SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT 311
***Espinosa v. Bodycote Thermal Processing, Inc.*, BC501617**
Case Anywhere
Motion to determine the right to trial by jury

Luis Espinosa sued his former employer, Bodycote Thermal Processing, Inc. on March 1, 2013. Espinosa asserted claims under the Labor Code Private Attorneys General Act of 2004.

(Espinosa is the name under which the Superior Court and Case Anywhere have filed this matter, so for clarity and consistency the court refers to the putative class and the representative plaintiffs as Espinosa, despite the fact Espinosa passed away on July 30, 2013.)

The parties have briefed the issue of whether there is a right to a jury trial for claims under the Labor Code Private Attorneys General Act of 2004. This is a recent and recurrent issue in the booming field of California wage-and-hour litigation. So far, there is no appellate authority on the issue. California trial courts would be grateful for appellate resolution of this issue, which is of great practical importance.

In the absence of specific authority, this court applies general law on the topic.

To test for a jury right, a California court first examines whether the statute at issue requires a jury. The Labor Code Private Attorneys General Act of 2004 does not. If Espinosa has a right to trial by jury, then, that right must spring from a constitutional source.

The right to a jury trial is guaranteed by our Constitution. That right, however, is the right as it existed at common law in 1850, when the Constitution was first adopted. What that right might be is a historical question. As a general proposition, the jury trial is a matter of right in a civil action at law, but not in equity. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8.) The parties are not entitled to a jury if the action is essentially one in equity. "And if a proceeding otherwise identifiable in some sense as a civil action at law did not entail a right to jury trial under the common law of 1850, then the modern California counterpart of that proceeding will not entail a constitutional right to trial by jury." (*Franchise Tax Board v. Superior Court* (2011) 51 Cal.4th 1006, 1010 (italics deleted); see also *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 905-911 (historical investigation determines assumpsit is an action in law and not equity).)

This historical analysis thus requires courts to determine whether the claim at issue is more like:

- Cases tried by common law courts of law to juries, or,
- Cases tried in courts of equity or admiralty, where juries were unavailable.

To make this constitutional determination, the court must examine both (a) the nature of the action and (b) the remedy sought. (See, e.g., *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 180 (incorporating into California state law the federal law set forth in *Tull v. United States* (1987) 481 U.S. 412, 417).)

First, what is the nature of the action? The nature of this action is private assistance to a regulatory agency. This type of action had no counterpart in pre-1850 common law courts of law. Judge Jerome Frank coined the phrase "private attorney general" in 1943. (See *Associated Industries of New York State v. Ickes* (2d Cir. 1943) 134 F.2d 694, 704.) The concept expanded slowly; use of this phrase did not skyrocket until the 1970s. (William B. Rubenstein, *On What A 'Private Attorney General' Is -- And Why It Matters* (2004) 57 Vanderbilt Law Review 2129, 2134.) "The California Labor and Workforce Development Agency was created in 2002 . . . ." (State of California Labor and Workforce Development Agency, <http://www.labor.ca.gov/aboutindex.htm> (as of 2-14-17).) The California Legislature enacted the Labor Code Private Attorneys General Act to assist that agency in its regulatory work. These developments postdate our Constitution by roughly a century or more.

More generally, regulatory agencies are, in constitutional terms, a new development in American history. The first independent regulatory agency of this kind was the Interstate Commerce Commission, which Congress created in 1887 (and abolished in 1995). There were professional societies in 18th century America (such as a medical board in Massachusetts), but these were of a fundamentally different character than the Interstate Commerce Commission, which was supposed to be independent of the regulated industry rather than comprised of it. Critics like Gabriel Kolko argued in 1965 the railroads had captured the Interstate Commerce Commission, but the agency itself claimed to be independent and to be regulating transportation in the public interest. In 1887, this was a new American form of law and government. There was nothing like this in the common law, just as there was nothing like California's Labor Code Private Attorneys General Act of 2004, which was designed to assist the regulatory agency in its independent and public-spirited mission.

In sum, the nature of a Private Attorneys General Act suit is different than any common law action tried to juries. This suggests there is no jury right in a Labor Code Private Attorneys General Act of 2004 suit. (See *McHugh v. Santa Monica Rent Control Board* (1989) 49 Cal.3d 348, 379-386; cf. *Franchise Tax Board v. Superior Court* (2011) 51 Cal.4th 1006, 1012 (no jury right because "[m]ost courts have viewed actions for a refund from the government as new and distinct proceedings, subject to such conditions as the legislative branch sees fit to impose").)

The second test is the remedy sought. The remedies in the Labor Code Private Attorneys General Act of 2004 are equitable, not legal. This confirms there is no jury right in a such a case.

Compensatory remedies are legal in character and mandate a jury. (*DiPirro v. Bondo Corp., supra*, 153 Cal.App.4th 150, 182.)

The Act's remedies are not compensatory. They bear no relation to injuries workers may have suffered. Five features of this Act show its remedies are equitable rather than compensatory.

First and most importantly, the Act gives courts equitable discretion to adjust penalties that otherwise would be unjust, arbitrary and oppressive, or confiscatory. (Lab. Code, § 2699, subd. (e)(2).) This law requires a court to weigh the facts and circumstances to reach a just result, which mandates equitable discretion. This action thus is properly classified as equitable. (*Interactive Multimedia Artists, Inc. v. Superior Court (Allstate Ins. Co.)* (1998) 62 Cal.App.4th 1546, 1556.)

This mandate of equitable adjustment distinguishes this cause of action from legal actions in debt that preserve the right to trial by jury. (See *Tull v. United States*, *supra*, 481 U.S. 412, 418.) When one sues on a debt, the finder of fact has no equitable discretion to adjust its size. (Compare *id.* 421 ("the essential function of an action in debt was to recover money owed under a variety of statutes or under the common law").)

Second, the penalties are uniform. They are not keyed to a particular wage rate or to the number of hours a worker may have suffered without proper pay. The penalties are not like a debt. As Espinosa's reply brief 5:14-15 states, this statute "is not designed to compensate employees for harm suffered . . . ."

Third, the Act's penalties are penalties upon penalties. The Act's penalties can augment Labor Code penalties, whether or not the Labor Code penalties fully compensated the victim employee.

Fourth, the Act's penalties do not go mainly to the injured employee. Rather, the government gets the lion's share. The Act thus is mostly a government funding program rather than a private compensation system. But there is no conventional sense in which the employer owes a debt to the government.

Fifth, the penalties can apply even when there is no actual employee injury, as in certain wage statement violations. For instance, Espinosa was "employed by 'Bodycote Thermal Processing, Inc.' but [his] wage statements list [Espinosa's] employer as 'Bodycote.' " This disparity is apparently the heart of Espinosa's wage statement claim. Espinosa has not explained how the disparity mattered to anyone. By contrast, unpaid debts usually do matter to someone.

The gist of an action to enforce the Labor Code Private Attorneys General Act of 2004 is equitable, not legal. There is no right to a jury.