



OFFICE OF THE ATTORNEY GENERAL

Department of Justice

STATE BUILDING, SAN FRANCISCO 94102

December 14, 1966



Charles P. Scully, Esq.
Attorney at Law
995 Market Street
San Francisco, California

Dear Mr. Scully:

Re: Mengelkoch, et al. vs. Industrial Welfare
Commission, et al. - United States Dist. Ct.
Central Dist. of California - Civ. No. 66-1618-S

Enclosed please find copies of the pleadings in this matter. As indicated in our telephone conversation, I will welcome the participation of the California Federation of Labor as amicus curiae on behalf of defendants Division of Industrial Welfare and the Industrial Welfare Commission.

Yours very truly,

THOMAS C. LYNCH
Attorney General

By *B. Franklin Walker*
B. Franklin Walker
Deputy Attorney General

BFW:va

Encls.



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10 Industrial Welfare Commission and
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 VELMA L. MENGELKOCH, et al.,	}	CIVIL NO. 66-1618-S
12 Plaintiffs,		
13 v.		NOTICE OF MOTION
14 INDUSTRIAL WELFARE COMMISSION,	}	
15 et al.,		
16 Defendants.		

17 TO: VELMA L. MENGELKOCH, et al., and their attorneys
18 PHILL SILVER and PHILIP POPPLER;
19 TO: NORTH AMERICAN AVIATION, INC., and its attorneys
20 GIBSON, DUNN & CRUTCHER:

21 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on
22 January 9, 1967, at 9:30 A.M. or as soon thereafter as the matter
23 can be heard, in Court Room No. 6 of the above entitled court,
24 defendants Division of Industrial Welfare and Industrial Welfare
25 Commission of the State of California will move the court to
26 dismiss the complaint upon the grounds set forth in the attached
27 motion.

28 The motion will be based upon this notice, the

29 /
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31 /

1 attached motion to dismiss and memorandum of points and authori-
2 ties attached thereto, and the court's file in this proceeding.

3 DATED: December 12, 1966

4 THOMAS C. LYNCH, Attorney General
5 B. FRANKLIN WALKER, JR.
6 WILLIAM L. ZESSAR,
Deputy Attorneys General

7 By William L. Zessar
8 WILLIAM L. ZESSAR

9 Attorneys for Defendants
10 Industrial Welfare Commission and
11 Division of Industrial Welfare
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2-9-66

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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 VELMA L. MENGELKOCH, et al.,

14 Plaintiffs,

15 v.

16 INDUSTRIAL WELFARE COMMISSION,
17 et al.,

18 Defendants.

CIVIL NO. 66-16-18-S

MOTION TO DISMISS

AND

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

19 Defendants Division of Industrial Welfare and Indus-
20 trial Welfare Commission appearing specially for the purpose of
21 challenging the jurisdiction of the three judge court and the
22 federal court and in lieu of answering the complaint present
23 this motion to dismiss on the following grounds:

24 I

25 A three judge court does not have jurisdiction over
26 the subject matter of this lawsuit under 28 U.S.C. § 2281 in
27 that the claim that section 1350 of the California Labor Code
28 is unconstitutional under the equal protection provision of the
29 Fourteenth Amendment to the United States Constitution is
30 frivolous and unsubstantial for the reason that said code section
31 has been held constitutional by the United States Supreme Court.

II

A three judge court does not have jurisdiction over

1 the subject matter of this lawsuit under 28 U.S.C. section 2281
2 because the question of the application of the Supremacy clause,
3 United States Constitution, article VI, clause 2, is not a
4 sufficient legal basis for invoking the jurisdiction of such a
5 court.

6 . III

7 A three judge court does not have jurisdiction over
8 the subject matter of this lawsuit under 42 U.S.C. 2000e-6(b)
9 because the authority to request such a court is within the
10 exclusive power of the Attorney General of the United States who
11 has made no such request in this case.

12 IV

13 The federal court does not have jurisdiction over these
14 defendants in that the suit is one against the State of Califor-
15 nia instituted without its consent.

16 V

17 The federal court should abstain from hearing this
18 case on equitable grounds until such time as the courts of the
19 State of California have had an opportunity to rule.

