

Announcer ([00:06](#)):

Welcome to The Performance Review, Greenberg Traurig California Labor and Employment Law Podcast. Where we discuss and review important trends and topics for California employers, with host Ryan Bykerk and Philip Person.

Philip ([00:18](#)):

Welcome back!

Philip ([00:19](#)):

We're 12 episodes in and we haven't done a deep dive into the world of PAGA, the Private Attorney General Act.

Philip ([00:27](#)):

Luckily for our listeners, this episode, we'll discuss the framework of PAGA, how it works, the penalties associated with it, everything and a bag of chips. We'll also dive into the recent California Appellate Division case, dealing with manageability and discuss the impact it will have in the pocket space.

Ryan ([00:50](#)):

Yeah.

Ryan ([00:50](#)):

In that case, for those of you keep it track at home, it is the Wesson v. Staples, the Office Superstore LLC case that's found at 68 Cal. App. 5th 746.

Ryan ([01:00](#)):

That case came out this year and it deals with as Philip mentioned, manageability, right? So this is a big deal. It settles a somewhat long standing debate over manageability and whether that's relevant for PAGA claims and it just clarifies things really, for both sides of the aisle, speaking of both sides of the aisle.

Ryan ([01:21](#)):

Instead of just giving you the management side, we are very excited on this episode to have Marcus Bradley of Bradley/Grombacher to give the plaintiffs side perspective as we discuss the impact of this case.

Ryan ([01:33](#)):

Marcus is one of the named partners at Bradley/Grombacher, he's the Bradley, the name I can say with much greater ease. He routinely represents individuals in PAGA class and representative actions. And of course his opinion is obviously wrong in every way, because he is on the other side. But, we thought we'd keep this podcast balanced at least for one episode.

Ryan ([01:56](#)):

Marcus, thanks for joining us. Thanks for keeping us balanced, we appreciate it. Could you maybe just introduce yourself to our listeners and give us a little bit of your background?

Marcus ([02:04](#)):

My background is, I've been doing wage and hour and PAGA cases for over 20 years. I was around when there wasn't even PAGA, before 2004. So way back when we didn't have to deal with the nuance of PAGA, but here we are where the bulk of my practice now involves a PAGA claim. I also do some consumer cases, but most of the practices, wage and hour, has evolved into quite a PAGA practice, much to my chagrin.

Ryan ([02:42](#)):

All right. Well, thank you for being here, we appreciate it.

Philip ([02:46](#)):

Welcome to the podcast, it should be fine but if you say anything too controversial, we won't invite you to the next episode, but we're glad to have you for this one.

Marcus ([02:56](#)):

I'll keep it very benign. No controversy.

Philip ([02:58](#)):

There we go, there we go.

Philip ([03:01](#)):

Let's start off with an overview of PAGA and the Wesson case.

Philip ([03:08](#)):

Just as a background, PAGA is a statute that allows a person to sort of sit in the shoes of the labor commissioner to enforce some labor code violations. It's a scheme by which an individual can bring an action on behalf of the state to represent all aggrieved employees of a company. It's not necessarily a class action, but a representative action. There are massive penalties involved in this for noncompliance, which the recovery for those penalties are divided, 75% goes to the state and the other 25% goes to the employees. That's just a general high level background on PAGA.

Ryan ([03:44](#)):

Yeah.

Ryan ([03:44](#)):

We could probably spend many, many episodes talking about the intricacies of PAGA, but maybe Marcus, if there's anything you want to add, you kind of just mentioned, you alluded to this a little bit, about how it's become more and more a part of your practice. I think that's a result of changes in the case law, but is there anything you wanted to add to that very high level summary?

Marcus ([04:04](#)):

No, that's the nuts and bolts of it. I mean, there's some nuance, but that's basically what it is.

Marcus ([04:13](#)):

Representative plaintiff stands in the shoes of the state and whatever they recover, 75% goes to the state 25 to the aggrieved employees.

