SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

CIVIL DIVISION

MARK JACOBSON, Plaintiff, vs. THE LELAND STANFORD JUNIOR UNIVERSITY, Defendant.	Case No. 22CV400728 ORDER RE: MOTION FOR SUMMARY JUDGMENT

The present motion came on for hearing before the court on April 4, 2023, at 9:00 a.m. in Department 10. The matter having been submitted, the court finds and orders as follows:

I. Background

This is an appeal from a Labor Commissioner's ruling, brought by Appellant/ Defendant The Leland Stanford Junior University ("Stanford") pursuant to Labor Code section 98.2. Under section 98.2, the "appeal" consists of a de novo bench trial in the Superior Court, which is currently set for May 8, 2023 in this case.

In the underlying proceeding, Respondent/Plaintiff Mark Jacobson ("Jacobson"), a professor at Stanford, asserted that he was entitled to reimbursement for expenses incurred in bringing a lawsuit to defend both his academic integrity and that of others. The underlying Labor Code proceeding (sometimes referred to as a "Berman hearing") "is designed to provide a speedy, informal, and affordable method of resolving wage claims." (*Post v. Palo/Haklar & Assocs.* (2000) 23 Cal.4th 942, 947; see also *Arias v. Kardoulias* (2012) 207 Cal.App.4th 1429, 1434 ["The purpose of the Berman hearing procedure is 'to avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims.'"])

In the June 26, 2022 ruling (attached as Exhibit A to the Notice of Appeal filed with the court), the Labor Commissioner found that Jacobson was entitled to $62,101.99 in reimbursable business expenses under Labor Code section 2802(c) and $7,452.24 in interest under Labor Code sections 98.1 and 2802. This was less than the amount Jacobson sought. Rather than accede to the Commissioner's decision, Stanford filed this appeal pursuant to Labor Code section 98.2 on July 15, 2022. This court held a trial setting conference on September 20, 2022. Currently before the court is a motion for summary judgment filed by Stanford on December 21, 2022. Jacobson filed a timely opposition to the motion on January 30, 2023.

II. Discussion

A. Legal Standard

Labor Code section 98.2 does not create a new civil action. As noted above, it provides for a de novo hearing with the Superior Court: a court trial, not a jury trial. "[T]he section 98.2 proceeding is neither a conventional appeal nor review of the Labor Commissioner's decision, but is rather a de novo trial of the wage dispute." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1116 (*Murphy*).) The June 26,

2022 decision of the Labor Commissioner will not be entitled to any weight at the May 8, 2023 bench trial, the court will conduct a new trial on the merits, as if the matter had never been before the Labor Commissioner. (*Id.* at pp. 1116-1117.) The court may hear testimony, including entirely new evidence.

"The Labor Code, Code of Civil Procedure, and California Rules of Court provide no specific procedures for the hearing of Labor Code section 98.2(a) appeals." (1 Wilcox, Cal. Employment Law (2022) § 5.17.) Because such an appeal involves a trial de novo in the reviewing court, the trial, which is limited to a court trial, "is generally subject to all of the procedures incident to any other trial in the particular reviewing court. However, the reviewing court has discretion to establish procedures for handling such cases to assure that the purposes of the wage claim statutes in providing an expedited proceeding will not be thwarted." (*Ibid.*) The Wilcox treatise goes on to state:

> Once a party has filed an appeal for a trial de novo under Labor Code section 98.2, no statutes or regulations provide procedures for withdrawing that appeal. Thus, a non-appealing party can reasonably expect that it need take no action, such as a cross-appeal, to preserve its rights once the adverse party has filed a notice of appeal. Conversely, the party that has filed an appeal does not have the unilateral right to withdraw its appeal by filing a request for dismissal, because this action affects the rights of the other party. For example, an employer may appeal to the appropriate court for a trial de novo, but cannot file an appeal and then unilaterally request its dismissal because the dismissal could deprive the employee of participation in proceedings that potentially could lead to additional damages and reimbursement of attorneys' fees.

(*Ibid.*, citing *Miller v. Foremost Motors, Inc.* (1993) 16 Cal.4th 1271, 1274-1275.)

