Case Number S185827

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Anthony Kirby, et al.,
Plaintiffs and Appellants

vs.

Immoos Fire Protection, Inc.,
Defendant and Respondent

Appeal from a Decision of the Third Appellate District,
Case Number C062306

APPELLANTS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Kirby does not seek to transform Labor Code section 1194[1] into a "refuge for plaintiffs to bring any and all wage actions" as Immoos fears. (Immoos' Answer Brief on the Merits ("IAB" or "Answer"), 41-42.) Rather, Kirby seeks to protect employees forced to vindicate their rights under the Labor Code from ruinous employer attorney's fees. Here, an employer demanded more than $143,000 in fees from two construction workers earning an average of $16.50 per hour who simply sought compensation owed for working through afternoon rest periods. Allowing employer fee demands like this one would chill the enforcement of meal and rest period requirements and minimum labor standards. It is inconceivable that the Legislature that forbade the Industrial Welfare Commission ("IWC") from weakening meal period requirements (section 516) would provide unscrupulous employers with such an obvious way to chill the enforcement of these core remedial worker protections.

This appeal is not about the scope of section 1194. Instead, it is about the scope of section 1194 *in relation* to the scope of 218.5. Both of the issues on which review was granted relate to the same inquiry: whether the Legislature intended that employees who sue their employers unsuccessfully for violations of section 226.7 are subject to potentially ruinous liability under section 218.5 for the attorney's fees generated by their *employers* in those failed suits. California's statutes, their legislative history, California's case law and strong public policy considerations all point to the same answer: No.

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[1] All section references are to the California Labor Code unless otherwise stated.

ARGUMENT

I. ATTORNEY'S FEES MAY NOT BE AWARDED UNDER SECTION 218.5'S TWO-WAY FEE PROVISION FOR CAUSES OF ACTION ALLEGING MEAL AND REST VIOLATIONS UNDER SECTION 226.7; INSTEAD, SECTION 1194'S ONE-WAY FEE PROVISION APPLIES

Immoos attempts to harmonize sections 218.5, 1194, and 226.7 as follows: section 226.7 meal and rest pay is a wage that does not fall within section 1194's one-way fee provision and therefore defaults into section 218.5's two-way fee provision. This reasoning cannot stand. Meal and rest premium pay is like overtime pay: both are wages, but both are *statutorily-required* wages. Unlike contractual wages, statutory wages are regulatory devices, and applying two-way fee shifting to meal and rest pay would thwart the Legislature's enforcement mechanism. Thus, section 218.5 cannot apply to section 226.7 pay. The statutory language, the regulatory context, and case law all support this construction.

Contrary to Immoos' misreading, the legislative history in 1999-2000 does *not* show that the Legislature "abandoned" one-way fee shifting for section 226.7 claims. Indeed, it supports section 1194's application to section 226.7 claims. And even if the legislative history were ambiguous, any ambiguity in the Labor Code should be resolved in favor of workers. (*Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094, 1103 ("*Murphy*") (citations omitted).) Thus, consistent with the decisions in *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420 ("*Earley*"), which the Legislature codified, and *McGann v. United Postal Service, Inc.* (2011) 192 Cal.App.4th 1425 ("*McGann*"), which applied *Earley*, and in accordance with the powerful and long-standing public policy of protecting workers and law-abiding employers, this Court should hold section 218.5's reciprocal fee provision inapplicable to section 226.7 claims.

A. Section 218.5 Does Not Apply To Statutorily-Required Meal And Rest Premium Pay

1. The Statutory Language, Regulatory Context, And Case Law Show That Section 218.5 Applies To Contractual Wages Only

Immoos argues that the "pay" owed under section 226.7 is a wage, and therefore is covered by the phrase "non-payment of wages" in section 218.5. (IAB, 3, 22-26; see 218.5.) The words "wages" or "wage" appear in *both* sections 218.5 and 1194, so the status of section 226.7 pay as a wage cannot dispose of the fee shifting question. (See §§ 1194, 218.5; IAB, 22-26.)

The Labor Code defines "wages" broadly. (§ 200; see *Murphy, supra,* 40 Cal.4th at 1104, fn. 6.) Like most other payments for employees' time, unpaid balances of section 1194's "legal overtime compensation" and "legal minimum wage" qualify as "wages" under section 200. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178; *Cuadra v. Millan* (1998) 17 Cal.4th 855, 862.) Indeed, the CACI Jury Instructions on section 1194, which Immoos cites extensively, references section 200's definition. (IAB, 12-13, 17-18; (Respondent's Motion for Judicial Notice ("RMJN"), [Exs. O, 36, U, 39].)

The fee shifting question instead turns on whether a wage is statutory or contractual, a distinction explained in *Earley.* (*Earley, supra,* 79 Cal.App.4th at 1430-1431; see also Appellants' Opening Brief on the Merits ("OB"), 1-2, 21-32.) *Earley* construed section 218.5's two-way fee provision restrictively, limiting the section's application to contractual wages only. (*Id.* at 1430.) *Earley* based its construction on the chilling effect on enforcement inherent in section 218.5's application. (*Id.* at 1431.) In 2000, the Legislature amended section 218.5 to restrict the section's

application with express instructions to interpret the amendment in accordance with *Earley*. (See, *infra*, 9-12; see OB, 21-28.)

As argued in the Opening Brief, *Earley* and its codification should govern here. Meal and rest pay is statutorily-required premium pay. (See, *Murphy,* 40 Cal.4th at 1114, 1120; OB, 12-13, 15, 18-19, 28-31.) As a regulatory device, it is identical to overtime, because it incentivizes employers to act in accordance with the state's regulatory goals and compensates workers whose employers have strayed from those goals. (*Id.* at 1109, 1113-1114; see OB, 28-29.) Only employees represented by a union may arguably alter the meal and rest requirements through a collective bargaining agreement. (See, *e.g.*, section 514; *Lazarin v. Total Western* (2010) 188 Cal.App.4th 1560.) Thus, consistent with *Earley* and its subsequent codification, meal and rest pay is statutory and cannot be construed to be among the contractual wages contemplated under section 218.5.

