

FEB 21 2017

Jorge Navarrete Clerk

Case No. S222732

IN THE SUPREME COURT OF CALIFORNIA

Deputy

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

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

AMICUS CURIAE BRIEF OF DIVISION OF LABOR
STANDARDS ENFORCEMENT, DEPARTMENT OF
INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

DIVISION OF LABOR STANDARDS ENFORCEMENT

State of California, Department of Industrial Relations

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I. INTRODUCTION.

This Court has requested that the Labor Commissioner¹ file an amicus curiae brief expressing its views on the following question:

In resolving the [issue presented for review in this case], what relevance, if any, should the court give to the Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual (2002 update as revised March 2006) and, in particular, to the sections of the manual that discuss the independent contractor/employee distinction (§§ 2.2, 2.2.1, 28-28.4.2.4).

As expressed by the Court's Order, issued on December 21, 2016, the underlying issue presented for review is whether "in a wage and hour class action involving claims that the plaintiffs are misclassified as independent contractors, may a class be certified based on the Industrial Welfare Commission definitions as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*), or should the common law test for distinguishing between employees and independent

¹ The terms "Division of Labor Standards Enforcement" (DLSE) and "Labor Commissioner" are often used interchangeably when referring to the enforcement functions that are performed by this state agency.

contractors discussed in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello* control?)”

The Court’s inquiry concerns two distinct parts of the DLSE Enforcement Policies and Interpretations Manual (“the Manual”). First, Sections 2.2 and 2.2.1 set forth the Wage Order’s definition of employer, and Section 2.2.1 notes that two or more entities may be joint employers who share responsibility for wages. Significantly, these provisions of the Manual do not address the discrete legal issue of whether workers are employees or independent contractors in resolving issues of class certification.

Second, Sections 28.2 through 28.3.3.2 are part of Chapter 28 of the Manual, titled “Independent Contractor vs. Employee,” and address the distinction between employees and independent contractors. These provisions discuss “the multi-factor *Borello* test” and its progeny as the means by which the Labor Commissioner makes a determination as to whether a worker is an employee or an independent contractor (Manual, §§28 – 28.4.2.4).

But, it is important to emphasize that the DSLE’s enforcement activities do not involve class actions, and thus the Manual does not discuss, nor do the portions cited specifically bear on, the standards for class certification presented in this case. Similarly, the Labor Commissioner does not possess particular

administrative expertise on that procedural question. The sections of the Manual describing the *Borello* analytical framework for evaluating independent contractor defenses are intended for use in DLSE's enforcement of wage and hour laws. Though not specifically cited in the Court's question, the Labor Commissioner has revised the Manual to reference the *Martinez* decision in an annotation to the definitions contained in the Industrial Welfare Commission Orders, repeating these definitions without analysis. Similar to Sections 2.2 and 2.2.1, the Section 55.2 revision, *infra*, does not address the legal distinction between employees and independent contractors for the purposes of class action certification.

Ultimately, there has been no occasion or need for the Labor Commissioner to address whether *Martinez* is germane to the analysis of whether workers are employees or independent contractors for the purposes of class action certification. The lack of any mention of *Martinez* in Chapter 28 of the Manual, therefore, should not be interpreted as an expression of a view on the underlying question presented for review in this case.

II. THE LABOR COMMISSIONER'S ENFORCEMENT ACTIVITIES DO NOT INCLUDE THE PROSECUTION OF CLASS ACTIONS, AND ACCORDINGLY, THE LABOR COMMISSIONER HAS NO SPECIAL EXPERTISE ON THE CERTIFICATION QUESTION PRESENTED.

The Labor Commissioner has two primary functions related to the enforcement of California labor laws concerning wage and hour issues. First, the

Labor Commissioner adjudicates individual administrative wage claims that are filed with the agency pursuant to Labor Code sections 98 et seq. This is known to as the “Berman” hearing process. (See *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1128 [explaining the Berman administrative wage claim and hearing process].) In this process, claims found to be within the Labor Commissioner’s jurisdiction which are not informally resolved are heard by hearing officers who render orders, decisions, or awards. (Lab. Code § 98.1.) These administrative decisions may be appealed de novo to the superior courts. (Lab. Code § 98.2, subs. (a) – (c).) Final awards that are not appealed may be entered and enforced as superior court judgments. (Lab. Code § 98.2, subd. (e).) Significantly, this Berman administrative wage claim process involves solely individual claims; and does not provide the Labor Commissioner with experience or expertise in issues germane to certification of class claims.

Within the Berman administrative hearing process, the Labor Commissioner continues to use *Borello* as the analytical framework for evaluating independent contractor defenses. *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.

The second manner in which the Labor Commissioner is involved in the litigation of wage and hour laws emanates from its field enforcement program. The Labor Commissioner's Bureau of Field Enforcement ("BOFE") accepts and investigates complaints concerning alleged labor law violations (i.e., complaints concerning an employer, work site, group of employers within an industry, etc., as opposed to claims of unpaid wages by individual employees). (See Lab. Code §§ 90.5, 92, 93, and 95.) The focus of the field enforcement program is primarily on industries and areas in which employees are relatively low paid and unskilled and/or areas in which there has been a history of violations. (See Lab. Code § 90.5, subd. (c).) The Labor Commissioner's BOFE has broad investigatory powers and violations of state labor laws may be addressed through the issuance of civil penalty assessments. (See, e.g., Lab. Code §§ 226.3, 558, and 1197.1.) Additionally, or alternatively, the Labor Commissioner may exercise its police powers through the filing of civil enforcement actions in superior court, including for the collection of wages or other relief on behalf of workers, pursuant to Labor Code sections 98.3 and 1193.6. (See, e.g., *Dept. of Industrial Relations v. UI*

Video Stores, Inc. (1997) 55 Cal.App.4th 1084, 1088; *Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440, 1445.)

