Case No. S222732

SUPREME COURT
FILED
MAR 8 2017
Jorge Navarrete Clerk
Deputy

IN THE SUPREME COURT OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

CHARLES LEE et al.,
Real Parties in Interest.

ON REVIEW FROM A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN, CASE NO. B249546

LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC 332016
MICHAEL L. STERN, JUDGE

PETITIONER DYNAMEX OPERATIONS WEST, INC.'S REPLY TO PLAINTIFFS AND REAL PARTIES IN INTEREST'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I.

INTRODUCTION

The core question before the Court is what standard to apply in determining whether Plaintiffs are independent contractors or employees. Plaintiffs argue that the DLSE Manual is not relevant to answering this question. They support that position by asserting that the relevant independent contractor sections of the DLSE Manual (*e.g.*, Section 28) were not updated since *Martinez* was decided.

This argument fails for two reasons. First, the DLSE has consistently and effectively applied *Borello* even following *Martinez*. Second, the DLSE has had ample time and opportunity to revise its Manual if *Martinez* had any relevance to the independent contractor misclassification analysis. In fact, the DLSE has revised its Manual numerous times recently, even updating a separate section in response to *Martinez*. Given that *Martinez* is a decision of this Court, it is not plausible that the DLSE has simply overlooked it. Rather, it is quite clear that the DLSE does not see *Martinez* as pertinent to distinguishing between employees and independent contractors.

As Dynamex has argued previously, the long-standing practice of the DLSE—as accurately summarized by the DLSE Manual and mirrored by other California agencies—provides yet another reason why this Court should reaffirm that *Borello* remains the test for distinguishing employees from independent contractors in California.

II.

ARGUMENT

A. The DLSE Manual Is Relevant To Determining The Appropriate Standard For Distinguishing Between Employees And Independent Contractors, Including In The Class Certification Context.

Plaintiffs argue that the Division of Labor Standards Enforcement Policies and Interpretations Manual ("DLSE Manual") should be given no weight[1] because it "does not decide, or purport to decide, the issue before the Court." (Plaintiffs' Supplemental Brief ("PSB") at 4.) Plaintiffs arrive at this conclusion due to the fact that the DLSE Manual does not explicitly discuss the supposed "conflict" between *Martinez v. Combs* (2010) 49 Cal.4th 35 and *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal. 3d 341.[2] (PSB at 4 (noting the DLSE Manual does not make

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[1] Although "statements in the DLSE Manual are not binding on the courts because the rules were not adopted under the Administrative Procedure Act," they "may be considered for their persuasive value." (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 902.)

[2] Plaintiffs attempt to explain the "conflict" between *Martinez* and *Borello* by citing to a portion of *Martinez* where this Court explained that reliance on the common law would render the Industrial Welfare Commission's ("IWC" or "commission") definitions "effectively meaningless." (PSB, at 5.) As noted in prior briefing, *Martinez*—and, specifically, this passage from the decision—relates exclusively to the question of which entities may be deemed "employers" of acknowledged employees. *Martinez* did not attempt to distinguish employees from independent contractors. The common law definition referenced in *Martinez* was in conflict with the Wage Orders' definition precisely because it was presented in the employment context. In assessing the separate question of independent contractor status (which is outside the realm of the Wage Orders' definition), the common law test as interpreted by *Borello* would not render any of the "commission's definitions effectively meaningless." *Martinez* can continue to be applied in joint employment cases, and *Borello* in independent contractor classification cases, with no conflict.

any "attempt to reconcile the two potentially competing sources of authority.").) But it is only because Plaintiffs mistakenly attempt to extend *Martinez* to the independent contractor misclassification context that they see an imagined "conflict." If, as Dynamex contends, *Martinez* and *Borello* address separate legal questions, there is no conflict at all.

Certainly, the DLSE Manual does not suggest that any such conflict exists. The DLSE Manual shows that the DLSE, as the single state agency empowered to enforce the Labor Code and Wage Orders, never considered *Martinez* the new standard for distinguishing independent contractors from employees. This is supported by two critical facts: 1) the DLSE has continued to consistently apply the *Borello* standard as a workable standard even after *Martinez* was decided, and 2) the DLSE had ample time and opportunity in the six years since *Martinez* to revise the relevant sections of its Manual, yet never did so, despite making numerous other revisions.

1. The DLSE has consistently applied and relied upon *Borello* because it provides a workable standard.

As noted in Dynamex's Supplemental Brief, the DLSE has consistently applied and relied upon the *Borello* standard in its enforcement practices, even after *Martinez* was decided. The DLSE has confirmed this in its own Supplemental Brief to the Court:

> In the years since *Borello* was decided, the Labor Commissioner has routinely and consistently applied the *Borello* analysis in its Berman hearing process wage adjudication cases, in workers' compensation cases in which employee status may be an issue (as in when the BOFE issues a citation against an employer for failing to maintain workers' compensation insurance), and in other BOFE actions in which disputes may arise as to employee versus independent contractor status.

(DLSE Supplemental Brief at 11.) The DLSE further confirmed that it has consistently applied *Borello* in its enforcement practices because: a) it is a workable standard that b) it has had no reason to change, even after *Martinez* was decided:

> *Borello* has provided a satisfactory basis for analyzing disputes concerning independent contractor status in these individual cases and there has been no cause for the Labor Commissioner to address the issue of whether the holding in *Martinez* suggests an alternative framework for analyzing independent contractor status in Wage Order based claims before the Labor Commissioner.

