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# One Minute Memo®

## *Morgan v. Wet Seal, Inc.*

### CLASS CERTIFICATION PROPERLY DENIED FOR DRESS CODE AND TRAVEL EXPENSE CLAIMS

On November 7, 2012, in *Morgan v. Wet Seal, Inc.*, the California Court of Appeal published a decision affirming the denial of class certification with respect to two wage and hour claims: (i) that Wet Seal unlawfully required employees to buy Wet Seal clothing and merchandise, and (ii) that Wet Seal failed to reimburse employees for the expense of required travel between work locations. The Court of Appeal reasoned that individual issues would predominate over any common issues, would "pose overwhelming case management difficulties," and would thus preclude any "manageable trial plan."

### THE PLAINTIFFS' ALLEGATIONS

Employees sued Wet Seal under California Labor Code sections 450 and 2802, alleging that Wet Seal made them buy Wet Seal apparel and accessories and that Wet Seal failed to reimburse their mileage expenses after requiring them to use personal vehicles to drive to various Wet Seal locations for mandatory meetings and other work. The employees contended that these unlawful practices resulted from written policies applying to all employees.

### TRIAL COURT DENIED CLASS CERTIFICATION BASED ON INDIVIDUALIZED ISSUES

In addressing the parties' cross-motions regarding class certification, the trial court considered the following written evidence: (i) Wet Seal's dress code and travel expense reimbursement policies, (ii) declarations by the plaintiffs and various putative class members, and (iii) Wet Seal emails.

The trial court explained that because the dress code policy did not state that employees were "required" to purchase Wet Seal clothing as a condition of employment, individualized inquiries regarding specific communications would be needed to conclude whether any individual employee was required to purchase Wet Seal merchandise. Similarly, the trial court explained that because Wet Seal's expense reimbursement policy called for reimbursing employees "for reasonable expenses incurred in the course of business," and because the plaintiffs contended that Wet Seal followed its policy on a "hit or miss" basis, any liability for a travel expense claim would be individualized and not consistent across the putative class.

In particular, as to the dress code claim, the trial court identified individualized inquiries regarding (i) whether Wet Seal required employees to wear Wet Seal merchandise as a condition of employment, (2) whether Wet Seal compelled employees to buy its merchandise, (3) whether any purchased merchandise was a necessary work expense, and (4) whether any merchandize employees were required to wear constituted a uniform.

As to the travel expense claim, the trial court identified individualized inquiries regarding (i) what Wet Seal managers told employees about reimbursing travel expenses, (ii) whether each travel expense was a necessary and reasonable consequence of the discharge of job duties, (iii) whether the employee sought reimbursement of that expense in compliance with written Wet Seal reimbursement procedures, and (iv) whether the employee was in fact reimbursed for that expense.

## THE COURT OF APPEAL AFFIRMS THE DENIAL OF CLASS CERTIFICATION

On appeal, the employees argued that the trial court improperly engaged in a "substantive evaluation of the merits" of the legal claims." The Court of Appeal rejected this argument, because the trial court permissibly considered the merits of the claims for the limited purpose of assessing whether common issues predominated over individualized issues. Citing the recent decision in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1022 (2012), the Court of Appeal confirmed that assessing predominance may require examining these issues.

The employees next argued that they had demonstrated that Wet Seal had a common, unlawful, dress code policy. This argument failed because Wet Seal's policies were not facially unlawful, and because "anecdotal evidence regarding Wet Seal's application of its [lawful policies] is not substantial evidence of a class-wide practice." Accordingly, the employees had failed to show that liability could "rest on proof of a company-wide policy." The Court of Appeal also rejected the employees' argument that they could use "representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." The Court of Appeal, however, rejected this argument, reasoning that the class certification inquiry is "not concerned with determinations regarding the 'extent of liability,' but more fundamentally with the fact of liability."

## WHAT *MORGAN V. WET SEAL* MEANS FOR EMPLOYERS

The Court of Appeal's decision confirms several established principles of class certification, but the decision also provides further clarification as to how *Brinker* applies to employment class actions involving claims that *Brinker* itself did not have occasion to address.

First, as the decision makes clear, class certification is not warranted merely because an employer has a common written policy. Instead, for a class to be certified based on a common written policy, that policy must be unlawful.

Second, although *Brinker* addressed only meal and rest break claims and off-the-clock claims, the *Morgan* opinion applies *Brinker's* guidance more broadly. For example, just as the individualized nature of manager-to-employee communications in *Brinker* foreclosed certification of off-the-clock class claims, the Court of Appeal adopts similar reasoning in rejecting class certification of the dress code claim in *Morgan*.

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