Philip ([04:24](#)):

There's one issue that really hasn't been addressed yet directly by appellate courts. That's definitely the concept of manageability, at least it wasn't addressed in the past from the management perspective. Which I don't know if Marcus, if you agree is the proper side, but prior to the new case, this was a somewhat novel argument in which a defendant argues that the court has its discretion to manage their cases, their trial, their workload, and that unless a plaintiff could present a manageable trial plan, PAGA shouldn't go forward. The court has the right to strike that from its docket courts were applying this concept without a ton of regularity but it did happen in certain respects.

Philip ([05:15](#)):

So Marcus, from plaintiff's perspective, what did you think about manageability arguments before Wesson?

Philip ([05:25](#)):

Maybe you'll call them the good old days?

Marcus ([05:26](#)):

In the good old days?

Marcus ([05:27](#)):

In class action, manageability predominance is a construct of class case, but after Arias, part of, PAGA you don't have to fulfill the class action requirements. So I'm kind of puzzled about manageability in a PAGA case. I'm not sure where that is coming from.

Marcus ([05:55](#)):

To be honest, though, in looking at this case, when I first heard about it, I was a little taken aback, but reading the opinion, not so much, because it seems very fact specific. But in just as a general proposition, manageability has never come up before because it's not really a part of PAGA and I'm somewhat concerned about the trial court judge pulling a requirement from a class case, although she denied it, but I'm not sure where a manageability requirement comes in on a PAGA case.

Ryan ([06:42](#)):

This will be me skipping ahead a little bit. Maybe it would make sense to talk about some of those facts of the case real quick and then we can maybe circle back to and maybe expand a little bit about on reactions there too and whether we think this is going to be the last word on this issue. I mean, it certainly is not going to be the last word, but what maybe some of the next words are going to be.

Ryan ([07:01](#)):

Let me maybe quickly go over the ruling of the case and we can circle back to some of that. As both Philip and Marcus have alluded to, this case steps into kind of a long standing debate, right? Courts have split on this issue and employers have argued for a long time that PAGA claims have to be manageable and some courts have agreed with that.

Ryan ([07:22](#)):

They've held, look just any, claim's going to have to be manageable. There's got to be some way to actually try it within the bounds of just reality. Who's going to put on how many witnesses? How long is it going to take?

Ryan ([07:34](#)):

Others have noted as, Marcus, you just mentioned, there's nothing in the PAGA statute itself that specifically says "it's got to be manageable," right? That the word doesn't appear in the statute and courts have declined to impose, some courts have declined to impose one. This court begins by noting that this is an issue of first impression and then it really gets into it but ultimately holds on its facts that even PAGA representative actions have to be manageable and that courts have the authority to strike PAGA actions that aren't.

Ryan ([08:05](#)):

Marcus, you mentioned the facts are important and of course they are in every case, but here are the basic facts.

Ryan ([08:11](#)):

A former employee sued his employer, alleging that among other things, the employer was liable for penalties under PAGA, stemming from the employers' misclassification of him and other similarly aggrieved employees as exempt employees, employees exempt from certain wage and hour protections.

Ryan ([08:27](#)):

The trial court ultimately ended up denying the plaintiff's motion for class certification, so this had been a hybrid class and PAGA action. After that, the employer moved to strike the plaintiff's PAGA claims on the grounds that it would've been unmanageable at trial, given the employer's affirmative defenses. The plaintiff argued, really two main arguments. The first one was that the court lacked authority to ensure that PAGA actions were manageable at all.

Ryan ([08:55](#)):

The second one was, that even if the court does have that kind of authority, the plaintiff argued that the case was actually manageable and as a part of that argument, argued that the plaintiff really only has to show that his prima facie case is manageable and that the affirmative defense is really shouldn't have been considered in the manageability equation.