Understandably, Immoos skirts *Earley*, ignoring it until page 38 of its Answer and attempting to frame *Earley*'s construction of section 218.5 as dicta. (IAB, 37-41.) But Immoos recognizes, as it must, that when courts construe potentially overlapping statutory provisions, "all related statutory provisions must be read together and harmonized." (IAB, 4.) Indeed, courts harmonizing multiple provisions necessarily construe all provisions at issue. (See *Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1056 ("*Turner*") (statutes must be "regarded as blending into each other and forming a single statute").)

Earley was no different. Its construction of section 218.5 and its analysis of the distinction between statutory and contractual wages are at the heart of *Earley*'s explanation of how the provisions coexist. (See *Davis*

v. Ford Motor Credit Co. (2009) 179 Cal.App.4th 581, 601.) Even the Court of Appeal below considered that distinction and the section 218.5 construction as part of *Earley*'s harmonization of the two provisions. (*Kirby, et. al. v. Immoos* (filed June 25, 2009, Court of Appeal No. C062306) [nonpub. Opn.] (the "Opinion"), 14-15.) Thus, *Earley*'s construction of section 218.5 is not dicta.

Significantly, the Court of Appeal in *McGann* recently applied *Earley* to hold that "a claim for remedial compensation under Labor Code section 226.7 does not trigger the reciprocal fee recovery provisions of [section 218.5]." (*McGann, supra,* 192 Cal.App.4th at 1440.) Kirby fully agrees with *McGann*'s reliance on the *Earley* distinction: the forms of compensation "an employer voluntarily offers its employees, or agrees to provide pursuant to a collective bargaining agreement, are fundamentally different than a *state-imposed mandate to pay overtime, a minimum wage* or *compensation for a missed meal or rest break.*" (*Id.* (emphasis added).)[2]

Indeed, there are only three kinds of statutory wages in California: "the legal minimum wage," "the legal overtime compensation," and meal and rest pay. (*McGann, supra,* 192 Cal.App.4th at 1440; see §§ 1194, 226.7.) All three wages are among the "core remedial employee

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[2] Kirby, however, disagrees with *McGann*'s analysis of wages. Contrary to *McGann*, section 200 does not encompass contractual wages only. (192 Cal.App.4th at 1139-1440; see, *supra*, 3.) *McGann* misconstrues *Prachasaisoradej v. Ralphs Grocery Company, Inc.* (2007) 42 Cal.4th 217, 229 ("*Prachasaisoradej*"). *Prachasaisoradej* does not hold that section 200 wages includes contractual wages only. (*Prachasaisoradej, supra,* 42 Cal.4th at 229.) Thus, *McGann*'s analysis of how section 226.7 pay is more like a penalty and less like a wage for fee shifting purposes is not essential. (*McGann, supra,* 192 Cal.App.4th at 1139-1440.) Kirby also disagrees with *McGann*'s analysis of the term "action" in the second paragraph of section 218.5. (See *id.* at 1935; see, *infra*, 24-29.)

protections." (*McGann, supra,* 192 Cal.App.4th at 1439.) The Labor Code has long recognized the distinction between statutory and contractual wages as has the Court. (See § 223; *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 671-672 ("*Sonic*") (citations omitted); *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456 ("*Gentry*"); *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986-988; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 620 ("*Schachter*").)[3]

An employee's right to statutory wages and contractual wages "clearly have different sources." (*Earley, supra,* 79 Cal.App.4th at 1430.) Contractual wages are "a matter of private contract between the employer and employee." (*Id.*) Statutory wages, on the other hand, are imposed by the state to further important public policy purposes, and thus, cannot be subjected to the risks inherent in section 218.5. (See *id.* at 1430; *McGann, supra,* 192 Cal.App.4th at 1439-1440.)

In response, Immoos argues that meal and rest pay is calculated using the employee's "regular contracted wage rate," thereby rendering it within section 218.5's purview. (IAB, 22-23; see also OB, 31-32.) But overtime pay and the meal and rest pay are calculated using the same method: multiply the worker's "regular rate" of pay (which itself may be

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[3] Notably, the Labor Code contains at least one contingent statutory wage, where the right to the wage is contingent on an agreement to provide the wage in the first instance. (§ 227.3.) The Labor Code does not mandate vacation wages. But once an employer agrees to provide vacation wages, section 227.3 bars the employer from withholding payment of unlawfully forfeited accrued vacation wages. (*Id.*) Moreover, all wages are subject to statutory restrictions in amount, time, and manner of the payment. (See *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 572; *Schachter, supra,* 47 Cal.4th at 620.)

either a statutory minimum hourly rate or a contractual rate, it does not matter which) by a statutorily-prescribed number. (§§ 226.7, 510.) The multiplier for computing time-and-a-half overtime pay, for example, is 1.5; and that product then is multiplied by the number of hours to which that rate applies. For meal and rest pay, the multiplier is 1.0; and that product then is multiplied by the number of compensable violations. For both, while a contractual rate figure may be a part of the calculation, the amount to be paid is mandated by law and is not contractual. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 976 (dis. opn. of Kennard, J.).)

The equivalence of overtime pay and meal and rest pay does not end with method of computation. The regulatory goals of these statutory wages overlap as well. While overtime pay has a primary regulatory goal of encouraging job creation and spreading work throughout the workforce, reducing the number of long shifts undoubtedly has safety benefits as well. (See *Gentry, supra,* 42 Cal.4th at 456 (citation omitted).) And while meal and rest pay has a primary regulatory goal of enhancing safety and reducing accidents, it also gives employers added incentive to hire enough workers to avoid incurring those premium obligations.[4] (See *Murphy, supra,* 40 Cal.4th at 1113 (citation omitted).) Finally, meal and rest and overtime premium are the same conceptually in that both mandate additional compensation when employees work more than a defined amount. With overtime, that amount is defined in terms of the number of hours worked in a workday or a workweek. With meal and rest pay, it is defined in terms of

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[4] Immoos' argument that "[a]n employer failing to provide sufficient meal or rest periods is not saved from having to hire additional workers" is simply incorrect. (IAB, 36.) For example, 2,300 employees working eight-hour shifts without two ten-minute rest breaks will work as many hours as 2,400 employees who receive those breaks.

the number of hours worked without breaks as prescribed by section 512 and the IWC wage orders.

