal. Lab. Code § 226(a) ("[A] copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California."). Equally important is that requiring that the employees "retain the ability to easily access the information," is exactly what the DLSE's prior letters mandated for section 226 compliance.

Thus, by the 2006 Opinion Letter, the Labor Commissioner determined that an employer satisfied section 226(a), as it met all of the requirements for electronic wage statements, including the same requirement found in the 1999 Opinion Letter that, "Wage statements will

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[3] https://en.oxforddictionaries.com/definition/retain; https://dictionary.cambridge.org/dictionary/english/retain (accessed July 26, 2019).

be maintained electronically for at least three years and will continue to be available to active employees for that entire time." DLSE Op. Ltr. No. 1999.07.19 at 3; DLSE Op. Ltr. No. 2006.07.06 at 7.

The DLSE's interpretation of section 226 thus capitulates to reality and although the statute is not ambiguous the interpretation yet finds support in the more general principles guiding statutory construction. "[A] court's 'overriding purpose' in construing a statute is 'to give the statute a reasonable construction conforming to [the Legislature's] intent [citation]. . . . ' [Citation.] 'The court will apply common sense to the language at hand and interpret the statute to make it workable and reasonable.'" *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 567 (2007); *accord*, *Yohner v. California Dept. of Justice,* 237 Cal.App.4th 1, 8 (2015). The DLSE's approach makes sense by finding a way to preserve the protections for employees at the heart of section 226 and at the same time allow employers and employees both to reap the benefits of electronic wage payments.

The DLSE explained why section 226's purpose in protecting the interests of the employees required that electronic wage statements otherwise existing in the digital ether be treated a bit differently than the hard copies handed directly to the employees. Disregarding this guidance from the agency charged with enforcing California's labor laws also ignored the mandate that California's labor laws must be construed broadly for the benefit and protection of the employees.

The DLSE's construction of a statute is "entitled to consideration and respect." *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1106, fn. 7 (2007).

This is especially true where, as here, the DLSE's construction of the statute reflects a consistent position over time. *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 13 (1998) (position more deserving of weight where agency has "consistently maintained the interpretation in question"); *Murphy, supra*, at 1106, fn. 7 (agency's construction not entitled to "significant deference" where it contradicts its original interpretation).

Moreover, in light of the DLSE's having maintained its statutory interpretation without change since 1999, it deserves particular weight where it is the only known authority on whether and under what circumstances electronic wage statements satisfy section 226(a). *See Cornn v. United Parcel Service, Inc.*, 2005 WL 588431, *3 (N.D.Cal.) (unless it reflects an inconsistent agency position, "the Court would be inclined to follow the only known authority on a particular issue").

None of this is found in the Court of Appeals' analysis, which makes no reference to the decades of consistent interpretation by the DLSE or to the public policy that animates section 226. The latter is particularly critical as it remains the touchstone by which a California state court interprets statutes like section 226 as part of the foundational protections for California employees.

"[T]he state's labor laws are to be liberally construed in favor of worker protection." *Alvarado v. Dart Container Corp. of California*, 4 Cal.5th 542, 561-532 (2018) (citing *Mendoza v. Nordstrom, Inc.*, 2 Cal.5th 1074, 1087 (2017); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1026-1027 (2012); *Industrial*

Welfare Com. v. Superior Court, 27 Cal.3d 690, 702 (1980); *Murphy, supra*, at 1103 (given the Legislature's remedial purpose, "statutes governing conditions of employment are to be construed broadly in favor of protecting employees"). This rule is by now a mandate petrified given the number of times that the California Supreme Court has admonished on this fundamental instruction over the decades.

The rule applies to section 226 with full force. "The Legislature enacted section 226 to ensure an employer 'document[s] the basis of the employee compensation payments' to assist the employee in determining whether he or she has been compensated properly. [Citations.] Section 226 'play[s] an important role in vindicating [the] fundamental public policy' favoring 'full and prompt payment of an employee's earned wages.' [Citation.]" *Soto v. Motel 6 Operating, L.P.*, 4 Cal.App.5th 385, 390 (2016).

The fact that the DLSE has since withdrawn the 1999 and 2002 letters is of no import as the reason it did so was merely to dispel confusion over whether employers were required to get DLSE approval for electronic delivery of wage statements in California. *See also Murphy, supra*, at 1106, fn. 7 (relying on withdrawn opinion letters to determine consistency of interpretation by DLSE).