20 DATED: December 12, 1966.

21 THOMAS C. LYNCH, Attorney General
22 B. FRANKLIN WALKER, Jr.
23 WILLIAM L. ZESSAR,
Deputy Attorneys General

24 By

William L. Zessar
WILLIAM L. ZESSAR

25 Attorneys for Defendants
26 Industrial Welfare Commission and
27 Division of Industrial Welfare
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29

1 MEMORANDUM OF POINTS AND AUTHORITIES
2 IN SUPPORT OF MOTION TO DISMISS

3 I

4 A THREE JUDGE COURT MAY NOT BE CONVENED
5 FOR A FRIVOLOUS AND UNSUBSTANTIAL GROUND

6 Plaintiffs have attempted to invoke the jurisdiction
7 of the three judge court under 28 U.S.C. section 2281. Clearly
8 that section does not come into operation when the claim of
9 unconstitutionality is nonexistent. Bailey v. Patterson, 369
10 U.S. 31, 33 (1962). Nor is a three judge court required to
11 convene when prior decisions make frivolous any claim that a
12 state statute on its face is unconstitutional. Where there is
13 no dispute as to the constitutionality of the statute, a three
14 judge court will not convene. Board of Supervisors of La. State
15 U. & A. & M. College v. Ludley, 252 F. 2d 372, 376. (5th Cir.
16 1958).

17 In the instant complaint, plaintiffs' claim that
18 section 1350 of the California Labor Code is unconstitutional
19 under the equal protection provision of the Fourteenth Amendment
20 to the United States Constitution. (Complaint, para. XXIV.)
21 That this claim is clearly frivolous and unsubstantial is made
22 evident by the fact that both the Supreme Courts of the United
23 States and California have held that section constitutional.
24 Miller v. Wilson, 236 U.S. 373 (1915); In re Miller, 162 Cal.
25 687, 124 Pac. 427 (1912).

26 II

27 A THREE JUDGE COURT MAY NOT BE CONVENED WHEN
28 THE ALLEGED UNCONSTITUTIONALITY OF A STATE
29 STATUTE IS GROUNDED UPON THE SUPREMACY CLAUSE
30 OF THE UNITED STATES CONSTITUTION

31 Plaintiffs have also sought to invoke the jurisdiction
of a three judge court on the basis that section 1350 of the

1 California Labor Code conflicts with the provisions of the Civil
2 Rights Act of 1964, 42 U.S.C. section 2000e, et seq. (Complaint
3 paras. XXIV and XXV.)

4 However cases grounded upon the Supremacy clause of
5 the United States Constitution, article VI, clause 2 are not
6 within the purview of 28 U.S.C. section 2281. Clearly the three
7 judge court will not convene where the alleged claim involves
8 federal-state statutory conflicts. Swift & Co. v. Wickham, 382
9 U.S. 111 (1965).

10 III

11 PLAINTIFFS DO NOT HAVE THE POWER TO INVOKE
12 THE JURISDICTION OF THE THREE JUDGE COURT
UNDER 42 U.S.C. SECTION 2000e-6(b)

13 Plaintiffs have attempted to invoke the jurisdiction
14 of the three judge court under the authority of 42 U.S.C. section
15 2000e-6(b). That section provides in part:

16 ". . . in any such proceeding the Attorney General may
17 file with the clerk of such court a request that a
18 court of three judges be convened to hear and deter-
19 mine the case. Such request by the Attorney General
20 shall be accompanied by a certificate that, in his
21 opinion, the case is of general public importance."

22 This section does not provide for any other method of
23 convening a three judge court, nor does any other section in
24 Subchapter VI, the subchapter of the Civil Rights Act of 1964
25 that deals with Equal Employment Opportunities. The complaint
26 in the instant matter has not been filed by the Attorney General
27 (see 42 U.S.C. § 2000e-6(a)), there has been no request by the
28 Attorney General that a three judge court convene, nor has there
29 been certification that the case is of general public importance.
30 Therefore, the three judge court does not have jurisdiction
31 under 42 U.S.C. section 2000e-6(b).

IV

THE COURT DOES NOT HAVE JURISDICTION TO HEAR
THE INSTANT MATTER AS IT IS A SUIT AGAINST
THE STATE WITHOUT ITS CONSENT

Plaintiffs have named two governmental entities of the State of California namely the Industrial Welfare Commission and the Division of Industrial Welfare as defendants. We contend that the suit is essentially one against the State of California and therefore barred because this State has not consented. Hans v. Louisiana, 134 U.S. 1 (1890). A state is not divested of its immunity solely because the case is one arising under the Constitution or laws of the United States. Parden v. Terminal Ry. Co., 377 U.S. 184, 186 (1964).

