

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER**

MINUTE ORDER

DATE: 01/05/2024 TIME: 01:30:00 PM DEPT: CX103

JUDICIAL OFFICER PRESIDING: Lon F. Hurwitz

CLERK: M. Diaz

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: D. Miranda

CASE NO: **30-2021-01207569-CU-WT-NJC** CASE INIT.DATE: 06/25/2021

CASE TITLE: **Ascencio vs. Toshiba America Business Solutions, Inc.**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Wrongful Termination

EVENT ID/DOCUMENT ID: 74108591

EVENT TYPE: Motion - Other

MOVING PARTY: Marielos Ascencio, Toshiba America Business Solutions, Inc.

CAUSAL DOCUMENT/DATE FILED: Motion - Other to approve settlement, 09/19/2023

APPEARANCES

Matthew Scholl, from Constangy, Brooks, Smith & Prophete, LLP, present for Defendant(s) remotely.

Zoe Yuzna, from Colby Law Firm, PC, present for Plaintiff(s) remotely.

Hearing held, all participants appearing remotely.

Tentative Ruling posted on the Internet .

The Court having fully considered the arguments of all parties, both written and oral, now makes the tentative ruling final, with the exception of Item 14, and ruling is as follows:

Motion for PAGA Approval

On September 19, 2023, the parties filed the current Joint Motion for Approval of PAGA Settlement. (ROA 128.) The PAGA claim is based on Defendant's alleged failure to provide accurate itemized wage statements. This is the first hearing on the matter.

SUMMARY OF SETTLEMENT AND SETTLEMENT ISSUES:

The fully executed PAGA Settlement Agreement is attached as Exhibit A to the Declaration of Zoe Yuzna. (ROA 126.)

1. Aggrieved Employees Definition: "All employees who worked for Toshiba in California during the PAGA Period and who received one or more wage statements during the PAGA Period." [Settlement, ¶ 1.4.]
2. PAGA Period: "The period from June 24, 2020 through July 28, 2021." [Id., ¶ 1.19.]
3. Number of Aggrieved Employees: 419 employees who worked a total of 11,893 PAGA Pay Periods.

[Id., ¶ 4.1.]

4. Gross Settlement Amount: \$100,000.00 [Id., ¶ 3.1.]

5. Net Settlement Amount: \$49,027.30 (PAGA Penalties), with 75% (\$26,770.48) to the LWDA and 25% (\$12,256.92) to the Aggrieved Employees. [Id., ¶ 3.2.3.]

6. PAGA Released Claims: Aggrieved Employees release with prejudice the Released Parties from any and all claims arising under PAGA that could have been made based on the allegations in the FAC or the PAGA Notice for any violation of Labor Code sections 226 and 226.3. [Id., ¶ 5.2.]

7. Plaintiff's Release: Plaintiff releases with prejudice the Released Parties "from all claims, transactions, or occurrences arising out of her employment with Toshiba, including but not limited to all claims that were, or reasonably could have been, alleged, based on the facts contained in the Operative Complaint and the PAGA Notice." Release does not extend to any claims or action to enforce Settlement Agreement, or to claims for vested benefits, unemployment benefits, disability benefits, Social Security benefits, or workers' compensation benefits. Release include Section 1542 waiver. [Id., ¶ 5.1.]

PAGA Counsel releases with prejudice the Released Parties from all claims for PAGA fees incurred in connection with the FAC and the PAGA Period facts stated in the FAC and the PAGA Notice. [Id., ¶ 5.3.]

8. Valuation of Claims: Based on an estimated 419 Aggrieved Employees who worked a total of 11,893 PAGA Pay Period. [Id., ¶ 4.1.]

ISSUE: Counsel does not provide any information in her declaration as to the valuation of the underlying claim of how the PAGA penalties were calculated. [See, Yuzna Decl.] The motion only provides a general discussion regarding the valuation of claims, but states that "[v]arious factors support settlement of the PAGA claim here for a portion of its maximum value." [Motion, 10:8-9.] The only "factor" that is mentioned in the Motion or counsel's declaration is that Defendant made good faith attempts to ensure it complied with the law by promptly updating its wage statements to address the violations alleged by Plaintiff. [Yuzna Decl., ¶ 13; Motion, 10:9-12.] Counsel must provide specific information for valuation of the Labor Code violations and assessment of PAGA penalties (i.e., with stacking vs. without stacking), including reasons for discount. This information must be provided to the Court so it can understand the assumptions/data that supports the valuation and GSA.

