

**In a major victory for NELF and its supporters, the Massachusetts Supreme Judicial agreed with NELF that an employee bringing a class action under the Massachusetts Wage Act must satisfy the requirements of Mass. R. Civ. P. 23, even though the Wage Act independently provides that an employee may sue “on his own behalf, or for himself and for others similarly situated.”**

*Gammella v. P. F. Chang’s Chinese Bistro, Inc.* (Massachusetts Judicial Supreme Court)

This case raised the important question whether the Massachusetts Wage Act, which provides that an employee may sue “on his own behalf, or for himself and for others similarly situated,” M. G. L. c. 149, § 150, permitted employees to pursue a class action without satisfying the class action requirements of Rule 23 of the Massachusetts Rules of Civil Procedure. Rule 23 governs all class actions in the Massachusetts courts, unless the Legislature expressly provides otherwise. In this connection, the plaintiff here argued that the Wage Act’s “similarly situated” language indicated such a legislative intent, because the Legislature added that language to the Wage Act in 1993 when it created a private remedy, even though Mass. R. Civ. P. 23 (adopted in 1973) already existed.

NELF submitted an amicus brief in support of the employer, urging the SJC to reject the plaintiff’s argument and affirm—as the Court already had done by implication in at least one decision—that Rule 23’s requirements must apply to a motion for class certification under the Wage Act.

In a unanimous decision issued on April 12, 2019, the SJC agreed with NELF and held that Rule 23 governs class actions brought under the Massachusetts Wage Act. As NELF had argued, the Court held that, far from announcing a different standard for class certification, the statute’s “similarly situated” language merely clarified that, for the first time in the Wage Act’s history, employees had the private right to pursue both individual *and* class claims under that statute. (Indeed, as NELF also had pointed out in its brief, and as the Court had noted in prior decisions, the Wage Act was an exclusively *criminal* statute until the 1993 amendment.)

As NELF had also argued, the Court explained that, when the Legislature has intended to depart from the general court rules governing civil actions, it has done so expressly, and in some detail. Notably, when G. L. c. 93A, § 9, was amended in 1969 to provide a private remedy for both individual and class claims, the Legislature provided, in a separate paragraph, the specific class certification requirements for a consumer wishing to pursue a c. 93A claim on behalf of “numerous other persons *similarly situated*.” Those requirements, drafted before Massachusetts had adopted the rules of civil procedure, incorporated Fed. R. Civ. P. 23(a), but *not* Fed. R. Civ. P. 23(b)(3) (predominance and superiority). No such detailed and selective language occurs in the Wage Act.

Finally, the Court agreed with NELF that “it is clear from our previous application of rule 23 to class actions brought under the wage laws in *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 371-372 (2008), that rule 23 has the necessary structure and adaptability to advance the very legitimate policy rationales underlying the Legislature’s decision to provide for class proceedings under the Wage Act.” Indeed, —the Court and NELF quoted the same language

| from *Salvas* praising the efficacy of Rule 23 for Wage Act claims: “One of the great strengths of the rule 23 class action device is its plasticity. Case-by-case considerations of practicality and fairness have enabled rule 23 certification decisions to adapt appropriately to a variety of contexts, even within the same litigation.” *Salvas*, 452 Mass. at 371.

Ironically, after agreeing with NELF that Rule 23 applies to the Wage Act, the Court concluded that the plaintiff *had* satisfied Rule 23’s requirements for class certification, contrary to the lower court’s ruling. Therefore, the Court reversed the lower court’s denial of class certification. | Nonetheless, the decision *is* a victory for employers because the Court rejected the plaintiff’s effort to provide an essentially “free form” class action procedure under the Wage Act.