

Adolph (Erik) v. Uber Technologies, Inc., S274671
Oral Arguments | Tuesday, May 9, 2023
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The court ordered the issue to be briefed and argued in this case limited to the following: Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are “premised on Labor Code violations actually sustained by” the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. __, __ [142 S.Ct. 1906, 1916] (*Viking River Cruises*); see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue “PAGA claims arising out of events involving other employees” (*Viking River Cruises*, at p. __ [142 S.Ct. at p. 1916]) in court or in any other forum the parties agree is suitable.

- **Appellant Uber Technologies, Inc. [argued by Theane D. Evangelis]**
 - Evangelis focused on statutory interpretation of PAGA.
 - Evangelis argued that 5 justices in *Viking River* agreed that a non-individual PAGA claim must be dismissed after an individual’s own PAGA claim is compelled to arbitration. This result is based on the language in PAGA, which only the Legislature can change. “Plaintiff’s interpretation would cause a collision with the FAA.”
 - Justice Liu did most of the questioning, as follows.
 - First, Justice Liu asked how it would cause a collision with the FAA. Evangelis responded that PAGA requires that a claim be brought on behalf of the employee *and* others, whereas the FAA requires an individual’s claim that is subject to arbitration to be severed. Justice Liu said that did not answer the question why survival of the non-individual claims poses a problem under the FAA. Evangelis again focused on PAGA’s language to respond to his question:
 - Evangelis’ main argument was that in Labor Code § 2699(a), the Legislature changed “or” to “and” to avoid the problem with general public standing that had led to Prop 64:
 - Labor Code § 2699(a): Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself **and** other current or former employees pursuant to the procedures specified in Section 2699.3.
 - Due to the word “and,” a plaintiff cannot proceed solely on behalf of others. Further, to proceed on a PAGA claim there must be a finding that the individual plaintiff is aggrieved, and if that finding is made in arbitration, it stays there as required under the arbitration agreement. Also, under 2699(c), the plaintiff cannot litigate in court whether he is aggrieved because he agreed to individually arbitrate his claims.
 - Justice Liu said he is “happy to entertain the state law issue, and that is the nub of it, but I don’t see the FAA problem.”
 - Evangelis also argued that this situation is like *Robinson*, where the plaintiff lost standing to represent others based on the settlement of his individual PAGA claim. Whereas *Kim v. Reins* was different, because the settlement was only of the plaintiff’s underlying wage claims, and the PAGA claim remained active.
 - Second, Justice Liu posited that if the individual PAGA claim goes to arbitration, and it turns out the employee is not aggrieved, then “maybe the employee loses standing for the stayed representative court action.”
 - Evangelis agreed “100%” and said at minimum, the court action should be stayed pending the individual arbitration, but argued that even if the plaintiff wins in arbitration s/he cannot go back to court because of the arbitration agreement.
 - In addition, if the plaintiff loses in arbitration, then s/he has no further stake in the litigation – no “skin in the game” – and cannot go back to court on behalf of others.

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- Next, Justice Liu asked why can't the court simply accept the arbitrator's decision either way? "My understanding is there a single PAGA action, but some of the claims are arbitrated and some remain in court. It is not a 'severance.'"
 - Evangelis responded that under federal law it is not a "single action"; *KMPG* and *Viking River* both say that when a claim has to be separated due to an arbitration agreement, it cannot be re-injected later after the individual arbitration.
 - Also, under *Robinson*, if someone settles their individual PAGA claim, they cannot go back and litigate on behalf of others.
- Justice Liu said "the problem is one of your own making." California has a policy against waiver of these claims – the anti-waiver rule – and *Viking River* took no issue with it.
 - Evangelis responded that PAGA as written is not conducive to this reading.
- In rebuttal, Evangelis argued that you are not aggrieved if you already got your recovery and that it would not make sense to proceed in court within the statutory framework. Further, there must at minimum be a stay of the court action pending the arbitration: "I can't imagine proceeding in court with a representative action before the individual arbitration is completed."
- Arbitration agreement
 - Evangelis' argued that the arbitration agreement (section 15.3) is very clear in that all disputes have to be arbitrated on an individual basis.
 - She acknowledged that Adolph had the opportunity to opt-out of the arbitration agreement, as many employees had, but he chose not to.
 - Argued that there is specific language in the arbitration agreement that requires a stay.

