

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 9 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SERGE HAITAYAN; et al.,

Plaintiffs-Appellants,

v.

7-ELEVEN, INC., a Texas corporation,

Defendant-Appellee.

No. 21-56144

D.C. No.

2:17-cv-07454-DSF-AS

MEMORANDUM*

SERGE HAITAYAN; et al.,

Plaintiffs-Appellants,

v.

7-ELEVEN, INC., a Texas corporation,

Defendant-Appellee.

No. 21-56145

D.C. No.

2:18-cv-05465-DSF-AS

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted December 7, 2022**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: GRABER, WATFORD, and WALLACH,*** Circuit Judges.

Four 7-Eleven franchisees brought this putative diversity class action, contending that they should be classified as employees rather than as independent contractors under California law. After a bench trial, the district court entered a final judgment in favor of 7-Eleven, and Plaintiffs have timely appealed. On appeal, Plaintiffs argue that the district court erred by applying the test enunciated in S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 769 P.2d 399 (Cal. 1989), rather than the “ABC” test adopted for California wage order violations in Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

We review legal issues de novo and factual findings for clear error. Saltarelli v. Bob Baker Grp. Med. Tr., 35 F.3d 382, 384–85 (9th Cir. 1994).

Our recent decision in Bowerman v. Field Asset Services, Inc., 39 F.4th 652 (9th Cir. 2022), controls most of the legal issues. The expenses at issue here, including employee compensation and advertising, are just as distinct from Wage Order 9’s concept of “tools and equipment” as were the Bowerman plaintiffs’ fuel and insurance costs. Bowerman, 39 F.4th at 665. Bowerman also holds that Assembly Bill (“A.B.”) 5, which extends the ABC test to govern all Labor Code

*** The Honorable Evan J. Wallach, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

claims, Cal. Lab. Code § 2775(b), does not apply retroactively to claims not rooted in a wage order. Id. at 665 n.11; see also Cal. Lab. Code § 2785.

The district court erred by refusing to consider Plaintiffs' claims that accrued after 2020, which are governed by A.B. 5 and, therefore, are subject to the ABC test. But that error is harmless. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553–54 (1984). The district court made extensive factual findings that all three parts of the ABC test are met. The three prongs of the ABC test are included within the Borello test. See Vazquez v. Jan-Pro Franchising Int'l, Inc., 478 P.3d 1207, 1214 (Cal. 2021) (“[T]he three elements of the ABC test are prominent factors already listed in Borello.”). In particular, the district court properly found that Plaintiffs are engaged in a different course of business than 7-Eleven and that Plaintiffs engaged in a distinct business and held themselves out to be business owners. See Curry v. Equilon Enters., LLC, 233 Cal. Rptr. 3d 295, 314 (Ct. App. 2018) (holding that franchisor Shell Oil engaged in a different business than its franchisees).

AFFIRMED.