Ryan ([09:15](#)):

It's kind of an interesting issue, right? Because this was a misclassification case where the prima facie case is fairly easy to establish. I worked hours over 40 for example, and wasn't paid for them, but the exemption, the affirmative defense is pretty fact intensive. The court ultimately agreed with the employer at a hearing on the plaintiff's proposed trial plan. The parties estimated that this case was going to need about six trial days per individual employee and since there were like 300 something employees at issue, the trial was going to last eight years. That was just not something anybody wants to do. I just can't imagine an eight year trial and apparently the court could not imagine that either. So following that, hearing the court, granted the employer's motion to strike commenting that even if you

were to cut the estimate in half, I think this is a quote, "a four year trial involving witnesses and documents individually pertaining to each of the 346 general managers does not meet any definition of manageability." I suppose I'd probably agree with that.

Ryan ([10:17](#)):

Thereafter after that was the trial court's ruling, the employee appealed the appeal, also involved an issue on app pending motion for summary adjudication that we're not going to address and that wasn't ultimately part of the published opinion, but the court of appeal affirmed. Trial courts have inherent authority to manage the proceedings before them and through that authority can ensure that PAGA claims are manageable. It reasoned that courts aren't powerless to address challenges presented by these PAGA cases and have the ability to sort of, depending on the breadth of the plaintiff's claims, dismiss parts, some or all of it.

Ryan ([10:52](#)):

The court went one step further stating "Look, if a PAGA claim can't be efficiently managed at trial, the court should preclude plaintiffs from using the representative action procedure."

Ryan ([11:04](#)):

Again, tons of facts there. I know that was a big description of what happened, but they are important here. I guess with that, Marcus you had mentioned that the facts are important. What are the ones that stick out to you as I go through that?

Philip ([11:22](#)):

Before you comment Marcus, I want to give a round of applause to Ryan for giving the summary of that. You have a career as a professor. I don't know if any law school professors could have summarized it the way you did, you kept us engaged with the facts and really very succinct.

Philip ([11:38](#)):

So back to Marcus.

Marcus ([11:47](#)):

[crosstalk 00:11:47]

Marcus ([11:47](#)):

One of the questions was, in three words, "what was my reaction?" My reaction is I'm not shocked. To give that some context, I'm not shocked because, knowing the trial judge, as I do, for as long as I have, Carolyn Kuhl, I think the first case I had with her was a class action. We were there for initial status conference and there was an issue with my plaintiffs because I list them as three different plaintiffs because they were afraid of the defendant.

Marcus ([12:16](#)):

In any case, at the initial status conference, defense counsel brings a list of 298 titles for this company on which I was trying to certify a class. I remember we went into the jury room, this was in Central Civil West in LA, way back when. We sat at a round table, she looks at me, looks at this list of titles and just looks at me and says, "How are you ever going to manage this class?" Like how is it predominance? She

couldn't get over the fact that there were 298 different categories or titles of employees. Ever since then, that that is always her big thing, manageability of a class, but I've never seen it as manageability of a PAGA action.

Marcus ([13:04](#)):

What I saw, I was like, "I get it." I think one of the things in reading the court of appeal opinion, I think there was this perceived intransigence by the plaintiff's counsel. When the trial court asked for a trial plan, he kind of refused to give the judge what she wanted. I suspect why it was the same issue when he went for class certification. So you're right, he has a class certification immense to include PAGA, tries to certify the class. One of the issues is he's asked to provide a trial plan for the class certification motion on the same issue of manageability. Will he loses a cert motion, now he stuck with a PAGA only action and the defense counsel jumps on that, on a procedural issue, on a motion to strike that and I don't know what authority they had to file a motion to strike.

