

Massachusetts Employment & Labor Law Report

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SJC Upholds Class Action Waiver In Arbitration Agreement, But Strikes Bar On Multiple Damages

In *Machado v. System4 LLC*, the **Massachusetts Supreme Judicial Court** (SJC) held that Massachusetts courts must enforce class action waivers in employment arbitration agreements unless plaintiffs can establish that they lack practical means to pursue their claims on an individual basis. This is a good decision for employers who want to enforce arbitration agreements that bar class proceedings.

The plaintiffs were individuals who entered into "local franchise agreements" with defendants, System4, LLC and NECCS, Inc., for the provision of commercial janitorial services to third-party customers. The plaintiffs alleged that the defendants had misclassified them and other allegedly similarly situated individuals as independent contractors, rather than employees, and that defendants had committed other violations of the Massachusetts Wage Act, M.G.L. ch. 149, §§ 148, 148B, and 150 (Wage Act). The defendants moved to stay the court proceedings pending arbitration according to the terms of the arbitration clause contained in the parties' franchise agreements. The trial court denied the motion, concluding that the arbitration provision was invalid and unenforceable because it barred class proceedings and prohibited an award of multiple damages. The trial court relied on the SJC's 2009 decision in *Feeney v. Dell Inc.*, 454 Mass. 192 (Feeney I), in which the SJC invalidated Dell's arbitration agreements that contained class action waivers as being against public policy.

However, following the SJC's decision in *Feeney*, in *AT&T Mobility, LLC v. Concepcion* the U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempted a California rule that "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable." Based on

Concepcion, the defendants moved for reconsideration of their motion to stay. The trial court denied the motion, and the SJC granted direct appellate review.

In light of *Concepcion*, the SJC ruled that it was improper to deny enforcement of class action arbitration waivers based solely on Massachusetts' public policy favoring class proceedings in certain contexts, including in Wage Act claims. Rather, in order to avoid enforcement of a class action waiver in an arbitration agreement, a plaintiff must demonstrate that "the class waiver, when combined with other terms of the arbitration agreement, effectively denies the plaintiff a remedy and insulates the defendant from private civil liability for violations of [s]tate law." The Court noted that the magnitude of the potential damages may be the most important factor in determining whether a claim is remediable in individual arbitration; that is, the higher the potential damage award, the more likely that the claim will be found to be remedial on an individual basis, resulting in enforcement of the class waiver. The SJC held that the *Machado* plaintiffs could not sustain their burden based on the fact that their damages relating to franchise fees alone ranged from approximately \$9,500 to \$21,000. "[I]t would be difficult for us to conclude that potential damages of approximately \$10,000 or greater are so small as to preclude the bringing of claims in individual arbitration."

Although the Court held that the class waiver was enforceable, it struck the provision that barred an award of multiple damages as being an illegal attempt to circumvent the Wage Act. According to the SJC, an arbitrator who finds for a plaintiff in a Wage Act claim must award treble damages and attorneys' fees. According to the SJC, striking the bar on multiple damages would not change the fundamental character of the proceedings or the purpose of the arbitral forum.

Employers are encouraged to review their arbitration

agreements to ensure they comply with the SJC's holding in *Machado*. Employers may want to consider including provisions in their waivers that make individual-based arbitrations feasible for small-dollar claims.

District Court Denies Class Certification in Independent Contractor Case

In *Schwann v. FedEx Ground Package System, Inc.* the **U.S. District Court for the District of Massachusetts** denied class certification in a case brought by FedEx delivery drivers because individualized factual inquiries with respect to the circumstances of each driver would have been required in order to adjudicate their claims.

The plaintiffs in the case claimed that FedEx had violated the Massachusetts independent contractor statute, Massachusetts General Laws ch. 149, § 148B (the IC Statute) by classifying them as independent contractors rather than employees. They sought certification pursuant to Rule 23 of the Federal Rules of Civil Procedure (Rule 23) of a class of Massachusetts drivers who had not been included in a prior settlement of similar claims against FedEx.