B. Analysis

Given that Labor Code section 98.2 provides for only a de novo bench trial rather than an independent civil action, the full range of pretrial procedures employed in civil litigation are not necessarily available to the parties, unless the trial court consents to their use, keeping in mind the policy goal of providing a speedy and expeditious review of wage

claims. In *Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757, 763-764 (*Sales Dimensions*), the Court of Appeal concluded that a trial court could deny discovery and consolidation in a section 98.2 appeal: "If discovery is not effectively controlled in appeals from decisions of the Labor Commissioner, trials will be prolonged rather than expedited. . . . [T]he question whether discovery should be allowed in a proceeding under Labor Code section 98.2 is best left to the discretion of the superior court hearing the appeal. . . . The superior court is vested with jurisdiction to hear the appeal de novo. Yet, no procedures for exercising that jurisdiction are specified. Therefore, the superior court, in the exercise of its discretion, may establish an appropriate procedure on discovery in each case. . . . Some of the same considerations affecting the appropriateness of discovery in appeals under section 98.2 should be considered when determining whether such an appeal should be consolidated with a pending related action."

More recently, the California Supreme Court has explicitly recognized that "the Labor Commissioner represents that de novo appeals typically proceed directly to trial, without lengthy pretrial proceedings. Formal discovery in the superior court, though permissible, is disfavored except in unusually high-value or complex wage disputes." (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 134 fn. 18.)

In a Labor Code section 98.2 appeal, there are no "pleadings" in the usual sense of the word. As a result, there is also no apparent basis for pleading challenges such as a demurrer (under Code of Civil Procedure ("CCP") section 430.10) or a motion to strike (under CCP section 435), without the trial court's prior consent. For example, in the present case, we have a form complaint (Form WCA 55) and form answer that were submitted to the Labor Commissioner below, but neither of these pleadings is binding on the parties in this de novo appeal. Both sides may raise completely new claims and defenses in the de novo trial. (*Murphy, supra*, 40 Cal.4th at p. 1119 ["Just as an employer is

not bound by the defenses it raised in the Berman process, but rather is entitled to abandon, change, or add defenses not brought before the Labor Commissioner (see *Jones v. Basich* (1986) 176 Cal. App. 3d 513, 518–519 [222 Cal. Rptr. 26]), so may an employee raise additional wage-related claims in the de novo trial."].)

If a regular demurrer or motion to strike is not feasible in a section 98.2 appeal, then why should there be an automatic right to a summary judgment or summary adjudication motion under section 437c, absent leave of the court? The lack of any superior court pleadings is a hindrance to a motion under CCP section 437c, just as it is a hindrance to motions under CCP sections 430.10 and 435: "It is well established that the pleadings determine the scope of relevant issues on a summary judgment motion." (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.) In this case, the full scope of relevant issues will not be finally determined until the commencement of the de novo trial. As noted above, at that hearing, the trial judge may, in his or her discretion, allow Jacobson to raise new wage claims not raised in the Berman hearing if they are deemed sufficiently related to the issues that were previously raised. Similarly, Stanford may, with the permission of the trial judge, abandon, change, or add defenses that were not raised before the Labor Commissioner. (See *Murphy, supra*, 40 Cal.4th at pp. 1117-1119.) "[A]llowing trial courts to exercise their discretion in deciding whether to permit employees to raise additional related wage claims is consistent with the Legislature's intent 'to discourage frivolous and unmeritorious appeals from the commissioner's awards.' A party who appeals a Labor Commissioner award does so at its own peril. If the employer appeals, and the employee obtains representation, it is likely that the employee's attorneys will uncover additional, related facts and claims not thoroughly examined at the administrative level when the claimant was unrepresented." (*Id.* at p. 1119, internal citations omitted.)