Immoos next contends that the *McGann* decision harms workers by precluding prevailing workers from recovering section 218.5 attorney's fees. (IAB, 26-28.) Kirby is not fooled by Immoos' sudden purported advocacy for workers. Even if *McGann* did prevent prevailing workers from recovering section 218.5 fees, it would still protect workers rather than harm them.[5]

If it comes to a choice between a two-way fee provision and the American Rule, the latter obviously is the safer and better rule for workers. (See OB, 12.) The alternative that Immoos advocates would impose on workers a risk they cannot afford to bear. The chilling effect that such a risk allocation would impose on workers seeking to enforce state minimum labor standards is undeniable. (See OB, 42-43.)

Immoos also asserts that courts may not look beyond the text and legislative history, and use analogous reasoning to exclude meal and rest pay from section 218.5. (IAB, 41-42.) But the statutory text expresses the distinction between statutory and contractual wages. Under the doctrine of *noscitura a sociis* ("a word is known by the company it keeps"), the words in section 1194 describe statutory wages, whereas the words in section 218.5 describe contractually agreed-upon rights. (See §§ 1194, 218.5; *Gustafson v. Alloyd Co.* (1995) 513 U.S. 561, 575 ("*Gustafson*").) Moreover, far from "taking on the role of the Legislature," the Court will

[5] Whether *McGann* barred prevailing employees from recovering fees is an open question. The opinion does not explicitly state that section 218.5 does not apply to section 226.7 claims. Instead, *McGann* states only that the "reciprocal fee recovery provisions" do not apply. (*McGann, supra,* 192 Cal.App.4th at 1139-1440.)

be harmonizing statutes as is it required to do. This is a core function of the judiciary. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1202.)

2. Section 218.5's Legislative History Demonstrates That The Legislature Did *Not* Intend Two-Way Fee Shifting To Apply To Section 226.7 Claims

When the Legislature amended section 218.5 in 2000, it stated: "[T]hese amendments are intended to reflect the holding of the Court of Appeal in [*Earley*]." (Stats. 2000, ch. 876 [Assembly Bill No. 2509 ("AB 2509")], § 11.) The Legislature could not have been more explicit about its intent. Once again, Immoos sidesteps *Earley* and its codification, and instead points to unrelated one-way fee language deleted from earlier versions of section 226.7, contending that those deletions are "most persuasive" of the Legislature's intent to subject section 226.7 claims to section 218.5. (IAB, 5-8, 28-29.) But Immoos fails to mention that this language was part of the original civil penalty scheme contemplated for section 226.7 ("penalty"), which the Legislature rejected, instead enacting the current self-executing and statutorily-required pay obligation ("pay"). The deletions simply show that once the section 226.7 remedy fundamentally changed from penalty to pay, an explicit one-way fee provision became unnecessary. (See, *infra*, 12-16.)

a. Immoos Misreads The Legislative History Of 1999-2000

Courts have a "duty to construe statutes, not isolated provisions." (*Gustafson, supra,* 513 U.S. at 568.) The omission of specific statutory language should be interpreted in context. (See *Pattern Makers' League of North America, AFL-CIO v. National Labor Relations Board* (1985) 473 U.S. 95, 111, 111, fn. 23.) Immoos wrongly interprets the relevant history surrounding these deletions, and in arguing that these deletions are

somehow indicia of the Legislature's intent to subject section 226.7 claims to two-way fee shifting, fails to discuss accurately or even mention the following:

- *The original version of section 226.7 introduced on February 19, 1999 as part of Assembly Bill No. 633 ("AB 633") contained a* ***penalty scheme*** *providing both an explicit civil penalty and a separate payment for aggrieved workers.* Proposed section 226.7(c) of this penalty scheme required workers to file enforcement actions, and subsection (c)(2) contained the one-way fee language at issue. (See *Murphy*, 40 Cal.4th at 1106-1108; AB 633 (1999-2000 Reg. Sess.) Feb. 19, 1999) [Appellants' Supplemental Motion for Judicial Notice ("ASMJN"), Ex. Q], section 226.7(c)(2) § 9.) Known as California's landmark anti-sweatshop bill, AB 633 sought to enforce wage and hour laws in the "large and growing 'underground economy.'" (See Assem. Com., on AB 633 (1999-2000 Reg. Sess.) (Mar. 25, 1999) [ASMJN, Ex. R], 6-8.) The garment-related portions of AB 633 were eventually enacted, while all non-garment-related provisions, including section 226.7(c)(2), were moved into Assembly Bill No. 1652 ("AB 1652"), which Governor Davis vetoed. (See Stats. of 1999, AB 633 [ASMJN, Ex. S]; AB 1652 (1999-2000 Reg. Sess.) Sept. 8, 1999 [ASMJN, Ex. T], § 4; AB 1652, Assem. Final Hist. (1999-2000 Reg. Sess.) [ASMJN, Ex. U].)
- *Five months later, on February 24, 2000, the same version of the section 226.7 penalty scheme was introduced in* AB 2509.[6] (AB 2509

[6] The February 24, 2000 version of section 226.7(c)(2) provided: "Seek recovery of payments under paragraph (2) of subdivision (b) in a civil action." ([ASMJN, Ex. V], § 12) This differed from the original 226.7(c)(2) which provided: "Bring a civil action." (AB 633 (1999-2000 Reg. Sess.) Feb. 19, 1999 [ASMJN, Ex. Q], § 9.)

(1999-2000 Reg. Sess.) Feb. 24, 2000 [ASMJN, Ex. V], § 12.) AB 2509 sought to "strengthen enforcement of existing wage and hour standards." (See Assem. Com. on AB 2509 (1999-2000 Reg. Sess.) Feb. 24, 2000, [ASMJN, Ex. W], 5-7.)