The IC Statute requires that all workers are classified as employees unless they satisfy three criteria: (1) they perform their work "free from control" by the employer, (2) their work is performed "outside the usual course of business" of the employer, and (3) they maintain an "independently established . . . business of the same nature as that involved in the service performed."

In order to obtain class certification under Rule 23, a plaintiff must show, among other things, that "questions of law or fact common to class members predominate over any questions affecting only individual members." The plaintiffs did not challenge FedEx's assertion that significant individualized evidence would be required in order to determine whether the first and third criteria of the IC Statute were met. However, the plaintiffs argued that they could prove they did not meet second prong – *i.e.*, that the work they performed was within the "usual course of business" of FedEx – using class-wide evidence. They asserted that because a worker must meet all three prongs of the test in order to be considered an independent contractor, the court would never need to consider the questions that required individualized proof.

The Court rejected the plaintiffs' argument, holding that it was premature to determine whether it could avoid looking at any of the prongs of the IC statute. The Court acknowledged the recent U.S. Supreme Court ruling in *Comcast Corp. v. Behrend* that courts may address

questions related to the merits of the case when those questions overlap with the Rule 23 inquiry. However, the Court determined that the plaintiffs' argument required a broader merits analysis than was appropriate under the circumstances. The Court stated that the plaintiffs' argument attempted to "shortcut the statutory test" and improperly asked the court to "conclude[e] from the outset that FedEx's independent contractor defense must inevitably fail."

Schwann is significant because it was one of the first cases following the Supreme Court decision in *Comcast* to address the scope of a federal court's authority to address merits questions in the context of a Rule 23 motion for class certification. The Court in *Schwann* interpreted the *Comcast* decision in a relatively restrictive manner but other courts may find that they have broader authority.

Failure to Reimburse Business Expenses May Result In Wage Act Claim

In *Fraelick v. PerketPR, Inc.* the **Massachusetts Court of Appeals** reversed the dismissal of a plaintiff's claims that her former employer violated the anti-retaliation provisions of the Wage Act (M.G.L. c. 149, § 148A) when it fired her after she complained about its failure to reimburse her for business expenses she incurred while working for the employer.

According to the complaint filed by Heather Fraelick, in June 2007 PerketPR (PPR) hired her as a fulltime senior account executive. PPR was a virtual PR firm, and required the plaintiff to work from home and pay for a variety of business-related overhead costs out of her own pocket before being reimbursed by PPR. The plaintiff's offer letter promised a base salary and the benefit of the company's "paid expenses program." Paid expenses included telephone, computer, office supplies, and business travel. The plaintiff alleged that the expense program was a component of her agreed-to compensation package.

According to the plaintiff, in December 2009 PPR failed to reimburse her for expenses incurred in the course of her employment. The plaintiff raised this issue with PPR's President who, according to the plaintiff, acknowledged the debt owed and promised payment. As of December 31, 2010, PPR had not reimbursed the plaintiff for any of the business expenses she incurred in 2010. The plaintiff continued to complain to the President in 2011, and on February 3, 2011 she refused to travel on behalf of PPR until she received reimbursement. Two days later, PPR reimbursed plaintiff's business expenses and terminated her employment. PPR cited the plaintiff's unwillingness to incur expenses as a reason for her termination.

The plaintiff sued PPR, claiming that it violated the Wage Act for failure to pay wages and also that its termination of her employment violated of the Wage Act's anti-retaliation provisions. The trial court granted PPR's motion to dismiss the complaint, concluding that "business expenses are not covered under the Wage Act" and that the plaintiff's allegations failed to meet applicable pleading standards. The plaintiff appealed the dismissal of certain claims, including the Wage Act retaliation claim. She did not appeal the dismissal of her claim that the unreimbursed business expenses were wages under the Wage Act.