Marcus ([14:04](#)):

In any event, he's asked for the same trial plan that contains the same burden to disprove the defendants affirmative defense of exemption. I think he just threw up his hands and said, "Well, what's the use? You didn't approve it the first time, you're not going to approve a trial plan this time." I think the court of appeal read into that he couldn't do it or wouldn't do it. I think that kind of, not led the opinion, but I think they were always thinking that like, "Gee, if you thought you had a manageable case to try, why didn't you tell the judge how you were going to do that?" I think reading between the lines he thought, "Why is it my burden to disprove the affirmative defense?"

Philip ([14:53](#)):

You brought up an interesting point, in that, it's whether he couldn't do it or wouldn't do it. The "couldn't do it" piece is really what I saw in the Wesson case and I wanted to get your thoughts on that Marcus.

Philip ([15:08](#)):

Going forward, what does this mean? Does this mean that your practice is going to start having to think about trial plans for a PAGA case, and you're going to have to present that to a trial court judge?

Marcus ([15:23](#)):

I think, if I was a defense attorney and I'd a misclassification case, [crosstalk 00:15:28] but that's one of the first things I'm asking for is a trial plan and, where warranted, in that trial plan to include this issue of the burden of the affirmative defense. I, but that pulls, and that's what I'm kind of struggling with, because that pulls from class actions. I don't know why that is plaintiff's obligation to come up with a trial plan on manageability, I'm still scratching my head on that. There was some language, some [inaudible 00:16:02] that kind of referenced the word manageability, but it's nowhere to be found in the PAGA, it's only a construct in class actions, not in PAGA cases. So I think the court of appeal looked at that and then this issue of conceding that, yes, it will take six days per general manager, times 346 general managers, so we're over eight years and that's not a manageable way to try a case. I think the court of appeal looked at that and said "You know what we're upholding the trial court ruling."

Marcus ([16:36](#)):

It's interesting because, not to get too deep in the weeds on this, but the PAGA is a substantive right of the state of California and the court just, I don't know how they strike a substantive right in the state of California. Like you wouldn't do this in any other type of case, any civil litigation. I don't know how you get away with this because the LWDA, and they recently did it to me, could come in and say, "Well, your honor, we could try 10 managers of 10 different stores and you could find that there were PAGA violations and 75% of that money would go to us as the state. Like, how are you able to just wipe out our case entirely. It's a substantive of right, it's just not a procedural vehicle. Your honor, you have wiped out our case, you haven't given any individual the opportunity to prove their PAGA claims, their individual PAGA claims."

Marcus ([17:33](#)):

The Supreme court is not going to take it up, I think they might de publish, but I don't think they're going to take it up.

Philip ([17:39](#)):

That's always the question is "What's next?" I don't have the crystal ball, but it's interesting and we're, we're kind of waiting with bated breath to see what's going to happen with other courts of appeals, or if the Supreme court is going to, as you said, take that up, the California Supreme court.

Ryan ([17:53](#)):

This is maybe a bit of an aside, but I've never heard of the LWDA actually stepping in on a case, and you just had that happened. What precipitated that and how did that go? If you don't mind? I know it's a bit of an aside but...

Marcus ([18:10](#)):

It was a new one on me.

Marcus ([18:12](#)):

I have had cases early on where LWDA, after I filed the PAGA investigated, usually because I do quite a bit of farm worker cases. Sometimes they'll get involved in those, that's at the outset where they say, "Hey, we're going to investigate this, we'll get back to you."

Marcus ([18:33](#)):

This one, I had reached a settlement and it's actually, well, we have final approval, but the appeal period's still out there, so I'll be a little circumspect. During the course of litigation, we went through the COVID period and there was supplemental sick pay. My original complaint was filed in 2019 and had a sick pay component.

Marcus ([18:53](#)):

None of my employees worked in 2020 after COVID, there was a sick pay, supplemental sick pay claim. Unbeknownst to me, the LWDA had been in the background and got all of the employee records. There were 20,000 employees, got all the records, scrutinized them, and showed up during the notice period for final approval motion and said, "Hey, you didn't give any weight to these supplemental sick pay claims, but you released them by virtue of release labor code, section 246." I was like "I didn't know that you were there." They're like, "Not only were there, we find this company \$450,000 and your settlement

potentially could wipe that out." We go to the judge, "I was like, your honor, I didn't know anything about this. I was never told, defense council knew she never told me."

