S.Ct. Case No.: S222732

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner and Defendant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent,

CHARLES LEE and PEDRO CHEVEZ, individually, and on behalf of all others similarly situated,
Plaintiffs and Real Parties in Interest.

After Decision by the Court of Appeal
Second Appellate District, Div. Seven (B249546)

Superior Court of Los Angeles County (BC332016)
Hon. Michael L. Stern

SUPPLEMENTAL BRIEF REGARDING RELEVANCE OF DLSE ENFORCEMENT MANUAL

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I. INTRODUCTION

This principal issue before this Court is whether, in a wage-and-hour class action involving claims arising under the Industrial Welfare Commission's Wage Orders and related provisions of the California Labor Code, the proper standard for determining whether plaintiffs were misclassified as independent contractors is the common law test set forth in *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, or the three disjunctive tests set forth in the Wage Orders' definition of employment, as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35.

The Court has now requested supplemental briefing to address what relevance, if any, the Court should give to the sections of the Division of Labor Standards Enforcement Policies and Interpretations Manual ("DLSE Enforcement Manual") that discuss the employee/independent contractor distinction.

All parties and their amici agree that, under existing legal standards, California courts are not required to give deference to the policies and provisions of the DLSE Enforcement Manual. Consequently, the focus of this Supplemental Brief will be on the subsidiary question of whether those sections of the DLSE Enforcement Manual constitute "persuasive authority" based on the thoroughness and thoughtfulness of the DLSE's analysis.

As explained below, the DLSE Enforcement Manual does not provide persuasive authority concerning the proper test to apply in this case. The relevant sections of the Manual pre-date this Court's *Martinez* decision, and DLSE has not

yet revised those sections to take *Martinez* into account. DLSE has itself made clear that its Enforcement Manual was drafted for the purpose of summarizing existing law rather than establishing new legal principles; and the fact that the DLSE has not yet devoted the staff time necessary to update those Enforcement Manual provisions cannot be construed as a silent administrative ratification of its prior, but now outmoded, case law summary.

II. DISCUSSION

A. THE CITED SECTIONS OF THE DLSE ENFORCEMENT MANUAL ARE NOT ENTITLED TO DEFERENCE AND SHOULD NOT BE GIVEN ANY WEIGHT

This Court has repeatedly held that the DLSE's regulations and enforcement policies are not entitled to judicial deference, because they were not adopted in compliance with the notice-and-comment requirements of the Administrative Procedure Act, Gov. Code, § 11340 et seq. *See Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576 ["We conclude we can give no weight to the DLSE's interpretation of the wage orders."]; *Martinez*, 49 Cal.4th at 50 n.15. ("[W]e give the DLSE's current enforcement policies no deference because they were not adopted in compliance with the Administrative Procedure Act."]

Given that the DLSE Enforcement Manual receives "no weight," the next question is whether it contains information "persuasive" to this Court. It does not. Simply put, the DLSE Enforcement Manual contains an unremarkable summary of *Borello* – consistent with pre-*Martinez* case law. All parties in this case concede

that *Borello* and successor decisions, such as *Ayala v. Antelope Valley Newspapers*, (2014) 59 Cal.4th 552 ("*Ayala*") are appropriate to examine alleged independent contractor status under the common law definition of employment – the third alternative definition set forth in *Martinez*.

While some might disagree with the DLSE's characterization of the *Borello* decision or with DLSE's failure to discuss how the common law test may vary depending on the context in which it is applied – *i.e.*, in a traditional master-servant tort case like *Patterson v. Domino's Pizza* (2014) 60 Cal.4th 474, as opposed to a statutory case where the underlying legislative purposes might require a different weighting of factors affecting the "right to control," *see, e.g.*, *Ayala v. Antelope Valley Newspapers* (2014) 59 Cal.4th 552 – the issue before this Court is not whether *Borello* correctly defines the common law test. Rather, the question is whether *Borello*, or some other variant of the common-law test, must be the *exclusive* test for determining "employee" status in *all* independent contractor misclassification cases, even those arising as a result of claims made under the Wage Orders and related Labor Code provisions.[1]

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[1] In *Martinez*, this Court referred to *Borello* as applying "the common law test of employment," 49 Cal.4th 73, although to be more precise, *Borello* applied the version of that test that the Court found best-suited to determining eligibility for workers' compensation protections. *See* 48 Cal.3d at 350 (declining to apply the common law "right to control" test "rigidly and in isolation," and instead requiring consideration of other "indicia of the nature of a service relationship"). This Court's decision in *Martinez* also calls into question the statement in section 28.3 of the DLSE Enforcement Manual that refers to *Borello* as applying a "multi-factor" or "economic realities" test. The *Martinez* decision explains that the

The DLSE Enforcement Manual does not decide, or purport to decide, the issue before this Court. The relevant sections of the Manual have not been updated since this Court decided *Martinez* and they make no attempt to reconcile the two potentially competing sources of authority. Section 2.2 of the Manual simply cites the Wage Order definition of "employer," as "any person...who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any person," but does not explain what that definition means – as this Court did in *Martinez*. While a later section of the Manual, section 55.2, cites *Martinez*'s description of the three alternative prongs of that definition, the Manual as a whole has not been updated since *Martinez*, and the DLSE's periodic section-by-section revisions have simply not yet caught up with legal developments (and the DLSE will presumably await the ruling in this case before being updated again).