The Appeals Court reversed the dismissal of the claims on appeal. While noting that the violation of a standard expense reimbursement arrangement would not typically constitute a violation of the Wage Act, the Court focused on the fact that the Wage Act prohibits an employer from exempting itself from timely and complete payment of wages by "special contracts...or by any other means." It cited to the Supreme Judicial Court's previous decisions in *Awuah v. Coverall North America, Inc.* (2011) and *Camara v. Attorney General* (2011) in which it held that improper charge backs (*Awuah*) and deductions for accidents (*Camara*) violated the Wage Act because they improperly reduced the wages owed to employees. According to the Court, the plaintiff's complaint fairly alleged that PPR implemented a practice which "required the [plaintiff], under penalty of discharge, to advance, indefinitely, expense for the employer's benefit. Viewed in light of *Camara* and *Awuah*... this was a sufficient allegation of 'reasonable belief'" that the unreimbursed expenses fell within the scope of wages covered by the Wage Act.

Although the issue of whether the unreimbursed expenses constituted "wages" under the Wage Act was not directly before the Court, its finding that the alleged reimbursement policy at issue fell short of the Wage Act's requirement that wages be paid both timely and in full suggests that, in the right circumstances, failure to reimburse expenses could constitute a failure to pay wages under the Wage Act.

Class Claim Under Massachusetts Tip Statute Not Preempted by Federal Labor Law

In *Hernandez, et al. v. Harvard University*, the **U.S. District Court for the District of Massachusetts** rejected Harvard's argument that federal labor law completely preempted a putative class action brought under Mass. Gen. Laws ch. 149, § 152A (the Tip Statute) and the common law (unjust enrichment) and remanded the case to Massachusetts

Superior Court for further proceedings.

Plaintiffs, wait staff at the Harvard Faculty Club, were paid a flat hourly rate pursuant to the terms of a collective bargaining agreement (CBA). While the CBA was silent on the subject of tips, patrons were told not to tip wait staff, and employees were not permitted to retain tips. The Faculty Club imposed an 18-22% surcharge on certain food and beverage events, but proceeds from that charge were not remitted to wait staff, and the restaurant did not inform patrons that the charge was not a tip. Because of the no-tipping policy, wait staff received hourly wages higher than peers in other restaurants.

After the plaintiffs filed their complaint in Massachusetts Superior Court, Harvard removed the case to the U.S. District Court on the ground of "complete preemption" under § 301 of the Labor Management Relations Act (LMRA). Plaintiffs then moved to remand the case back to the Superior Court.

The District Court granted the plaintiffs' motion to remand, holding that the LMRA did not preempt the plaintiffs' claims. While preemption can apply where a state law claim is either founded on rights created in a CBA or would require interpretation of the CBA, the operative CBA was silent on the issue of tips. Although Harvard argued that the Court would need to interpret the CBA to determine whether the parties modified the state law tip standard, but the Court rejected this argument and noted that mere consultation of a CBA does not lead to complete preemption in a case where the right at issue stems purely from state law.

The Court also held that the plaintiffs' unjust enrichment claim was "on its face derivative of liability under the Tips Law," and thus similarly grounded on an independent state law interest and not preempted. Lastly, the District Court rejected Harvard's argument that liability would result in a windfall for the well-compensated plaintiffs, noting that Massachusetts courts do not consider a plaintiff's earnings in determining whether a Tip Statute violation occurred.

Although the *Hernandez* decision narrowed the applicability of the complete preemption doctrine, it did not address the validity of other preemption defenses that may be available to employers. Food and beverage employers with unionized workforces subject to a no-tipping policy should consider negotiating the terms of the no-tipping policy into their CBA. All employers should be vigilant that their compensation policies are compliant with the Tip Statute, as non-compliance can lead to claims of significant value, including automatic treble damages and attorneys' fees.

First Circuit Rejects *Prima*

Facie Case As Pleading Standard

In *Rodriguez-Reyes v. Molina-Rodriguez*, the **U.S. Court of Appeals for the First Circuit** held that the *prima facie* case is not the appropriate benchmark for determining whether a complaint meets the plausibility pleading requirement established by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. This ruling may make it more difficult for employers to seek the dismissal of claims of marginal merit.