In citations issued pursuant to Labor Code sections 558 and 1197.1, the Labor Commissioner addresses employer violations of the minimum wage, overtime, meal period, rest period, and reporting time provisions of the Wage Orders and Labor Code. These citations are issued and enforced in the name of the agency, but the remedies sought and obtained may include restitution of wages owed to the affected employees, as well as civil penalties payable to the State. Similarly, when the Labor Commissioner files civil actions it does so in the name of the agency, but seeks wage restitution for the affected workers as well as civil penalties.

Labor Commissioner penalty citations and lawsuits, however, are not class actions, and neither seek nor require class certification. The only plaintiff is the Labor Commissioner. (See also *Arias v. Superior Court* (2009) 46 Cal.4th 969 [private attorney general actions brought by private parties in place of the Labor Workforce and Development Agency to enforce penalty provisions of the Labor Code do not require class certification].)

Thus, as with the Berman hearing process, the Labor Commissioner's enforcement activity through its BOFE, does not involve any class litigation. As

such, the Labor Commissioner has no special experience or expertise relevant to class action procedures, including certification, either in its adjudicative or prosecutorial roles.

III. THE PROVISIONS OF THE LABOR COMMISSIONER MANUAL RELATING TO THE INDEPENDENT CONTRACTOR DEFENSE HAVE NOT BEEN UPDATED SINCE *MARTINEZ* WAS ISSUED.

As indicated earlier, sections 28.2 through 28.3.3.2 of the Manual discuss the distinction between employees and independent contractors, the application of the *Borello* analysis, factors, and line of cases that are used in making the determination of employee status. 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.

Chapter 28 of the DLSE Manual has not been updated subsequent to the issuance of this Court's decision in *Martinez v Combs, supra*, 49 Cal.4th 35. As stated previously, however, that these sections of the Manual have not been updated should not be interpreted as a statement of any position taken by the Labor Commissioner on the underlying question presented in this case. The Labor

Commissioner has not been presented with that particular question, and accordingly, has not addressed it within the Manual or otherwise.

As also referenced above, the only provision of the Manual referencing *Martinez* is found in Chapter 55, titled “IWC Definitions.” That section now provides as follows:

55.2 Definition Of “Employer”. The definition of employer for purposes of California ’s labor laws is set forth in the Wage Orders promulgated by the Industrial Welfare Commission. : To employ under the IWC definitions has three alternative definitions.

“It means (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common-law employment relationship.” *Martinez v Combs* (2010) 49 Cal.4th 35

(Manual, section 55.2.)

Thus, the revision to Section 55.2 solely acknowledges the Court’s holding in *Martinez* as authority, setting forth the IWC’s definition of the meaning of “employ.” It, like Sections 2.2, 2.2.1, 28-28.4.2.4, does not address the issue pertaining to class certification before the Court.

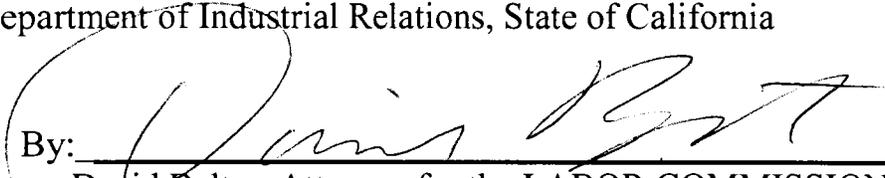
IV. CONCLUSION.

The sections of the Manual referenced in the Court’s Order do not address the underlying question presented in this case. The Labor Commissioner continues to use the *Borello* analysis in adjudicating individual wage claims and prosecuting

BOFE actions when threshold questions of employee versus independent contractor status arise, but has not been called upon to, and has not taken a position as to the relevance of *Martinez* in resolving question of class certification where the defense of independent contractor is raised.

Dated: February 21, 2017

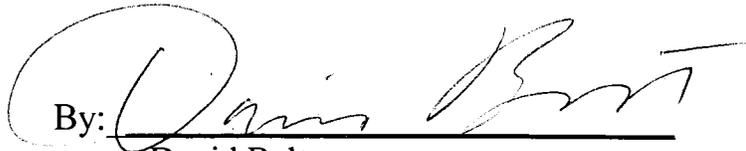
DIVISION OF LABOR STANDARDS ENFORCEMENT,
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By: 
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CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204(c), the undersigned counsel hereby certifies that the foregoing Division of Labor Standards Enforcement Amicus Brief is double spaced, printed in Times New Roman 14-point text, and contains 1988 words. The above word count was determined using the Word Count function of the Microsoft Word 2010 program, and includes words in this certificate, the Table of Contents and the Table of Authorities.

Executed on February 21, 2017, at San Francisco, California.

By: 
David Balter
Attorney for the Labor Commissioner

PROOF OF SERVICE BY MAIL

Dynamex Operations West, Inc. v. Charles Lee and Pedro Chevez
Second Appellate District, Division 7 Case No.: B249546
Superior Court of Los Angeles Case No.: BC332016
Supreme Court Case No.: S222732

I, Joanne M. Leduc, do hereby declare that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, California, 94102.

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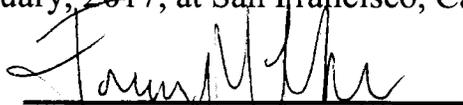
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed this 21st day of February, 2017, at San Francisco, California.



Joanne M. Leduc