Marcus ([19:52](#)):

So I got, kind of walked into a buzz saw. I said, "Your honor, I'm willing to carve that out. LWDA was fine, carving it out, but they made it difficult." The judge was very differential to the LWDA coming in and objecting to the settlement. Well, they moved to intervene, he granted their motion to intervene. He said, "You guys go talk about it, come back to me, work it out, let me know what happens."

Marcus ([20:16](#)):

I was able to carve them out, ironically, subsequent to that, the LWDA went and fined the same company over a million dollars for the same violation. So the LWDA is not shy on coming into these cases. So I'm wondering on these cases going forward, does LWDA say, "Yeah, your honor, you're claiming these cases aren't manageable, but yes, they are to a certain number of employees and you're just wiping them out in entirety. Like, we have a substantive right here. This doesn't belong to the employee they represented, this is our claim, this is the state of California's claim."

Marcus ([20:55](#)):

So I'd be curious as to what the LWDA, what their opinion, would be on this.

Ryan ([21:01](#)):

Yeah, no. Interesting.

Ryan ([21:05](#)):

That's fascinating. Like I said that's something I've not come across. I mean, they get noticed obviously a couple times during the process, but to have them step in, that's an interesting, interesting development. So...

Philip ([21:16](#)):

That late in the stage of litigation too.

Marcus ([21:20](#)):

Right.

Marcus ([21:21](#)):

The interesting thing was, I had claims for missed meals, missed breaks, those kind of things. This company had paid about a half a million dollars in meal period premiums. They were, what I thought was kind of a caring company, so to speak. But anyway, there was a question as to the amount of settlement versus the... With respect to the meals on rest.

Marcus ([21:48](#)):

Somebody tried to intervene and the LWDA actually said, "No, we looked at that. There wasn't a claim there, because if there was a claim there as well and if the plaintiff's council wasn't valuing properly, we would've taken that one too. We only took the one that we didn't think was being addressed, which was



the supplemental sick pay." And I'm like, "I didn't address it because I didn't know about it. It wasn't in my case, my case was long gone, it was filed well before this even issue came up."

Marcus ([22:18](#)):

So like I said, the LWBA is not shy about getting involved in cases.

Philip ([22:23](#)):

Interesting.

Marcus ([22:25](#)):

There's 346 general managers here, if they have a case with 10 or 20,000 people and the trial court just wipes it out and says, it's not a manageable representative action, they might have something to say about it.

Philip ([22:41](#)):

Professor Ryan can you tell us what Wesson stands for and then what it doesn't stand for?

Ryan ([22:47](#)):

Sure.

Ryan ([22:48](#)):

I appreciate that Philip is guiding me from my aside, because I would just keep asking you questions Marcus about all this. But okay. So...

Ryan ([22:55](#)):

Let's get back to Weston, let's talk about what it means and what it doesn't. I think we've covered some of this. Here's what it doesn't mean, it certainly doesn't mean that, when an employer gets the next PAGA case, you're not just going to be able to [inaudible 00:23:13] say, "This doesn't seem manageable, this should go away." It's it doesn't say that. The court of appeal made really clear that ensuring manageability of claims is not "tantamount to discarding them on an employer's mere objection." And that's a quote. So it doesn't mean the employer just gets to object and it goes away.

Ryan ([23:33](#)):

It also doesn't, mean once a court determines that the PAGA action is at least potentially unmanageable that the court has to then strike it. The court of appeal says, and maybe this is an effort to sort of temper the opinion, but just to say, look, if it's possible, the court's got to work with the parties to try and figure out a way to make this manageable. Marcus, as you're mentioning, if the LWDA has a claim for 10 of the 346 people, maybe that's manageable, maybe it's not, but maybe that's one of the ways that you're going to see trial courts, trying to make a sense of some of these opinions. It's hard, hard to know.