In *Rodriguez-Reyes*, former teachers in the Puerto Rico Administration of Juvenile Institutions (“AJI”), alleged that the AJI discriminated against them based on their political affiliation. In 2008, the New Progressive Party (NPP) won Puerto Rico’s general election, ending the eight-year reign of its political rival, the Popular Democratic Party. Plaintiffs alleged that once NPP officials took control of the AJI, they launched a “witch hunt” and ousted plaintiffs from their positions, notwithstanding their untarnished work records and strong qualifications. The AJI then filled the empty posts with APP-affiliated replacements.

Plaintiffs sued several government defendants, invoking 42 U.S.C. § 1983, and alleged discrimination based on political affiliation in violation of the First Amendment. The U.S. District Court for the District of Puerto Rico granted the defendants’ motion to dismiss and held that the plaintiffs’ complaint failed to state a claim for relief because it did not please facts sufficient to establish a *prima facie* case of political discrimination. Plaintiffs appealed, arguing that the district court applied a standard more stringent than the plausibility requirement demands.

The First Circuit agreed. In reversing the dismissal of the plaintiffs’ claims, the First Circuit held that a 2002 Supreme Court decision that held that it was not necessary to plead facts supporting a *prima facie* case at the pleading stage was not overturned by, but in fact was consistent with, the Supreme Court’s subsequent holdings in *Twombly* and *Iqbal*, which require that a plaintiff’s complaint states a “plausible claim for relief.” The First Circuit noted however, that such a conclusion does not make the *prima facie* case irrelevant to a plausibility determination at the initial pleading stage. Rather, while a plaintiff need not plead facts sufficient to establish a *prima facie* case, the *prima facie* case may be used as background or “as a prism to shed light upon the plausibility of the claim.” With this framework in place, the First Circuit held that plaintiffs’ factual allegations, taken in their entirety, plausibly stated a claim for political discrimination.

The *Rodriguez-Reyes* decision is significant because it

affirms that even under the heightened pleading standards articulated in *Twombly* and *Iqbal*, plaintiffs need not assert facts supporting a *prima facie* case at the pleading stage. This decision could result in claims of marginal merit surviving a motion to dismiss, requiring employers to incur significant attorneys’ fees and costs during the discovery process. Employers and their counsel should carefully review complaints when deciding whether a motion to dismiss is warranted.

Table of Cases

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Boston Office Labor & Employment Attorneys

Richard L. Alfred
ralfred@seyfarth.com

C. J. Eaton
ceaton@seyfarth.com

Jessica Schauer Lieberman
jmschauer@seyfarth.com

Jean M. Wilson
jwilson@seyfarth.com

Patrick J. Bannon
pbannon@seyfarth.com

Emily C. Ehl
eehl@seyfarth.com

Kristin G. McGurn
kmcgurn@seyfarth.com

Business Immigration

Dyan DelVecchio
ddevecchio@seyfarth.com

Anne S. Bider
abider@seyfarth.com

Andrew L. Eisenberg
aeisenberg@seyfarth.com

Barry J. Miller
bmiller@seyfarth.com

John F. Quill
jquill@seyfarth.com

Jeffrey M. Burns
jburns@seyfarth.com

Michael D. Fleischer
mfleischer@seyfarth.com

Anna Nesterova
anesterova@seyfarth.com

Russell B. Swapp
rswapp@seyfarth.com

Anthony S. Califano
acalifano@seyfarth.com

Beth Gobeille Foley
bfoley@seyfarth.com

Katherine E. Perrelli
kperrelli@seyfarth.com

Elaine M. Walsh
ewalsh@seyfarth.com

Ariel D. Cudkowicz
acudkowicz@seyfarth.com

James M. Hlawek
jhlawek@seyfarth.com

Dawn R. Solowey
dsolowey@seyfarth.com

Lisa J. Damon
ldamon@seyfarth.com

Lynn A. Kappelman
lkappelman@seyfarth.com

Arthur G. Telegen
atelegen@seyfarth.com

John E. Duke
jduke@seyfarth.com

Daniel B. Klein
dklein@seyfarth.com

Lauren Wachsman
lwachsman@seyfarth.com

www.seyfarth.com



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