(Id. at 8-9.)[3]

Thus, contrary to the Supplemental Briefs of Plaintiffs and the amici curiae supporting Plaintiffs, the DLSE's inability to keep up with new legal developments is not the reason *Martinez* goes unmentioned in the relevant independent contractor sections of the DLSE Manual. Rather, it is because, after decades of consistent application, *Borello* has proven to be a workable standard not in need of modification or replacement.

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[3] The DLSE's Supplemental Brief provides no support for Plaintiffs' position here. Instead, the DLSE attempts to take a neutral stance by claiming its Manual has not decided the issue of whether *Martinez* is the proper standard in the class certification context because it only deals with individual hearings. However, the core issue in both a class action and an individual hearing is whether the plaintiff was misclassified as an independent contractor. It would make little sense for the *Martinez* standard to apply when determining whether common issues of law and fact predominate for class certification, and then decide the merits using a different legal standard, i.e., the *Borello* standard. The legal standard should be the same for all independent contractor misclassification cases. And, it is undisputed that the DLSE still uniformly applies the *Borello* standard when resolving independent contractor status.

2. Despite ample time and opportunity, the DLSE has not changed the relevant sections of its Manual.

The DLSE's consistent application of *Borello* in its enforcement practices is accurately reflected in the DLSE Manual. If *Martinez* were as groundbreaking as Plaintiffs argue, then, in the over six years that have passed since *Martinez*, the DLSE surely would have at least discussed *Martinez* in connection with its independent contractor analysis.[4] This has not happened, as is evident by the DLSE's Manual, opinion letters, administrative decisions, and its Supplemental Brief to this Court.[5]

As noted above, this is not from lack of opportunity. It is common for the DLSE to update its Manual in response to new developments in the law. Notably, the DLSE has made over ninety revisions to different parts of its Manual from November 22, 2005 to April 1, 2014. (See DLSE Manual, at pp. 2-13.) Nine of those revisions were made after *Martinez* was decided. (See id.) Indeed, the DLSE was well aware of the *Martinez* decision, having updated the section regarding the IWC Order definition of "employer" per *Martinez*. Thus, had the DLSE believed *Martinez* restructured or conflicted with the *Borello* standard in any way, it would undoubtedly have discussed this development in one of its numerous

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[4] By way of comparison, about a year after *Brinker Restaurant Corporation v. Superior Court of San Diego* (2012) 53 Cal.4th 1004 was decided, the DLSE updated its Manual to clarify meal period requirements. (See DLSE Manual, at § 45.2.1.)

[5] The DLSE observes in its Supplemental Brief that this lack of discussion should not be interpreted to mean the DLSE holds any position regarding the present issue on appeal. However, the DLSE also narrowly frames that issue (as discussed in more detail above, *supra*, note 3). If the issue is correctly framed as what standard should be used to distinguish employees from independent contractors, then the DLSE's position must be read as intentional, given its admission that it has continued, even after *Martinez*, to consistently apply *Borello*.

updates to its Manual.

B. Reaffirming The *Borello* Standard, As The DLSE Continues To Do, Is Necessary For Maintaining A Distinction Between Employees And Independent Contractors Consistent With Other Remedial Employment Statutes In California And The Rest Of The Nation.

Plaintiffs additionally argue that, for the sake of uniformity, the *Martinez* definition of "employer" should apply to all cases brought under the Labor Code as well as the Wage Orders. This misstates the issue on appeal. The issue is whether the Wage Orders as interpreted by *Martinez* (which were created in the context of employment) or the common law as interpreted by *Borello* (which was adopted to resolve with the precise issue of independent contractor misclassification) should apply in this case. Dynamex submits, once again, that *Borello* should remain the sole standard for determining the issue of independent contractor misclassification in all California cases, regardless of whether they involve the Labor Code or Wage Orders. *Martinez* should remain the controlling standard when deciding the separate issue of whether an entity is an employer of an already acknowledged employee under the Wage Orders.

Plaintiffs' argument for creating new law and applying *Martinez* to independent contractor misclassification cases should be rejected as unconvincing, unworkable, and unsupported by the DLSE's Manual, enforcement practices, and Supplemental Brief. As argued in prior briefing, Plaintiffs' proposed standard will effectively convert every independent contractor in California into an employee, creating a deep rift with the enforcement practices among California agencies under remedial employment statutes, and a sharp break with the rest of the nation.

III.

CONCLUSION

The DLSE Manual is relevant to the issue on appeal, as it demonstrates that the DLSE has consistently applied *Borello* as the proper standard to distinguish employees from independent contractors, even after *Martinez*. After over six years of enforcement of the Labor Code and Wage Orders and numerous revisions to the DLSE Manual, the DLSE has still not perceived any conflict between *Borello* and *Martinez*. The DLSE's long-standing reliance on *Borello* is consistent not only with the DLSE's own admissions in its Supplemental Brief, but with the practices of other California agencies and states across the U.S. Accordingly, for the reasons set forth above and in Dynamex's prior briefing, Dynamex respectfully urges the Court to reaffirm longstanding precedent that *Borello* is the proper standard to distinguish employees from independent contractors in California.

DATED: March 8, 2017

LITTLER MENDELSON, P.C.

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this Supplemental Brief, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and this certification, consists of 1,837 words in 13-point Times New Roman type as counted by the word-processing program used to generate the text.

DATED: March 8, 2017

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