- *Significantly, the February 24, 2000 version of AB 2509 also included the proposed amendment to section 218.5.* (See [ASMJN, Ex. V], § 8.)
- *On June 30, 2000, the IWC adopted a meal and rest pay remedy modeled after overtime.* (See *Murphy*, 40 Cal.4th at 1105-1106, 1109-1111; IWC Hearing Transcript (May 5, 2000) [ASMJN, Ex. AA], 75:10-24, 76:1-15.)
- *On August 25, 2000, the critical modifications to section 226.7 in AB 2509 occurred.* The Senate ***deleted*** the section 226.7 penalty scheme in its entirety – including the 226.7(c)'s enforcement action requirement and 226.7(c)(2)'s one-way fee language – replacing it with a self-executing pay remedy identical to the IWC pay remedy enacted two months prior. (See *Murphy*, 40 Cal.4th at 1106-1108; AB 2509 (1999-2000 Reg. Sess.) Aug. 25, 2000 ([ASMJN, Ex. BB], § 7.)
- *On that same day, August 25, 2000, the Senate* ***simultaneously*** *codified Earley.* (See [ASMJN, Ex. BB], § 11.) This codification occurred five months *after* the decision in *Earley* on April 20, 2000.
- *The Legislature then moved the original section 226.7 penalty scheme to Assembly Bill No. 2857 ("AB 2857").* (See AB 2857 (1999-2000 Reg. Sess.) Aug. 25, 2000 [ASMJN, Ex. CC], § 3.) The AB 2857 version of section 226.7 contained section 226.7(c)(2)'s one-way fee language.
- *On August 29, 2000, the Assembly concurred in the Senate amendments to AB 2509.* (See Conc. in Sen. Amend. to AB 2509 (1999-2000 Reg. Sess) Aug. 25, 2000 [ASMJN, Ex. DD].)

- *One day later, on August 30, 2000, the Senate deleted the original penalty scheme, including 226.7(c)(2), from AB 2857.* (See AB 2857 (1999-2000 Reg. Sess.) Aug. 30, 2000 [ASMJN, Ex. EE], § 2, 3.) On August 31, 2000, AB 2857 was placed in the "inactive" file. (AB 2857, Assem. Final Hist. (1999-2000 Reg. Sess.) [ASMJN, Ex. FF], § 3, 2.)
- *On September 28, 2000, the governor approved AB 2509.* (AB 2509, Assem. Final Hist. (1999-2000 Reg. Sess.) [ASMJN, Ex. GG].)

The Answer fails to convey these events accurately or even chronologically, describing only certain selected events over several non-consecutive pages. (See IAB, 6-8, 11, 38.) Viewed in context and proper sequence, the legislative history does *not* show that the Legislature intended for section 218.5 to apply to section 226.7 claims.

b. The Legislature Did *Not* Abandon One-Way Fee Shifting, Nor Did It Intend For Two-Way Fee Shifting To Apply When It Deleted Section 226.7(c) And Fundamentally Altered The Meal and Rest Remedy From A Penalty To Pay

The history demonstrates that when the Legislature fundamentally altered the remedy in section 226.7 from a penalty to pay and simultaneously codified *Earley*, the Legislature did *not* "abandon" one-way fee shifting as Immoos urges. (IAB, 5-8.) To the contrary, because the penalty scheme had been superseded by a self-executing pay remedy, the Legislature found it unnecessary to provide explicitly for fees. Instead, the Legislature had every reason to assume one-way fee shifting would apply to its newly-created pay. Notably, the Legislature did not codify *Earley* until after it removed the penalty, indicating that the Legislature was not compelled to explicitly embrace *Earley*'s harmonization of sections 218.5 and 1194 until it created a new statutory wage in the Labor Code: meal and rest pay. (See *County of San Diego v. Alcoholic Beverage Control Appeals*

Board (2010) 184 Cal.App.4th 396, 405 (finding significance in actions the Legislature undertakes concurrently); see, *supra*, 5-6.)

Murphy supports this interpretation by confirming the self-executing aspect of the newly-created pay:

> The Senate amendments eliminated the requirement that an employee file an enforcement action, instead creating an affirmative obligation on the employer to pay the employee one hour of pay. Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime. (citation omitted) By contrast, Labor Code provisions imposing penalties state that employers are "subject to" penalties and the employee or Labor Commissioner must first take some action to enforce them. (citation omitted)

(*Murphy*, 40 Cal.4th at 1108.) The Legislature's decision to make meal and rest pay automatic instead of subjecting the requirement to fragmentary worker-initiated enforcement suggests that it believed the requirement to be particularly important. The Legislature simply could not have intended to subject its newly-created self-enforcing right to pay for missed meal and rest periods akin to overtime subject to attorney's fee liability for employees.

The Legislature's decision to move the penalty scheme into AB 2857 while it debated the pay remedy in AB 2509 provides further support. The Senate rules committee's simultaneous discussion on both versions of section 226.7 demonstrates the fundamental distinction between the two remedy schemes. (See Sen. Rule Com., AB 2857 (1999-2000 Reg. Sess.) Aug. 25, 2000 [ASMJN, Ex. HH], 4 ("The option of filing a right of private action is deleted."); Sen. Rule Com., AB 2509 (1999-2000 Reg. Sess.) Aug. 25, 2000 [ASMJN, Ex. II], 2-3 ("Rest and meal periods: right of private action").) Significantly, this committee did not expressly list one-way fee

shifting among the Senate's deletions from AB 2509, nor did the Legislature list one-way fee shifting as deleted in the concurrence in 2000 as it did in the concurrence of 1999 for AB 1652. (See Conc. in Sen. Amend. to AB 2509 (1999-2000 Reg. Sess.) Aug. 25, 2000 [ASMJN, Ex. DD], 1-2; Conc. in Sen. Amend. to AB 1652 (1999-2000 Reg. Sess.) Sept. 9, 1999 [ASMJN, Ex. JJ], 2.) This suggests that the Legislature in 2000 was careful to preserve one-way fee shifting generally, even as it rejected the section 226.7 penalty scheme and saw as unnecessary the one-way fee language in section 226.7(c)(2).