9. PAGA Payment: \$49,027.30, with 75/25 split between the LWDA and Aggrieved Employees. [Id., ¶ 3.2.3.]

10. Escalator Clause: No escalator clause contained in the Settlement Agreement.

ISSUE: Without escalator clause, Settlement Agreement does not address what will happen if the actual number of Aggrieved Employees and PAGA Pay Periods is higher than the estimate.

11. Payments to Aggrieved Employees: Pro rata share of 25% of PAGA Penalties (\$12,256.92) based on number of pay periods each worked during PAGA Period. [Id., ¶ 3.2.3.1] Aggrieved Employees assume full responsibility for any taxes owed on their individual payment. PAGA payments will be reported to IRS. Settlement checks are negotiable for 120 days, and thereafter will be voided. Funds from uncashed checks will be transmitted to State Controller's Unclaimed Property Fund. [Id., ¶ 4.4.]

ISSUE: Check cashing period should be at least 180 days.

12. Disbursements:

\$ 40,000.00 Attorneys' fees (NTE 40% of GSA)

\$ 5,972.70 Litigation costs (NTE)

\$ 5,000.00 Administration costs

ISSUE: Counsel only generally attests as to attorneys' fees of 40% of GSA. Counsel does not provide lodestar or litigation costs detail. Court is not inclined to award more than 1/3 of GSA for attorneys' fees. Counsel must provide detailed information regarding hours expended and hourly rates for each attorney who worked on litigation, as well as hours and rates for paralegal and other staff members. Counsel also does not explain why there is no enhancement award to Plaintiff.

13. Settlement Administration: Settlement Administrator is ILYM Group, Inc. [Id., ¶ 7.1.] Administration costs up to \$5,000.00. [Id., 3.2.2.]

ISSUE: Settlement does not provide that administrator must post the operative Complaint, Notice to Aggrieved Employees, and Order and Judgment on its website. Administrator must provide invoice of fees and expenses.

15. Other Pending Actions: Counsel attests that the parties are unaware of any other class or representative action currently pending that asserts similar claims. [Yuzna Decl., ¶ 12.]

16. Notice to LWDA: Counsel attests that the settlement and Motion for Approval of PAGA Settlement were submitted to the LWDA on September 19, 2023. [Yuzna Decl., ¶ 14.]

ISSUE: Counsel has not provided a copy of the LWDA notice letter, or proof that the settlement and motion have been served on the LWDA.

17. Continuing Jurisdiction: Settlement states that Court will retain jurisdiction to enforce the settlement, address settlement administration matters, and other such post-Judgment matters as permitted. [Settlement, ¶ 9.]

ISSUE: Settlement must state that continuing jurisdiction is pursuant to CCP § 664.6.

ISSUES RE PAGA AWARD NOTICE:

The Notice is attached to counsel's declaration as Exhibit B. The following issues need to be resolved:

1. The Notice is to be revised consistent with the issues identified above.
2. Notice must state that the operative Complaint, Notice, and Order and Judgment are posted on the settlement administrator's website.
3. Notice should include details of Release.
4. Notice should explain that settlement check must be cashed within 180 days.
5. Notice should explain that funds from uncashed settlement checks will be transmitted to the State Controller's Unclaimed Property Fund.
6. Notice should explain that taxes are responsibility of individual employee.

ISSUES RE PROPOSED ORDER: (ROA 124)

The Proposed Order is wholly inadequate in that it consists of a single paragraph and does not provide any substantive information about the litigation or the settlement. Counsel must provide the Court with a proper and comprehensive Proposed Order.

RULING:

The Motion for Approval of PAGA Settlement is **CONTINUED** to March 8, 2024, at 1:30 p.m. in Department CX103 to give counsel an opportunity to address the issues identified above by the Court.

Counsel must file supplemental papers addressing the Court's concerns no later than fourteen (14) calendar days prior to the continued hearing date. Counsel must also provide red-lined versions of all revised papers, as well as an explanation of how the pending issues were resolved, with precise citation to any corrections or revisions. A supplemental declaration or brief that simply asserts the issues have been resolved, or does not clearly state a specific concern has been resolved, is insufficient and will result in a continuance.

Plaintiff to give notice of this Court's ruling, including to the LWDA, within five (5) calendar days, and file proof of service.