Ryan ([24:09](#)):

Here's what it probably does mean, employers, at least now have some authority to support the argument that that manageability needs to be part of the equation, it sort of makes clear manageability matters.

Ryan ([24:22](#)):

It sort of suggests to me, I mean that facts of this case, dealt with a hybrid class and representative case where the class case had already failed, likely due to predominance grounds. Right? So it sort of suggests to me that, I'm going to screw up the saying, but as like as goes, "Wichita falls, so falls, Wichita, whatever." I screwed that up badly. What it means, I think is, if the class case fails on predominance, there's going to be some arguments I think we can expect on the PAGA case.

Ryan ([24:57](#)):

I think that's one of the things that this is likely going to suggest for the future. Then it also clarifies that a motion to strike is apparently the proper grounds. It is an interesting question and you raised it earlier, motions to strike, we typically see...

Ryan ([25:14](#)):

Under the code, a motion to strike has to happen at the beginning of the case, right? But I've actually seen reference to a non-statutory motion to strike which is quite a nice title to throw in front of a court. But that's what this court seems to say is the proper vehicle, a motion to strike. So...

Philip ([25:35](#)):

[inaudible 00:25:35] in the bag, Ryan.

Philip ([25:37](#)):

The other point too, that I just started thinking about when I saw the Wesson case is, and you two already touched on it, is how big is the group of aggrieved employees? Are we talking about 10, as you two mentioned, or a lot of times prior to Wesson, when we had a PAGA representative claim, with aggrieved employees of maybe 900, a 1000 plus employees, in that statutory period, you were worried. You may put on a different lens and say, well, what are the distinct facts and how are they different? How many departments, how many people will have to be witnesses? How many people will have to come to trial? Is it going to be manageable for the court? It's all almost a different way of looking at a PAGA case.

Marcus ([26:32](#)):

Huff v. Securitas, where you could have someone who, as long as they suffer, one labor code violation can represent a bunch of aggrieved employees for other labor code violations, even though they haven't suffered that same labor...

Marcus ([26:46](#)):

Like, how do you, the manageability argument there, how would you manage that case? Like, do you just limit to all people? You'd have to really narrow these cases, but Huff says, oh, you can represent anybody.

Philip ([27:06](#)):

Right.

Marcus ([27:06](#)):

Maxim Healthcare is like, you don't even have to be within the statutory period. You can...

Philip ([27:10](#)):

Right.

Marcus ([27:13](#)):

So the dynamic there, the tension there between Huff v. Securitas and Wesson and some of the others, Kim v. Reins, there's a lot of other cases that you're going to have to sort out.

Marcus ([27:32](#)):

I think there're more questions than answers based on this court of appeal opinion, because it doesn't really describe what manageability is in the PAGA context. And I think you're right, Ryan, one of the things you wrote about was, the court working with the parties. I think that's what the court of appeal was a little put off by, the parties not working with the court. I think that really, if you read that opinion, it's really kind of justice Manila kind of sticking it to plaintiff's council a little bit.

Ryan ([28:11](#)):

Yeah, you certainly get the impression that there was, there was a not sufficient cooperation in the court of appeals view, just the way it's presented.

Ryan ([28:20](#)):

So do you see this as, as going to be a hurdle going forward?

Marcus ([28:23](#)):

I do and I don't. I mean, it's very fact specific. It's a misclassification case, which you see... I don't know about you guys, but do you see a lot of PAGA misclassification cases?

Ryan ([28:34](#)):

Not a lot, but I've got one and have had them but not a lot of them, no.

