

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 12/22/11

DEPT. 35

HONORABLE DANIEL J. BUCKLEY

JUDGE

L. ISMAEL

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

R. ECHON, C.A.

Deputy Sheriff

NONE

Reporter

2:00 pm

BC461746

Plaintiff

Counsel

JAMES HAMILTON

NON-APPEARANCE

VS

Defendant

WHOLE FOODS MARKET CALIFORNIA I

Counsel

**NATURE OF PROCEEDINGS:**

**RULING ON SUBMITTED MATTER (DEMURRER TO COMPLAINT)**

Defendant demurs to the Complaint based upon PAGA unconstitutionality. The Court took the matter under submission.

The demurrer is overruled. Twenty days to answer.

According to the allegations, defendants, as employers, failed to provide chairs for employed cashiers to sit in during times it would not interfere with work, in violation of California Industrial Wage Order (IWC) 7-2001, paragraph 14, and Labor Code Section 1198, et seq., (commonly known as the Private Attorney General Act, "PAGA").

Plaintiff brings the action under PAGA which permits Hamilton, an aggrieved former employee, to bring this action on behalf of himself and other current or former employees of Whole Foods.

Defendant demurs to Plaintiff's Complaint, on the ground that the PAGA statute (providing for penalties for employer Labor Code violations) is void as being unconstitutional, on separation-of-powers grounds, where allowing private attorneys to serve as private attorney generals interferes with powers of the courts to control

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attorney discipline, and removes neutral government attorneys needed in the process.

The parties agree that the raised issues of constitutionality of PAGA are first impression, and that a District Court decided in favor of constitutionality on different issues.

This Court must presume the validity of PAGA, resolving all disputes in favor of the act. The Court must uphold the act unless a conflict with the state or federal Constitution is clear and unquestionable. California Housing Finance Agency v. Elliot (1976) 17 Cal.3d 575, 594.

A statute must be upheld unless the unconstitutionality appears clearly, positively, and unmistakably. People v. Superior Court (1997) 54 Cal.App.4th 407, 411. Defendants' arguments have not reached that significant threshold.

The separation-of-powers issue asserted in the demurrer is inherently debatable, because the line to draw as to the doctrine is anything but clear, as summarized in a recent opinion:

The California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const.,

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art. III, § 3.) FN14 "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly...." ( Cal. Const., art. IV, § 1.) "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." ( Cal. Const ., art. V, § 1.) The judicial power is vested in the courts. ( Cal. Const., art. VI, § 1.) "[T]he essential power of the judiciary [is] to resolve 'specific controversies' between parties." ( People v. Bunn (2002) 27 Cal.4th 1, 15, 115 Cal.Rptr.2d 192, 37 P.3d 380.)

"Although the language of California Constitution article III, section 3, may suggest a sharp demarcation between the operations of the three branches of government, California decisions have long recognized that, in reality, the separation of powers doctrine ' does not mean that the three departments of our government are not in many respects mutually dependent" ' [citation], or that the actions of one branch may not significantly affect those of another branch.... [] At the same time, [the separation of powers] doctrine unquestionably places limits upon the actions of each branch with respect to the other branches." ( Superior Court v. County of Mendocino (1996) 13 Cal.4th 45, 52-53, 51 Cal.Rptr.2d 837, 913 P.2d 1046.)

The Constitution "vest[s] each branch with certain

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'core' [citation] or 'essential' [citation] functions that may not be usurped by another branch." ( People v. Bunn, supra, 27 Cal.4th at p. 14, 115 Cal.Rptr.2d 192, 37 P.3d 380.) "The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch. [Citations.] ' "The courts have long recognized that [the] primary purpose [of the separation-of-powers doctrine] is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." ' [Citations.] To serve this purpose, courts ' "have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." ' [Citations.]" ( Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal.4th 287, 297, 105 Cal.Rptr.2d 636, 20 P.3d 533 ( Carmel Valley Fire Protection Dist.))