c. Immoos Fails To Show How The Legislative History Of 1999-2000 Supports The Application Of Section 218.5 To Section 226.7 Claims

Immoos first contends that the Legislature did not consider the proposed "private right of action and unilateral attorney's fee provision" subject to section 1194. (IAB, 8.) For support, Immoos cites an enrolled bill report, dated September 13, 2000. (IAB, 8.) This report, however, does not comment on law existing at the time of "the private right of action and unilateral attorney's fee provision." ([IMJN, Ex. H].) The Legislature wrote the enrolled bill report *after* it abandoned "the private right of action and unilateral attorney's fee provision" in favor of a pay remedy. The report simply compares the pay remedy to the absence of a pay remedy. (IAB, 9.) Immoos also cites a Senate judiciary committee report, dated August 8, 2000. (See *id.* at 8.) There is no description of existing law on the pages cited by Immoos or elsewhere in this report. (See [IMJN, Ex. I].)[7]

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[7] Rather than supporting Immoos, these reports buttress Kirby's interpretation. The enrolled bill report does *not* list AB 633 or AB 1652 as part of the legislative history of section 226.7. (See [IMJN , Ex. H]., 10-12.) This implies that the Legislature considered the ultimately enacted remedy distinct from those proposed in 1999.

Immoos next contends that the Legislature knew how to provide explicitly for one-way fees in AB 2509, but did not provide them for section 226.7. (IAB, 8.) The only fees stated in AB 2509, however, were either for civil penalty schemes, such as section 226, or to provide for two-way fee provisions, such as in section 98.2.[8] The Legislature did not explicitly state any one-way fee provisions in AB 2509.

Finally, Immoos points to the Legislature's "definitive statement that it did not consider section 226.7 . . . as providing for actions" under section 1194. (IAB, 7.) This "definitive statement," however, is dated April 12, 2000, five months *prior* to the August 25, 2000 Senate amendment transforming the penalty into pay. (See, *supra*, 11.) Thus, because it related to the proposed section 226.7 penalty, this document does not reflect any statement about the ultimately selected pay remedy and that remedy's interaction with "the legal minimum wage or the legal overtime compensation" under section 226.7.

In sum, Kirby's interpretation is the more reasonable. In enacting section 226.7, legislators were emphatic about protecting workers in the "underground economy" who worked "long hours without rest breaks." (See, *supra*, [ASMJN, Ex. W], 6-7; see also *Murphy*, 40 Cal.4th at 1112-1114.) The Legislature would not create a new self-enforcing pay remedy for workers whose employers violated meal and rest period requirements, but then turn around and let those *same* employers recover their attorney's fees from those *same* workers who brought unsuccessful claims in good faith. The unreasonableness of Immoos' construction becomes even more acute when one considers that, in precisely the *same* bill, the Legislature

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[8] The language in section 98.2 provided for two-way fee shifting until the Legislature amended section 98.2 to make it a one-way provision in 2003. (See *Sonic, supra,* 51 Cal. 4th at 674, fn. 2.)

stated it was codifying *Earley*, a case which explains how and why allowing employers to seek fees from workers under section 218.5 would severely diminish the enforcement of minimum labor standards. Further, if ambiguity exists in the Labor Code, it should be resolved in favor of workers. (See *Murphy, supra,* 40 Cal.4th at 1103 (citations omitted); *California Grape & Tree Fruit League v. Industrial Welfare Com.* (1969) 268 Cal.App.2d 692, 698 ("Remedial statutes . . .are not construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished.").) Thus, Immoos' interpretation of this legislative history fails.

3. Immoos' Proposed "Three-Fold Purpose" Of Section 218.5 Should Be Rejected

Immoos' interpretation of section 218.5's purpose also fails. Immoos argues that section 218.5's purported "three-fold purpose" is to: (1) encourage workers to file claims; (2) discourage workers from filing "unmeritorious" claims; and (3) encourage workers to file such claims with the Labor Commissioner. (IAB, 9-11 (relying on [IMJN, Exs. J-N], 28-30, 38.) Once again, Immoos distorts the legislative history. Contrary to Immoos' characterization, the purpose of section 218.5 is not evenly divided among three parts. The overall thrust of section 218.5 is to encourage workers to enforce their rights under the Labor Code. (See [IMJN, Ex. N], 2 ("SB 2570 is sponsored by the Teamsters Union and is intended to cover the cost of obtaining wages and benefits from recalcitrant or slow paying employers."); Assem. Com., SB 2570, as amend. Jun. 17, 1986 [ASMJN , Ex. KK], 1-2.)

Furthermore, even Immoos admits that the Legislature explicitly *included* the word "frivolous" in describing the purported second purpose. (See [IMJN , Ex. K], 3 ("[E]mployers will be protected from frivolous lawsuits."), Ex. M, 2 (same), Ex. L, 1 ("[T]his bill protects employers from

frivolous lawsuits.").) Additionally, there is no stated public policy in the Labor Code of protecting employers from employee suits. Thus, the most reasonable construction of section 218.5 is that section 218.5's two-way fee provision should apply *only* when contractual wages are solely at issue, and *only* when employers defeat frivolous claims. It should not apply when employers defeat non-frivolous claims where the litigation efforts of employees simply come up short. This interpretation of section 218.5 would align the statute with state and federal civil rights and employment rights statutes, which allow for two-way fee shifting in favor of the employer "only in exceptional circumstances" in which the plaintiff's claims are "frivolous, unreasonable, or groundless." (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1388; *Harris v. Maricopa County Superior Court* (9th Cir. 2011) 631 F.3d 963, 968.)