The DLSE Enforcement Manual does not contain any discussion of the question before the Court, and does not explain how the three alternative tests set forth in *Martinez* and the IWC Wage Orders differ in purpose or application from the common-law test. Differ they must, though, because otherwise there would be

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"economic realities test," which is part of the test applied by some federal courts under the federal Fair Labor Standards Act ("FLSA"), is *less* protective of workers' rights than the IWC Wage Order definition requires. As the Court explained, California law was designed "to provide employees with greater protection than federal law affords," and "[a]n examination of the wage orders' language, history and place in the context of California wage law, moreover, makes clear that those orders do not incorporate the federal definition of employment." 49 Cal.3d at 52, 59 (citing, *inter alia*, *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592).

no point in articulating those tests as alternative, disjunctive methods for establishing employee status, and the Court would have had no reason to conclude that California law, in order to provide greater remedial protections to workers within its borders, provides *greater* scope to its definitions of "employee" than does the common law or the federal FLSA. As this Court explained, "[w]ere we to define employment exclusively according to the common law in civil actions for unpaid wages we would render the commission's definitions effectively meaningless." *Martinez*, 49 Cal.4th at 65.

The traditional common law test is designed to protect the hirer from liability for the acts of her worker. *See Borello*, 48 Cal.3d at 350 ("The distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him."). The three *Martinez* tests are designed to achieve a much broader goal: the protection of workers from exploitation and harm by the conduct of those who control significant aspects of their working arrangements. The Wage Orders were designed to protect workers in "irregular" as well as traditional working arrangements. *See Martinez*, 49 Cal.4th at 55, 58. (Wage Orders' definitions of employment extend worker protections to "workers whose employment status the common law did not recognize") *Id.* at 64.

This Court made it clear that the Wage Order definitions of employment ushered in a new era. The IWC's "power to adopt rules to make the minimum wage effective includes the power to define the employment relationship as

necessary '***to insure the receipt of the minimum wage and to prevent evasion and subterfuge***....'" (*Martinez* at 64 (emphasis added, citation omitted).)

What better example of "evasion and subterfuge" than companies like Dynamex which "convert" a workforce from employees to independent contractors (with all of the workers' essential functions still in place) for the purpose of avoiding the hard-fought labor protections to which they otherwise would be entitled?

The ultimate question in this case is whether Dynamex is the employer of the plaintiff drivers, and is therefore subject to suit under Labor Code §§1194 and 2802 and Wage Order 9, §§3A ("Daily Overtime General Provisions") and §9 ("Uniforms and Equipment"). Those drivers, Real Parties herein, believe that the same definitions of "employ" that this Court applied in *Martinez* should also be applied in this case to determine whether plaintiffs are entitled to the workplace protections of the Labor Code and Wage Order provisions that plaintiffs rely upon. Those protections are the responsibility of an "employer" under California law; and that word should have the same meaning in Labor Code §2802 as in Labor Code §1194 and Wage Order 9-2001. All three enactments serve the same overall purpose – worker protection – and there is no indication in any of them that the Legislature and the IWC had a different meaning or purpose in mind. As this Court has written, "[t]o the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027. Labor Code Section 2802 and

Section 9(B) of the Wage Orders, both have the same basic purpose: to ensure that the employer–not the employee–bears the costs of its own enterprise.[2]

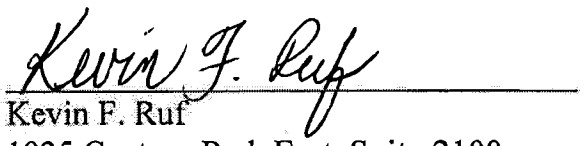
When a dispute arises over whether a worker is an "employee," California presumes an employment relationship and places the burden on the putative employer to prove otherwise. *See* Labor Code §3357. If the putative employer seeks to avoid liability on the ground that the worker is an independent contractor, it should have the burden of proving that it did not employ those workers under any of the three alternative definitions promulgated by the IWC in the Wage Orders and recognized by *Martinez*.

III. CONCLUSION

For the reasons stated above, this Court should not give any weight to the outdated language in the cited sections of the DLSE Enforcement Manual.

Dated: February 20, 2017

GLANCY PRONGAY & MURRAY LLP



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[2] The purpose of Labor Code §2802 is to ensure that the employer, not the employee, bears the costs of the employer's enterprise, and thus "to protect employees from suffering expenses in direct consequence of doing their jobs." *Grissom v. Vons Companies, Inc.* (1990) 1 Cal.App.4th 52, 59-60; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 74 n.24.

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CERTIFICATION PURSUANT TO CALIFORNIA RULE OF COURT 8.204(c)(1)

The undersigned hereby certifies that the *foregoing Supplemental Brief Regarding Relevance of DLSE Enforcement Manual* is proportionally spaced, has a typeface of Times New Roman 13-point, is double-spaced, and based upon the word court feature contained in the 2010 Microsoft Word computer program used to produce the brief, contains 2,028 words.

Kevin F. Ruf

PROOF OF SERVICE VIA U.S. MAIL

I, the undersigned, say:

I am a citizen of the United States and am over the age of 18 and not a party to the within action. My business address is 1925 Century Park East, Suite 2100, Los Angeles, California 90067.

On February 20, 2017, I served the following documents:

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Executed on February 20, 2017, at Los Angeles, California. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Daniel C. Rann