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PERSPECTIVE

Vazquez 'guidance' throws future plaintiffs a bone or 2

By Tamarah Prevost

Most plaintiff employment lawyers are now intimately familiar with *Dynamex*, the California Supreme Court case setting the "ABC test" for classifying independent contractors as employees. On May 2 in *Vazquez v. Jan-Pro Franchising International, Inc.*, 2019 DJDAR 3707, the 9th Circuit decided that *Dynamex* should be applied retroactively. But less remarkable than that ultimate holding (of which it devoted only five pages of its 48-page order), the panel made a number of other key observations that are likely to prove helpful fodder for future plaintiffs arguing they have been misclassified as independent contractors.

Retroactivity appeared to be a fairly easy decision for the panel: It restated the general rule that judicial determinations are retroactively applied, noting an exception for when such a decision "changes a settled rule on which the parties below have relied." The panel shrugged off Jan-Pro's argument that this reliance is a factual inquiry only suitably made on remand, finding remanding this issue makes "little sense" and "could lead to the surprising result that *Dynamex* applies retroactively to some parties but not others." The court found that retroactivity does not implicate due process concerns, but actually makes good sense here.

Vazquez's long and winding procedural history began as a class action in Massachusetts and was severed and sent to the Northern District of California, before Judge William Alsup. The Massachusetts case was dismissed, appealed to the 1st U.S. Circuit Court of Appeals, and dismissed there too, though neither dismissal was on the merits. In the 9th Circuit, defendant Jan-Pro argued that in light of this procedural posture, *Dynamex* could be avoided completely because dismissals from the other courts should be afforded preclusive effect. The panel credited the California plaintiffs' "steadfast" determination over ten years of litigation, and rejected Jan-Pro's argument because neither other courts reached the merits of the case before dismissing them.

And when Judge Alsup dismissed *Vazquez*, the landscape was quite different. *Dynamex* had not yet been decided, forcing him to cobble together tests from two different cases. The 9th Circuit teased out Judge Alsup's dismissal, acknowledging *Dynamex* as a game-changer that should be carefully applied to these facts on remand. As such, the panel offered what it calls "guidance" for the remand court, but is actually very specific substantive analysis which if followed, would arguably pave a clear path for Vazquez's case to succeed. There are a few examples of this.

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First, the panel's selection of facts highlights the aspects of Jan-Pro and the plaintiffs' relationship that would support a finding of misclassification. Jan-Pro uses a two-tiered franchise system where it contracts with "master owners" (regional, third party entities), who in turn sell business plans to "unit franchisees." The panel carefully points out that despite these tiers, Jan-Pro has ultimate authority to enforce any agreement between either of the lower entities. Jan-Pro can even step in and assume the master owner's rights and obligations over the unit franchisees, and reserves the right to unilaterally set "policies and procedures" pertaining to both entities.

When posed with a question about the plaintiff employees' respective knowledge of this underlying franchise relationship, the panel makes a critical observation: "Plaintiffs are not sophisticated parties, and English is not their first language … drawing inferences in favor of Plaintiffs, … [they] understood themselves to be 'Jan-Pro cleaners.'" (The panel also said, "Jan-Pro could be Plaintiffs' employer under the ABC test even though it is not a party to any contract with Plaintiffs."). Indeed, the panel's "Overview" section essentially forecloses Jan-Pro's argument that applying the ABC test would "sound the death knell" for franchising in California. Instead, the panel states that despite Jan-Pro's "financial interest," the case has "broader implications," citing an opposing amicus brief that describes the "impacts of [Jan-Pro's] franchising schemes and those of similar janitorial companies on low-wage and immigrant workers and their communities." Comments such as these acknowledge the real-life perspective of these Jan-Pro cleaners, and are a nod to the underlying purpose of the Labor Code which seeks to protect them.

Second, the panel prescribes an important change to Judge Alsup's analysis. In dismissing Vazquez, he merged the "exercise of control" standard with the "right to control" standard from *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014), a case concerning vicarious liability for sexual assault in a franchisee/ franchisor relationship. The panel found Patterson inapposite since Vazquez is a wage and hour, not a tort case, and the purpose of the Labor Code is to "protect a class of workers who otherwise would not enjoy statutory protections," rather than "preventing future injuries … and spreading the losses caused by an enterprise equitably." (Citations omitted). Again, the panel here throws a helpful bone to future plaintiff employment lawyers seeking to distinguish their case from the more stringent vicarious liability standard in the tort context.

The panel does note that "Prong B" of the ABC test, requiring the hiring entity to establish that it was not engaged in the same usual course of business as the putative employee, "may" be appropriate for summary judgment. However, the panel also draws a substantive roadmap for analyzing this prong, noting suggestively that "Jan-Pro is actively and continuously profiting from the performance of those cleaning services as they are being performed," and expressing "skepticism" to Jan-Pro's argument that it is in the business of "franchising" rather than cleaning.

To be sure, the 9th Circuit does not explicitly tell the remanding district court how to rule. But it comes close by describing the appropriate analytical framework and populating it with the facts necessary to support a conclusion that Jan-Pro cleaners would be properly classified as employees.

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