Finally, for the third purported purpose, Immoos relies on an enrolled bill report describing a "side effect" of section 218.5: the case load at the Labor Commissioner's office could increase. (IAB, 10-11 (relying on [IMJN, Ex. N].) Immoos then simply asserts that this "side effect" is a bona fide legislative purpose. (IAB, 10-11, 45-46.) Immoos cites no other legislative history or authority for this assertion.[9] Encouraging workers to file claims with the Labor Commissioner instead of in court is not a purpose of section 218.5. To the contrary, private civil suits are essential to the overall worker protection enforcement scheme in California. (See, *e.g.*, *Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210,

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[9] Indeed, the Legislature knows how to direct claims to the exclusive jurisdiction of the Labor Commissioner. (See [ASMJN, Ex. S], 3128 (stating that the new garment worker protections in AB 633 would be enforced by workers "solely by filing a claim with the Labor Commissioner").) The Legislature did not apply this procedure to section 226.7 claims.

224); *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1302.)

Moreover, Immoos does not cite to any post-1986 legislative history confirming that its purported "three-fold purpose" of section 218.5 survived in light of *Earley*. Instead, Immoos attempts to reconcile with *Earley* by arguing that the existence of section 227.3 vacation pay at the time of section 218.5's enactment in 1986 demonstrates that the "three-fold purpose" "transcends" both contractual and statutory wages. (IAB, 27.) But as set forth above, section 227.3 is a contingent statutory wage, not among California's statutory wages. (See, *supra*, 5-6.)

Finally, section 226.7 did not exist when section 218.5 was enacted in 1986, and section 1194 was not amended to include its one-way fee provision until 1991. Indeed, in 1986, there simply was no such thing as meal and rest pay, as the first version of section 226.7 was eight years away from being introduced. Therefore, at those times (1991 and 1986), the Legislature did not express – and could not have expressed – any specific intent or purpose regarding fee-shifting in causes of action alleging violations of section 226.7. Hence, this Court should reject Immoos' proposed "three-fold purpose."

B. Because Section 218.5 Does Not Apply To Section 226.7 Claims, Section 1194 Applies

There is support for including section 226.7 within section 1194's coverage. Immoos concedes that the Labor Code does not define the terms and phrase in section 1194. (IAB, 11.) Immoos insists, however, that those words should be read as referring exclusively to the "minimum wage *rate*" set by the IWC ("IWC rate") and the overtime compensation *rate* set by section 510 ("section 510 rate"). (IAB, 3, 11, 16, 22, 32.) Kirby agrees

that section 1194 *includes* these rates. (OB, 15-21.) Nonetheless, the statutory language should not be read as being confined to those rates.

In response, Immoos urges the Court to compare the language in section 1194 to section 1194.5. (IAB, 19-20.) A more accurate comparison, however, is between sections 1194 and 1194.2. Both sections 1194 and 1194.2 are wage statutes, unlike section 1194.5, which provides for injunctive relief. The liquidated damages provision of section 1194.2(a) reads as follows:

> In any action under Section 1193.6 or Section 1194 to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission, an employee shall be entitled to recover liquidated damages . . . .

(§ 1194.2.) Section 1194.2(a) limits its application to "*a wage less than the minimum wage fixed by an order of the commission.*" (*Id.* (emphasis added).) This is precisely the definition that Immoos seeks for "the legal minimum wage" in section 1194. The Legislature added section 1194.2(a) in 1991, when it added one-way fee language to section 1194. (See, SB 955 (1991-1992 Reg. Sess.), [ASMJN, Ex. MM], §§ 2-3.) If the Legislature intended to limit section 1194's scope to the narrow meaning argued by Immoos, it could and would have done so in the same manner it did in section 1194.2. Therefore, if the Court construes "the legal minimum wage" in section 1194 as an exclusive reference to the IWC rate, the construction would render section 1194.2's reference to "a wage less than the minimum wage fixed by an order of the commission" mere surplusage. (See *Moyer v. Workmen's Comp. Appeals Board* (1973) 10 Cal.3d 222, 230 ("[A] construction making some words surplusage is to be avoided.").) Thus, the meaning of "the legal minimum wage" in section 1194 clearly is not limited to the IWC rate.

As discussed in the Opening Brief, "the legal minimum wage or the legal overtime compensation" is unambiguously and deliberately broad. (OB, 14-15.) For example, "[i]t is well established that California's prevailing wage law is a minimum wage law." (*Road Sprinkler Fitters v. G & G Fire Sprinklers, Inc.*, 102 Cal.App.4th 765, 776 ("*Road Sprinkler Fitters*") (citing *Metropolitan Water Dist. v. Whitsett* (1932) 215 Cal.400, 417-418); *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 448, *People v. Hwang* (1994) 25 Cal.App.4th 1168, 1181).) Immoos, however, urges this Court to disregard *Road Sprinkler Fitters* because the Court of Appeal there did not construe section 1194. (IAB, 31-32.) While *Road Sprinkler Fitters* does not harmonize sections 218.5 and 1194, it demonstrates that "construed in context," and "with reference to the whole system of law of which it is a part," the meaning of section 1194's "the legal minimum wage" is broader than just the IWC rate. (See *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 ("*Mejia*") (citations omitted); OB, 14.) Indeed, there are many forms of "the legal minimum wage." Local jurisdictions in California may establish "living wages" that are higher than the IWC's rate. (See *One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1142; see also *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1177.)[10]

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[10] Immoos' erroneous reliance on a CACI Jury Instruction actually *supports* Kirby's interpretation. The instruction provides: "The court must determine the prevailing minimum wage rate from applicable state or federal law. (See, ***e.g.***, Cal. Code Regs., tit. 8, § 11000.)" (IMJN, Ex. O, 35 (double emphasis added).) This is exactly Kirby's point. The state minimum wage *rate* is just an "e.g." – one example of the "legal minimum wage." Immoos also points to the IWC wage orders and an IWC Notice. (IAB, 12-13.) Like the Labor Code, those documents do not define the "legal minimum wage." Section 1194 is not cited once. Nothing in wage order 16 or the Notice limits "the legal minimum wage" in section 1194 to the IWC rate.