Another factor that weighs against permitting a motion for summary judgment in a Labor Code section 98.2 appeal, at least without prior leave of court, is that in many instances, the automatic right to a summary judgment or summary adjudication motion will significantly delay the de novo trial. In *Cole v. Superior Court* (2022) 87 Cal.App.5th 84 (*Cole*), the Court of Appeal held that in an ordinary civil lawsuit, a timely filed motion for summary judgment must be heard even if doing so forces a continuance of the trial date. The situation that existed in *Cole*—severely congested trial court calendars in San Diego County—is not an uncommon one, particularly in this post-COVID era, and this court has similarly had to continue many initial trial date settings in order to accommodate summary judgment motion hearings under the principles articulated in *Cole*. To allow the same to happen in section 98.2 appeals would run directly counter to the legislative purpose of providing "an expeditious resolution of wage claims" in these appeals. (See *Post v. Palo/Haklar & Assocs.*, *supra*, 23 Cal.4th at p. 951; see also *Arias v. Kardoulias* (2012) 207 Cal.App.4th at p. 1438 [reducing costs and delays is part of the general purpose of Labor Code section 98.2, et seq.].)[1]

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[1] In its tentative ruling, the court identified one reported instance in which a trial court received a motion for summary judgment from an employer in a Labor Code section 98.2 appeal. (See *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp. 8 (*Mitchell*).) The court noted, however, that there was no indication in that opinion that the trial court *actually permitted or even considered* the motion. The opinion indicates that after the motion was filed, "[t]he parties executed a joint stipulation of facts, and the matter proceeded as a court trial." (*Id.* at p. 10.) In other words, the case was ultimately decided at the de novo bench trial, with no apparent decision on the summary judgment motion itself. Even if the trial court in *Mitchell* did allow a summary judgment motion to be filed under the circumstances of that case, that does not necessarily preclude this court from exercising its discretion to disallow a summary judgment motion in this case. Additionally, and most important of all, it does not appear that there was *any discussion* in either the trial court or the trial court's appellate division (which authored the opinion) about whether summary judgment and summary adjudication motions may be brought as a matter of right or only with leave of the court. In other words, there was nothing in *Mitchell* that actually addressed the issue currently under consideration here.

At the hearing, Stanford identified another reported decision in which a summary judgment motion was made on an original appeal to the Superior Court under Labor Code section 98.2: *Gipe v. Superior Court* (1981) 124 Cal.App.3d 617 (*Gipe*). This case is much older than the Supreme Court's decision in *Murphy*, *supra*, which laid out the parameters of the trial court's discretion in section 98.2 appeals. Moreover, in *Gipe*, the summary judgment motion was ruled upon, but there was no discussion about the trial court's exercise of discretion to entertain such a motion, just as in *Mitchell*. Indeed, there was again no discussion at all about whether summary judgment and summary adjudication motions may

In view of the above analysis and given that Stanford did not bring a request for leave to file its summary judgment motion before filing the motion, the court DENIES Stanford's motion as procedurally improper. Of course, this ruling is without prejudice to Stanford raising these exact arguments with the trial judge at the May 8, 2023 court trial. One of the reasons that the court is exercising its discretion to disallow a summary judgment motion here is that these very same same arguments can be presented to the trial judge as a single appellate "bite at the apple," rather than two bites. Another reason that the court is exercising its discretion in this manner is that the court remains somewhat skeptical that a determination as to what expenses were "necessary and appropriate to conduct University business" can be decided as a matter of law, before trial. That is inherently a factual question. In its briefs, Stanford looks to the court to set forth a *per se* rule that it is never "necessary and appropriate" for employees/professors to be plaintiffs in litigation—that employees can only *always* be defendants. Regardless of whether it was "necessary and appropriate" in this case for Jacobson to litigate his District of Columbia suit, the court would likely be overreaching to hold as a matter of law that it can *never* be "necessary and appropriate" for any professor to be a plaintiff under any potential set of facts. It appears to the court that Stanford's defense on the merits presents material issues of fact. Nevertheless, the court is *not* deciding the motion on this latter basis, only on the basis of its procedural impropriety. As a result, the court makes no ruling regarding the evidentiary objections submitted by Stanford.

Date: April 4, 2023

Frederick S. Chung
Judge of the Superior Court

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be brought as a matter of right or only with leave of the court. The appellate court in *Gipe* focused on a different question: whether the Labor Commissioner may represent a petitioner on appeal to the trial court. As such, this court finds *Gipe* to be inapposite, as well.