Where a commission is merely a channel through which the state performs its necessary governmental functions, the state is the real party in interest. Oklahoma Real Estate Comm'n. v. National Business & Property Exch., 229 F. 2d 205, 207 (10 Cir. 1955). Such is the case here. The Division of Industrial Welfare has been authorized by the California Legislature to enforce the provisions of section 1350 of the California Labor Code by section 1356 of that Code. The Industrial Welfare Commission has been authorized by the California Legislature to promulgate orders by which the maximum hours of work for women are fixed (but not greater than the maximum hours established by the Legislature). Calif. Lab. Code §§ 71, 71.1 and 1182(b).

It is readily apparent that the State defendants act on behalf of the State of California and as the State. The resultant affect of granting an injunction in the instant matter not only would prohibit the Division from enforcing the code provisions, but would also compel the State to invalidate its regulatory scheme in reference to hours of work for women. Such compulsion operates directly against the State. Chicago R.I. &

1 P.R. Co. v. Long, 181 F. 2d 295, 298 (8 Cir. 1950). "... any
2 suit, whether in law or equity, which has the purpose and effect,
3 directly and indirectly, of coercing the state is one against
4 the state. . ." Kansas City So. R. Co. v. Morley, 88 F. Supp
5 300, 305 (W.D. Ark. 1950).

6 It is submitted that by the instant action plaintiffs
7 seek to coerce the State of California and therefore that this
8 is a suit against the State which cannot be maintained in this
9 court because the State has not consented.

10 V

11 THE COURT SHOULD EXERCISE ITS EQUITABLE
12 DISCRETION AND ABSTAIN FROM HEARING THIS
13 CASE BY DISMISSING THE ACTION SO THAT THE
STATE COURTS HAVE AN OPPORTUNITY TO RULE

14 It is apparent that the only issue of any substance
15 in this case is whether section 1350 of the California Labor
16 Code is now invalid due to Congressional pre-emption via the
17 Civil Rights Act of 1964. Because no court of the State of
18 California has ruled upon that issue, we believe that this court
19 should exercise its equitable discretion, and abstain from
20 hearing the case by dismissing the action so that the State
21 courts have an opportunity to rule.

22 We recognize that the doctrine of abstention is
23 usually applied to permit a state to interpret its own statutes
24 and to determine if those statutes are constitutional under the
25 state constitution. Through the doctrine of abstention, the
26 federal courts refrain from deciding federal constitutional
27 issues prematurely for the state courts may by their decision
28 make it unnecessary for a federal court to decide the federal
29 constitutional issues. The doctrine also avoids conflict be-
30 tween two sovereignties and unnecessary impairment of state func-
31 tion. Martin v. Creasy, 360 U.S. 219, 224 (1959).

1 Obviously abstention in the instant matter will avoid
2 conflict between two sovereignties and the unnecessary impairment
3 of state function by a federal court. The application of the
4 Supremacy clause does not involve an issue of a basic constitu-
5 tional right such as equal protection or due process. Rather
6 what is involved is merely the construction of two statutes, one
7 federal and the other state. Swift and Co. v. Wickham, 382 U.S.
8 111 (1965). There is no valid reason why plaintiffs cannot
9 present such an issue to the State courts before forcing a
10 federal court to rule.

11 California has been carrying out its policies in
12 reference to the working laws for women through section 1350 of
13 the California Labor Code and the orders of the Industrial
14 Welfare Commission for some fifty years. A federal court may
15 exercise discretion in an area involving a state when it is
16 carrying out its policies. Burford v. Sun Oil Co., 319 U.S. 315,
17 318 (1943).

18 In summary:

19 ". . . Equitable relief may be granted only when the
20 District Court, in its sound discretion exercised
21 with the 'scrupulous regard for the rightful independ-
22 ence of state governments which should at all times
23 actuate the federal courts,' . . . is convinced that the
24 asserted federal right cannot be preserved except by
25 granting the 'extraordinary relief of an injunction in
26 the federal courts.' . . . Considering that '[f]ew
27 public interests have a higher claim upon the discre-
28 tion of a federal chancellor than the avoidance of
29 needless friction with state policies,' . . . the usual
30 rule of comity must govern the exercise of equitable
31 jurisdiction by the District Court in this case.

1 Whatever rights appellee may have are to be pursued
2 through the state courts. . . ." Alabama Comm'n. v.
3 So. Ry. Co., 341 U.S. 341, 349-50 (1951).

4 CONCLUSION

5 For the foregoing reasons, we respectfully request
6 that the court grant our motion to dismiss in all respects.

7 DATED: December 12, 1966.

8 THOMAS C. LYNCH, Attorney General
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