

MAR 24 2009

*Howard v. GAP*  
No. 07-15913

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

N.R. SMITH, Circuit Judge, dissenting:

This matter comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), limiting our “consideration to the complaint.” *Livid Holdings, Inc. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). We “must construe all allegations of material fact in the light most favorable” to Howard. *Id.* Accordingly, while I agree with the majority that the record has not been fully developed, a lack of developed record is of no import for consideration of this motion. Instead, when reviewing a dismissal under Rule 12(b)(6), as with a motion for judgment on the pleadings, we are to focus our review on the allegations in Howard’s Second Amended Complaint.

Moreover, because Howard asks us to expand New York law far beyond the bounds previously considered by New York courts and presents novel circumstances for doing so, I believe it is prudent for this court to certify the New York law issues to the New York Court of Appeals. *See Munson v. Del Taco, Inc.*, 522 F.3d 997, 1003 (9th Cir. 2008).

However, the majority disagrees and has decided to consider Howard’s allegations. Though the majority concludes that Howard states a claim upon which

the district court may grant relief, I disagree. Even when construed in the light most favorable to Howard, her allegations are insufficient to prove any set of facts that would support her claim that Gap, Inc. (“Gap”) violated New York Labor Code § 193 or § 198-b. I therefore respectfully dissent.

(1)

In Count I, Howard asserts that Gap violated New York Labor Code § 193 by requiring her to purchase Gap clothing and wear it while working her two shifts at Gap. However, even when construing the allegations in her complaint in the light most favorable to her, I cannot conclude that Howard could show that Gap’s policy violates § 193.

Section 193 states that “No employer shall make any deduction from the wages of an employee,” nor “require an employee to make any payment by separate transaction.” Howard alleges that Gap’s clothing purchase requirement “results in payments by separate transaction . . . which do not fall within the categories of [deductions allowed by New York law].”

Howard cannot point to anything in New York case law or legislative history that indicates that Gap’s requirement constitutes an unauthorized deduction. Howard cannot point to any New York precedent suggesting that § 193 prevents a separate transaction where plaintiff obtains valuable, tangible goods from her

employer for a monetary payment. In *Angello v. Labor Ready, Inc.*, 859 N.E.2d 480 (N.Y. 2006), the New York Court of Appeals held that “deduction” under § 193 requires a “literal[] . . . act of taking away or subtraction.” *Id.* at 482. In finding a violation under § 193, the court repeatedly cited the fact that the fee imposed for use of the Labor Ready’s cash dispensing machines was imposed *before* the employee ever received his salary: “Since the voucher already has the fee subtracted and can be cashed only at a Labor Ready CDM, the deduction is not disconnected from the payment of wages.” *Id.* at 483. Such a transaction, in which “the employee never actually receives a negotiable instrument,” not only more obviously involves a deduction from wages, but also more closely resembles the payment in scrip that § 193 was meant to prevent. *Id.* at 483-84; *see also Hudacs v. Frito-Lay, Inc.*, 683 N.E.2d 322 (N.Y. 1997); *Dean Witter Reynolds, Inc. v. Ross*, 429 N.Y.S.2d 653 (App. Div. 1980).

Howard’s allegations, on the other hand, do not establish a sufficient connection between her wages and a taking away or deduction, as contemplated by § 193. According to her complaint, Howard purchased several articles of clothing, then worked two shifts totaling approximately twelve hours, and terminated her employment. After reviewing her Second Amended Complaint, I cannot conclude that Howard’s quick termination resulted from anything other than her own

decision to leave Gap's employ. Moreover, Howard never asserted that (1) she could not return the clothing, (2) she attempted to return it, (3) the clothing was only to be worn while working, or (4) she didn't receive value from the clothing outside of wearing it to work at the Gap. Therefore, even construing Howard's Second Amended Complaint to give her every benefit, I cannot conclude that Howard has supported her claim with any assertion of a literal "act of taking away or subtraction," as the New York Court of Appeals requires. Accordingly, I would affirm the district court's decision to dismiss Howard's § 193 claim.

(2)

In Count II, Howard asserts that Gap's clothing purchase requirement violates New York Labor Code § 198-b, which prohibits employers from requesting, demanding or receiving "a return, donation or contribution of any part or all of [an] employee's wages, salary, supplements, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment." Howard's Second Amended Complaint does not allege that Gap requires her to return, donate, or contribute her wages to Gap. Instead, Howard argues that her purchase of clothing equates to a return, donation, or contribution of wages. Neither New York's legislative history nor case law support her

argument.

New York jurisprudence regarding the application of § 198-b is sparse. There is a substantial body of case law regarding an earlier version of the statute, Section 962 of the New York Penal Law—the text of which still makes up the bulk of § 198-b. *People v. Desowitz*, 2 N.Y.S.2d 87 (1938), is representative. In that case, a journeyman painter, who was paid at a rate of \$10.50 per seven-hour day, was told that as a condition of his employment he was required to return a kickback of \$1.50 per day. *Id.* at 88. The *Desowitz* court examined the history of Section 962, and determined that it had been passed to eradicate the “growing and extortionate evil” of the kickback system prevalent in the early 1930s. As an example, it cites to an earlier incident in which “mason’s helpers employed on the construction of a municipal project were compelled by the contractor to ‘kickback’ \$2.90 of the \$9.90 paid per diem for an eight-hour day specified in the building contract.” *Id.* at 89-90. These situations, which conform more closely to what is traditionally thought of as a kickback, were the clear motivation behind the passage of Section 962, and appear to provide the basis for later revisions to the law.

However, New York courts have not considered whether Howard’s situation would run afoul of § 198-b. Howard’s best argument on this score is *Chu Chung v. New Silver Palace Restaurant*, 272 F.Supp.2d 314, 315 (SDNY 2003), which

involved facts constituting a more standard kickback arrangement. In that case, waiters at a restaurant sued their employer on account of a tip-sharing policy which required the waiters to give a portion of their tips to management. *Id.* at 316. The waiters were not given anything of value in return for their tip money; they simply maintained their employment. Gap’s clothing purchase requirement is quite different. First, Gap does not require employees to return any portion of their wages to the company. Second, any money spent by employees at Gap clothing stores provides them with a valuable item—clothing—in return for their expenditure. This arrangement does not resemble the kind of “kickback” transactions the New York legislature desires to eradicate. Howard never asserted that (1) she could not return the clothing, (2) she attempted to return it, (3) the clothing was only to be worn while working, or (4) she didn’t receive value from the clothing outside of wearing it to work at the Gap.

Accordingly, my reading of New York case law and § 198-b’s legislative history suggests that the statute is designed to prevent garden variety “kickback” transactions, and nothing more. Howard’s complaint does not assert any facts that resemble a “kickback” transaction such as those in *Chu Chung* or *Desowitz*, both of which illustrate the types of transactions § 198-b prohibits. Howard asks this court to find a new transaction illegal under New York law, but there is no evidence to

suggest that New York intended this result. Accordingly, I conclude that she has not alleged a claim upon which New York law may presently grant relief. I would therefore affirm the district court with respect to its decision to dismiss her claim under § 198-b.