Marcus ([28:41](#)):

To be honest, I mean, a lot of plaintiff's lawyers look, get a case like that, especially after this ruling will be, they'll shy away. They'll be like, "That's too much heavy lifting for me, I'm not doing that. I'm just doing a straight parlay, meal and rest break case where I go to mediation quickly and move on to the next thing." They're not going to get involved in this, I mean, I think twice about doing a misclassification PAGA case.

Marcus ([29:04](#)):

Even if it was part of a certification motion or class certification case, just an add-on claim. I think that it's going to be very difficult with this ruling, his opinion is.

Philip ([29:17](#)):

Well, what about cases that, on the surface, they seem a little bit easier in plaintiff's council's eyes at least like something that deals purely with a wage statement where the employers...

Marcus ([29:31](#)):

[crosstalk 00:29:31] Those...

Marcus (29:32):

You're right, those cases, yeah. I mean the wage statement cases, that's not a manageability issue, you're right. That would be. I think for the most part, unless they're they're misclassification cases, I wouldn't be overly concerned about a lesson. It seems like kind of a one off to me, but I do see it resonating with some judges about manageability because they always wonder, what are you going to march a thousand people in here? Not in my courtroom.

Philip (30:02):

Yeah, that's probably going to be the question that's going to be asked going forward in PAGA matters, on the defense side, "How are we going to manage this?" I don't know what the crystal ball, as I said, is going to read here, but we are going to see this applied going forward in mediations and everything going forward, until we get another court of appeal decision on it.

Marcus (30:31):

It's funny, I was talking to a partner at a large firm that does wage in [inaudible 00:30:37] cases against and asked about Wesson and they kind of were vaguely familiar with it, this was just about two weeks ago. This opinion has been out a couple of months, I was like "Are you going to use that as a hammer?" She was like, "Eh." I thought she would've been, "Oh, we finally won one after all this goofy Maxim Healthcare stuff and statute limitations and Huff v. Securitas," but she wasn't really that enthused about it.

Philip (31:14):

I'm pretty sure that wasn't a GT partner, I'm pretty sure about that. One, they would be aware and I'm not sure if we would pass up the opportunity to use anything as a hammer.

Marcus (31:26):

I had a case with the GT partner, it was a year, a year and a half ago that took advantage of a wait statement case, they didn't have a local address. So she got in swooped in, took care of, and I was out of luck.

Philip (31:46):

There we go.

Marcus (31:48):

But yeah, I don't know.

Marcus (31:50):

I think this is going to scare a lot of people off and it's going to be used, but I'll tell you I'm expecting defense counsel on any type of case where it's any way feasible to get a trial plan. They're going to go in and they're going to want a trial plan early and it's going to resonate with judges because they're going to want to get rid of these cases if they can. If you say, "Gee, I don't know, your honor, how am I going to come up with a new trial plan that's going to disprove the affirmative offenses?" Case dismissed!

Marcus ([32:22](#)):

But again, the LWDA is going to be like, "Wait a second, you can't dismiss the entire..." "What about...?" "The plaintiff's council will bring in 200 people or a hundred people or 10 people don't they get to do their individual cases and don't we get to 75%?"

Philip ([32:37](#)):

Yeah.

Philip ([32:37](#)):

Maybe that's one of the upshots of this, we're going to see a more active LWDA. Which of course is interesting, because part of PAGA is all about, well, "We need to fund the LWDA."

Marcus ([32:47](#)):

Exactly!

Philip ([32:49](#)):

Now we're going to be looking to the LWDA to use the funding they've gotten over the last, what, 15 years or however long PAGA's been able to come in and be a part of these cases, maybe, I don't know. That's interesting.

Marcus ([33:00](#)):

Well, that case that I had, they're going to collect on their fines. All told it's going to be like a million and a half.

Philip ([33:08](#)):

Yeah.

Marcus ([33:09](#)):

They didn't need me.

Philip ([33:11](#)):

It's real money, yeah.

Marcus ([33:14](#)):

It's an interesting decision.