"The legal overtime compensation" is similarly broad. In explaining how the meal and rest pay is a form of "overtime," Kirby does not endorse an unpermitted "double dip." (IAB, 34-37; see OB, 18-21.) Kirby simply relied on *Murphy* to explain how work performed outside of the "section 226.7 prescribed period" can be construed as a form of overtime. (OB, 13-21; see *Murphy*, 40 Cal.4th at 1104 ("If denied two paid rest periods *in an eight-hour workday*, an employee essentially performs 20 minutes of 'free' work") (emphasis added).) Indeed, in insisting that "the legal overtime compensation" exclusively references the section 510 rate (IAB, 16, 34-37),[11] and arguing that no authority exists for interpreting that phrase to include meal and rest pay, Immoos completely ignores *Murphy*. (IAB, 37; see, *supra*, 4, 7-8.)

Immoos next provides a misleading discussion of legislative history.[12] (See IAB, 13-15.) Contrary to the Answer, the "single-subject rule" did not restrict the 1913 Act to enforcing the "minimum wage "'of this act.'" (See IAB, 13-15.) The "single-subject rule" prevents misleading or inaccurate titles so that legislators and the public are afforded reasonable notice of the contents of a statute." (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 988-989; see Cal. Const., Art. IV § 9.) Immoos

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[11] Immoos also relies on the Fair Labor Standards Act ("FLSA") and another CACI Jury Instruction. (IAB, 18-20.) Immoos' reliance on FLSA is baseless. FLSA's pay requirements are limited to minimum wage and overtime pay for workweeks longer than 40 hours. (See, *e.g.*, 29 U.S.C. § 207(a).) It provides essentially nothing else in those categories. Thus, FLSA's definitions and usages are irrelevant to California's significantly more complex and protective legislative scheme.

[12] Immoos also relies on publications from 1913. (IAB, 15-16.) Such publications are unpersuasive except insofar as they demonstrate that advances in workers' rights, even if controversial in their time, are the direction of progress.

incorrectly identifies the subject of the 1913 Act as "minimum wage." In reality, however, the subject is "the employment of women and minors." (See [IMJN, Ex. Q], 632 (describing the 1913 Act as "[a]n act regulating the employment of women and minors").) Hence, the 1913 Act would run afoul of the single-subject rule only if it sought, for example, to regulate employment of women and minors *and* the public education of minors. The 1913 Act is not limited to "enforc[ing] the minimum wage 'of this act.'" (IAB, 15.) Indeed, the 1913 Act is much broader.[13]

Immoos also misconstrues Kirby's "interchangeability" argument. (OB, 32-35.) Kirby does not argue that the "minimum wage" and "overtime" wages are literally interchangeable. (See *id.* at 32 (explaining Kirby's "broad and non-literal construction").) Rather, Kirby argues that, viewed in a broader regulatory context, they both are statutory wages and are among California's "minimum wage laws." (*Id.*) Indeed, viewed broadly, overtime pay and meal and rest pay both can be thought of as minimum wages themselves, in that they are the lowest wages allowed by law when they apply. (*Id.* at 13-18.) However they are conceptualized and calculated, "the legal minimum wage or the legal overtime compensation" are California's statutory wages, and none can or should be subject to the chilling effect of section 218.5. (See, *supra*, 5-7.) Instead, all belong under section 1194.

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[13] The 1913 Act created means to enforce regulations regarding employment of women and minors, and later, as amended, the employment of all workers. (See *Martinez v. Combs* (2010) 49 Cal.4th 35, 52.) Section 3(a) provided the IWC with broad powers, and section 18(a) instructed courts to construe the 1913 Act with equal breadth. ([IMJN, Ex. Q], 633; 637.)

C. California Public Policy Bars Section 218.5's Application To Meal and Rest Claims

If, however, this Court finds that "neither the language of the statutes nor their legislative history [is] dispositive," then the Court "turn[s] to an analysis of the relevant policy considerations as they bear on the question of legislative intent." (*Mejia, supra,* 31 Cal.4th at 668.) The Legislature has a powerful and long-standing public policy of enforcing wage and hour laws. (See *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 327; § 90.5.)

Law-abiding employers are victims of wage-related violations too, competing on an uneven playing field against the small percentage of employers that deliberately and repeatedly violate these important worker-protection and public-safety laws. (See § 90.5.) In an economy as large as California's, even a small percentage of unscrupulous employers adds up to a large number of violators, a far larger number of employers being competed with unfairly, and a still greater number of employees being denied legally mandated breaks, and an entire public being exposed to unnecessary safety risks. (*Id.* ("It is the policy of this state . . . to ensure employees are not required or permitted to work under substandard unlawful conditions . . . and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.").)

The Legislature's deliberate decision to deny fees to prevailing employers advances this policy. (See OB, 10-13, 27 (one-way provisions dominate the Labor Code); see also *Turner, supra,* 193 Cal.App.4th at 1061-1062.) The denial of liability for employer attorney's fees thus encourages aggrieved workers to "seek redress in situations where they

would otherwise not find it economical to sue," (*Earley, supra,* 79 Cal.App.4th at 1430-31) and is based on a fundamental recognition that employers "can more readily afford a protracted" litigation than can their employees. (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 111.) The Opinion directly contravened this policy in awarding fees to Immoos. The result here is particularly unjust as Kirby settled a separate Labor Code claim against co-defendants for $6,000, the full amount of which would revert to Immoos' attorneys if the Opinion is upheld. (See OB, 5.) The Opinion is an outlier and should be reversed.

II. "ACTION" IN SECTION 218.5 MEANS A CIVIL ACTION, NOT A CAUSE OF ACTION

If, however, the Court finds that section 218.5 applies to section 226.7 claims, then the Court's analysis *is* affected by whether section 226.7 claims are accompanied by claims for "minimum wage and overtime." This Court should adopt a plain language construction of the term "action" in section 218.5, which would preclude section 218.5's application to the section 226.7 claims here because those claims would be joined in an "action for which attorney's fees are recoverable under Section 1194." (§ 218.5.)

As Kirby explained in the Opening Brief, this interpretation is fully supported by the section's plain language, case law, and legislative history. (OB, 35-42.) The Court of Appeal in *Immoos* acknowledged that this construction is "plausible." (Op., 16-17.) *Immoos*, however, rejected this "plausible" construction which favors workers, and, instead, chose a construction that assumes workers seeking to vindicate their rights under section 1194 in conjunction with non-section 1194 claims bring their section 1194 claims to "insulate" their action from section 218.5 in order to "game" the system. (See *id.* at 10-18.) Again, the Opinion runs contrary to

the fundamental public policy of protecting workers and should be reversed.