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- **Respondent Adolph [argued by Michael Rubin]**
 - Rubin concentrated on reasoning from *Kim v. Reins* that there are only two standing requirements:
 - (1) the plaintiff must sue the employer who
 - (2) committed the alleged violations
 - Rubin contended that Adolph has satisfied these two requirements and that the fact that he is subject to an arbitration agreement does not strip him of standing to pursue some PAGA penalties (on behalf of others) in court.
 - Statutory interpretation
 - Justice Kreuger asked Rubin to comment on Uber’s argument about the “himself *and* others” language in PAGA and the “skin in the game” issue.
 - Rubin had 3 responses:
 - The language is not a standing requirement; it is a basis for relief. Rubin contended that the Court cannot add a requirement in Labor Code § 2699(a) that the Legislature has not included.
 - Adolph did initially seek recovery on behalf of himself and others.
 - If you construe “and” as meaning the individual and representative claim together, then the individual claim cannot be pursued in arbitration. Rubin said this is a single claim in two forums with some penalties sought individually in arbitration, and some sought on behalf of others in court – it is not a “severed” claim.
 - He argued that if “and” is construed in a manner that you can only pursue a PAGA claim if you are pursuing for LWDA, for yourself, AND for current/former employees, you would never have standing only on behalf of yourself.
 - Additionally, he argued that once it is determined that an individual is aggrieved and has standing, he has “skin in the game” pursuant to the statute and the fact that he may not recover much money is not at issue because PAGA’s purpose is maximum enforcement of labor laws, not damages.
 - Justice Guerrero asked how can the other uses of “aggrieved employee” in PAGA be reconciled? Rubin responded that there is no conflict: as long as the plaintiff alleges he is aggrieved, and it is not disproved, then he can seek remedies on behalf of others. Section (a) says how broad is the claim, whereas section (c) says who can bring the claim.
 - Stay
 - Justice Groban asked if Rubin agrees that the non-individual court action would have to be stayed pending the individual arbitration. Rubin said yes under the Uber agreement, but in most cases CCP 1281.4 governs so the trial court decides.
 - Enforcing arbitration judgment
 - Justice Liu asked if the non-individual claim remains in court, is the court required to accept the arbitrator’s finding on the individual claim? Rubin said yes; if a party is found to be individually aggrieved in arbitration, the court must accept that finding.
 - Justice Liu also asked if plaintiff is found to not be aggrieved in arbitration, then would the non-individual claims be dismissed? Rubin agreed that in that case, the plaintiff would no longer have standing like in *Robinson*.
 - Rubin also said that collateral estoppel is different from standing.
 - Arbitration agreement
 - Rubin requested that the Court look at Uber’s arbitration agreement to determine whether there was actually a requirement to split the individual and non-individual claims.

The matter was submitted.

- **Takeaways**

- The justices seemed to have their minds made up; a decision may issue well before 90 days.
- Justice Liu's position seems to be that when a PAGA plaintiff is bound by an arbitration agreement, the plaintiff's PAGA claim remains a "single cause of action" that is not "severable." Instead, the plaintiff's individual PAGA remedy must be adjudicated in arbitration, with the potential representative remedy stayed in court. If the arbitrator finds the plaintiff was aggrieved on the individual claim, the plaintiff can go back to court to adjudicate the representative claim on behalf of others. If the arbitrator finds the plaintiff was not aggrieved, the stayed court action is over as the plaintiff lacks standing to represent others.
 - If the Supreme Court does come out this way, parties would need to carefully evaluate cases to determine if it is advantageous to go to arbitration at all, because if s/he wins on any claim in arbitration, then the representative claim would proceed in court, but also, presumably under *Huff*, the plaintiff could then potentially bring additional claims on behalf of others even if the plaintiff did not personally experience them.
- This will also raise new questions about what evidence from the arbitration will be allowed if the action then proceeds to court on the representative claim and concerns about manageability.
- This Court's decision is likely to focus solely on the standing question presented. The collateral estoppel effect of the arbitration on the merits is likely to remain an open question.