"The doctrine, however, recognizes that the three branches of government are interdependent, and it permits actions of one branch that may 'significantly affect those of another branch.' [Citation.] ... 'The purpose of the doctrine is to prevent one branch of government from exercising the complete power constitutionally vested in another [citation]; it is not intended to prohibit one

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branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch.' ( Younger v. Superior Court (1978) 21 Cal.3d 102, 117, 145 Cal.Rptr. 674, 577 P.2d 1014.)" ( Carmel Valley Fire Protection Dist., supra, 25 Cal.4th at p. 298, 105 Cal.Rptr.2d 636, 20 P.3d 533, italics added & parallel citation omitted.) One branch of government may perform an act or exercise a function affecting another branch provided it does not "defeat or materially impair" the exercise of a power of the other branch. ( Id. at p. 305, 105 Cal.Rptr.2d 636, 20 P.3d 533.) " ' "The [separation of powers] doctrine has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of the government, it can never be used thereafter by another...." [Citation.]' " ( In re Attorney Discipline System (1998) 19 Cal.4th 582, 596, 79 Cal.Rptr.2d 836, 967 P.2d 49, italics omitted.)

In re M.C. (2011) 199 Cal.App.4th 784, 803.  
[Emphasis added.]

Here, the PAGA statute does not significantly impair judges' functions, or contain anything unique to necessitate prosecution only by neutral government lawyers. The absence of any real interference with the separation of powers knocks out the critical leg

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of defendant's arguments.

Another attack on the defense argument can be found by distinguishing the cited case, O'Brien v. Jones (2000) 23 Cal. 4th 40, 48, which addressed judicial authority over State Bar discipline. In this case, the PAGA statute would not significantly hinder judges' continuing referrals of involved counsel to the State Bar for consideration for discipline.

Many opinions, roughly 30, have recognized PAGA claims in some manner, since 2007, although admittedly without analyzing constitutionality under the separation of powers doctrine. E.g., Dunlap v. Sup. Ct. (2006) 142 Cal.App.4th 330, 340; Caliber Bodyworks, Inc. v. Sup. Ct. (2005) 134 Cal.App.4th 365, 378; Arias v. Sup. Ct. (2009) 46 Cal.4th 969, 975. But this Court is persuaded that no other court has hinted or outright concluded that PAGA is unconstitutional, especially when the argument raised by defendant is not unique to the employment issues of this lawsuit, but based on a broad argument of separation of powers which should arise in all these other matters.

Most importantly, courts have approved the goal of having private attorney generals under PAGA. One good example, with critical language, is found in Brown v. Ralphs Grocery Co:

The court in Franco, supra, 171 Cal.App.4th at page

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1303, 90 Cal.Rptr.3d 539, concluded that efforts to "nullify the PAGA and preclude [the plaintiff] from seeking penalties on behalf of other current and former employees, that is, from performing the core function of a private attorney general ... impedes Gentry's goal of 'comprehensive[ly] enforc[ing]' a statutory scheme through the imposition of 'statutory sanctions' and 'fines.' [Citation.] [A]nd the prohibition of private attorneys general is invalid."

Brown v. Ralphs Grocery Co. (2011) 197 Cal.App.4th 489, 499. [Emphasis added.]

Further, the enforceability of statutes or propositions by private attorney generals has long been recognized in many contexts, beyond PAGA. For example, there is the analogous Proposition 65. The Court disagrees with the defense argument that Prop 65 lawsuits are distinguishable from PAGA lawsuits for purposes of this analysis.

[T]he statutory framework governing a Proposition 65 action affirms the representative nature of the individual's role. An individual may sue under the Act only in the public interest; there is no provision for an individual to sue on his or her own behalf. (§ 25249.7, subd. (d).) An individual must notify various public prosecutors at least 60 days before commencing the action, and may not bring the action if one of the public prosecutors commences

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and is prosecuting an action against the same violation before the individual's action is commenced. (§ 25249.7, subd. (d)(1) & (2).) An individual must provide the Attorney General any settlement agreement being submitted for court approval, and the Attorney General may participate in court proceedings regarding approval. (§ 25249.7, subd. (f)(5).) Taken together, these provisions reveal a statutory scheme intended to create a mechanism for vindicating public rights. This purpose is not altered by the potential for an individual to share in any penalties recovered.

Consumer Advocacy Group, Inc. v. ExxonMobil Corp.  
(2008) 168 Cal.App.4th 675, 693.

The Court is struck by the reality that private attorneys can profit from the representation of clients in the Proposition 65 cases, and any concern about the control of attorney discipline is equally raised in those cases.

Clerk is to give notice.

**CLERK'S CERTIFICATE OF MAILING/  
NOTICE OF ENTRY OF ORDER**

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of



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12/22/2011, upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 12/22/2011

John A. Clarke, Executive Officer/Clerk

By:



L. Ismael

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