Marcus ([33:21](#)):

It'll make me think twice about taking misclassification cases. Even if it's a class case, but then again, how many class cases are you going to have with no arbitration agree, there's not that many out there anymore. The pie's getting smaller and smaller and smaller. So how many cases do you file as a class action that there's an arbitration agreements? Then how many of those are misclassification? This is just a particularly difficult case. If general manager from Staples came walking in the door, I'd be like, "I don't know about that one."

Ryan ([34:01](#)):

Yeah. No, the landscape has shifted, the arbitration agreement's being a big part of it, which that's something. We've done a prior episode, we should probably have you back to talk about arbitration for some future episode but I won't take us on Frolic and Detour on that just now.

Marcus ([34:16](#)):

When I started doing this, the first wage an hour case I had...

Marcus ([34:21](#)):

My old firm, we used to do misclassification cases of insurance adjusters, State Farm, Allstate, CNA, all those back in the day, it was kind of a cottage industry. We never saw arbitration agreements until maybe 2010, 2011, that's when they started coming in. We didn't get really bad for a while, then 2014, 15 it's like arbitration agreements were half and now it's like 90, 95%.

Marcus ([34:48](#)):

Like I'm shocked. I was talking to the defense council the other day. Like "How did you not have these people sign an arbitration agreements, a huge retailer, and no arbitration agreement?" He was like, "No."

Ryan ([34:59](#)):

Yeah, no. They become you ubiquitous.

Ryan ([35:02](#)):

Like I said, we'll have to do a whole other episode about that, we'll have to have you back for that.

Ryan ([35:07](#)):

I have to get your crazy employment story here.

Ryan ([35:11](#)):

Obviously it'll be interesting to see how this all plays out, we'll be looking at this. Of course now we had you on as a secret just to get your playbook and, of course now you've got ours, so I don't know how we're going to do next times we're on other sides, but...

Marcus ([35:24](#)):

I expect I'll see some way, somehow, I'll get a request for a trial plan early on in litigation.

Ryan ([35:30](#)):

Yeah, you could count on it.

Ryan ([35:36](#)):

This to us is our favorite part, trying to get crazy employment stories, I'm confident that you've got tons of them.

Ryan ([35:43](#)):

We try to end each episode just asking, "What's kind of the weirdest war story you've got?" So if you've got one or even two, we'd love to hear about it. An insane defense attorney, insane deposition, a big win, you didn't think you had a chance, anything like that.

Marcus ([35:58](#)):

Well, I've been doing this long enough, so I've come across a lot of insane opposing counsel.

Marcus ([36:05](#)):

I don't know, early in my career I made a guy vomit during his deposition, but that wasn't [crosstalk 00:36:10] detail.

Ryan ([36:13](#)):

I've heard of crying during the deposition, but not vomiting.

Marcus ([36:15](#)):

I was actually representing insurance, not insurance broker, real estate brokers on a transaction. Anyway, during the deposition, I was a young associate, I figured out the guy committed mortgage fraud. I started asking him questions and I showed a document in his face and he just threw up all over the conference table. I didn't know what to do, so I got up and went to my office. I got a knock on the door from the attorney saying, "you'll get a dismissal tomorrow."

Ryan ([36:46](#)):

Oh yeah, that qualifies as a crazy employment story, so thank you.

Marcus ([36:52](#)):

I'm old, I've been doing this a long time.

Philip ([36:54](#)):

Very good.

Marcus ([36:54](#)):

This gray hair.

Marcus ([36:56](#)):

Thanks guys, I enjoyed it.

Ryan ([36:58](#)):

Thanks so much for being with us, we really appreciate it, I'm sure we'll do it again in the not too distant future.

Ryan ([37:04](#)):

Hey, thank you all for listening. This has been the Performance Review. Thank you so much and we'll catch you on the next one.

Announcer ([37:27](#)):

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