Therefore, it was incumbent upon the federal courts here to interpret and apply section 226 as the California state court would do, with particular attention to the interests of the employees that the statute is aimed at protecting. "In the absence of a controlling decision from a state supreme court, a federal court must interpret state law as it believes

the state's highest court would." *Dias v. Elique*, 436 F.3d 1125, 1129 (9th Cir. 2006).

Petitioner proposed a jury instruction setting forth this condition as a basis for violating section 226 given Dollar Tree's admitted practice of failing to make the wage statement information for the preceding three years accessible to employees. The district court adopted the DLSE's opinion but refused the instruction deciding that this one condition was not found in section 226. In so doing, the district court erred in determining California law, in failing to determine how a California state court would decide the issue, and by disregarding the opinion letters, and incorrectly instructing the jury on the law.

"A party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence." *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). "In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered." *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (internal quotation marks and citations omitted).

Petitioner's proposed instruction no. 64 was supported by the law and had a foundation in the evidence. The instruction came right out of the DLSE's Opinion Letters' requirements for employers that want to use electronic pay stubs and is further supported by the rules on construction of labor statutes that, like section 226, are founded on a fundamental purpose aimed at protecting employees.

II. WHERE "EASY ACCESSIBILITY" WAS THE DISPUTED ISSUE FOR THE TRIER OF FACT, IT WAS ERROR TO EXCLUDE EVIDENCE OF THE EASE OF ACCESS TO WAGE STATEMENT INFORMATION DEFENDANTS PROVIDED TO EMPLOYEES OF BY DOLLAR TREE'S RELATED COMPANIES.

The district court abused its discretion in refusing to permit petitioner to put on evidence of how Dollar Tree's related companies pay their employees, including that the employees can access their wage statements via the internet. The employees' "ease of access" was a factual issue to be decided by the jury and the jury was entitled to hear evidence of what "ease of access" means with reference to ongoing and real-world practices of other employers, instead of being limited to what the Dollar Tree determined was "ease of access" for its own employees, only.

To judge whether the electronic wage statements were "easily accessible," the jury was entitled to hear evidence of how the other members of Dollar Tree's corporate family receive their statements. Whether wage statements are easily accessible has to be informed by methods that are available. *See, e.g.*, *In re Myford Touch Consumer Litigation*, 2018 WL 3646895, *5 (N.D.Cal.) ("[T]he knowledge of a reasonable consumer may have fluctuated over time . . . ."). At one time, a library card and working knowledge of the Dewey decimal system made information "easily accessible," a notion which is now quaint. Similarly, employees of respondent's related company Family Dollar, who can pull up their wage statements at any time of day or night from anywhere they choose and peruse them in solitude, provide evidence of what is "easily access-

ible," that informs the question versus Dollar Tree's employees who can only go to a store when its open, have to log onto a cash register and then view their payroll information midst the swirl of shoppers and coworkers. The point is that objective standards are not set in stone and may vary with time, experience, changed conditions, etc.

The district court saw the legal standard as whether the company's method was sufficient, not whether it was the best, and so determined that the evidence was not relevant, unduly prejudicial and a waste of time.

This error was compounded where Dollar Tree's witnesses were permitted to testify about how they had to have a corporate-issued virtual private network on corporate-issued laptops and iPads to get into Dollar Tree's secure network, pushing the impression that internet access to wage statements is somehow difficult.

Per the DLSE, it is not enough that the wage statements be accessible, they must be easily accessible. This question is one of fact that must be answered by a jury applying a reasonable person standard, taking into account evidence of how consumers today are accustomed to accessing information about themselves in light of available technology, including financial information such as banking and information received from employers. *Sherkate Sahami Khass Rapol (Rapol Constr. Co.) v. Henry R. Jahn & Son, Inc.*, 701 F.2d 1049, 1051 (2nd Cir. 1983) (application of reasonableness standard generally presents question of fact); *Foley v. Matulewicz*, 17 Mass.App.Ct. 1004, 1005 (1984) (jury has "unique competence in applying the reason-

able man standard to a given fact situation") (citing 10A Wright, Miller & Kane, Federal Practice & Proc. § 2427 at 194); *see also Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006) (objective standard of reasonable employee applied to lawfulness of employer's conduct).

Evidentiary rulings are reviewed for abuse of discretion. *Engquist v. Oregon Dep't of Agriculture*, 478 F.3d 985, 1008 (9th Cir. 2007). Errors will only support reversal if the error was prejudicial, or in the civil context, "more probably than not tainted the verdict." *Id.* at 1009. As the issue of "easy access" was a key dispositive issue and the first question on the verdict form (App.8a), there is no reasonable dispute but that the verdict was tainted by error.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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