Ample safeguards exist to prevent litigation abuses. Courts are well-equipped to manage and deter frivolous litigation. (See OB, 41, fn. 13.) Litigants who bring meritless matters to the courts risk substantial sanctions. (See *In re Shieh* (1993) 17 Cal.App.4th 1154, 1168.) Thus, employers are insulated against frivolous litigation in numerous ways.

Employees with non-frivolous meal and rest period claims, however, are not insulated from the chilling effect that results from the application of section 218.5 to meal and rest claims. Thus, this Court should adopt a plain meaning construction of "action" in order to prevent employers from threatening their workers with financial ruin and thereby intimidating them out of pursuing the wages they are legally owed under section 226.7.

A. Kirby's Interpretation of Section 218.5 Will Not Harm Workers As Immoos Claims

Immoos once again purports to become a workers' rights advocate, urging that Kirby's interpretation of "action" in section 218.5 will harm workers by depriving prevailing workers of section 218.5 attorney's fees. (IAB, 42-43; see, *supra*, 7-8.) Again, the American Rule is the better rule for workers. (See, *supra*, 8; OB, 42-43.) Moreover, the presence of any non-frivolous section 1194 claim guarantees that the employee bringing it is a non-exempt worker who should not be dissuaded from seeking section 226.7 pay by the employer's ability to raise the threat of liability for an outsized legal bill. If anything, bringing such a claim, far from "gaming" the system, vindicates "minimum wage" and "overtime" rights that the Legislature has made it clear that it wants enforced. If there is any potential for harmful "gaming" of the system, it takes the form of lawbreakers escaping their legitimate wage obligations.

B. Courts Can Manage Attorney's Fees Issues Where Causes of Action Are Joined With Section 1194 Claims

Immoos offers up a second specter that Kirby's construction of "action" means that in any "lawsuit" for non-payment of wages, section 218.5 could control, unless the litigant also pled a section 1194 claim. (IAB, 42-44.) Immoos' assertion fails. Determining that "action" means an entire lawsuit for purposes of section 218.5 will mean only that the trial court will be able to award "reasonable attorney's fees." It would not obligate the court to award all fees incurred for all work on the case. Trial courts have broad discretion in the matter of attorney's fees.[14] (*Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152, 169; *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

C. The Legislature and This Court Have Determined that the Term "Action" Refers to a "Lawsuit"

Immoos asserts that when the Legislature chose the term "action" for the second paragraph of section 218.5, it really meant "cause of action," even though it did not take the simple step of including those two additional

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[14] Courts have exercised this discretion to preclude two-way fee shifting when a two-way claim is "inextricably" intertwined with one-way claims. (See *Lopez v. United Parcel Service, Inc.* (N.D. Cal. Dec. 14, 2010, No. C 08-05396 SI) 2010 U.S. Dist. LEXIS 136352, 4 ("*Lopez*") (refusing to apply section 218.5 to action to recover overtime pay and straight-time because "any claims for which plaintiff would recover at a straight-time rate, rather than an overtime rate, were inextricably linked with the issue of whether he was entitled to overtime"); *Kline v. United Parcel Service, Inc.* (N.D. Cal. June 22, 2010, No. C09-00742 SI) 2010 U.S. Dist. LEXIS 69623, 5; see also *Turner, supra,* 193 Cal.App.4th at 1059-1060.) In light of *Lopez* and *McGann*, Kirby is willing to submit supplemental briefing on the effect of bringing meal and rest claims alongside "minimum wage and overtime" claims as well as on any other issues that would assist the Court in its analysis.

words. (IAB, 44-46.) But the authorities Immoos cites provide little support.

Immoos' reliance on *Frost v. Witter* (1901) 132 Cal. 421 ("*Frost*") is wholly misguided. In *Frost,* this Court held that if an amendment to a cause of action within a complaint alters only the remedy or "means" by which the alleged cause of action is brought about, then the amendment may be considered as *not* having altered the cause of action in the original complaint. (*Frost, supra,* 132 Cal. at 426-447.) The result was that the underlying statute of limitations on the cause of action was tolled upon the timely filing of the original complaint. (*Id.*) As part of the reasoning, this Court distinguished among an "action," a "cause of action" and a "remedy." The Court stated that the "action" is the right or power of being in court – "'of prosecuting in a judicial proceeding *what is owed to one,* – which is to but to say, an *obligation*'." (*Id.* (emphasis in original).) In other words, an "action" is the vehicle by which an obligation or obligations could be enforced. The cause of action, in contrast, is the underlying obligation from which a remedy or "relief" can be sought. (*Id.* at 426 (quoting Pomeroy on Pleading and Practice § 453).)

Hence, contrary to Immoos' erroneous reading, *Frost supports* Kirby's construction of "action" as the "judicial remedy," a proceeding that may include one or more different "obligations" or causes of action. (*Frost, supra,* 132 Cal. at 426-247; see *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 387) (relying on *Frost*'s interpretation of action and stating that "[a]n action is not limited to the complaint or the document initiating the action but the entire judicial proceeding" and that "Black's Law Dictionary states (at p. 49) the terms "action" and "suit" are now nearly synonymous . . . .").) Accordingly, Immoos' contention that "this

Court [in *Frost*] rejected the argument that the term 'action' referred to an entire lawsuit" is simply false. (IAB, 45.)

Frost also is more generally instructive, making it absolutely clear that "action" and "cause of action" are not the same thing – something that the Supreme Court recently confirmed in *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597, fn. 3, citing *Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294, 1298. The fact that the terms clearly have different meanings – even the parties agree on that much – only shines a light on the fact that when the Legislature drafted the amendment to section 218.5, it chose to use the term "action," not "cause of action."

Moreover, Immoos' reliance on the language of Code of Civil Procedure section 22 does not diminish Kirby's common sense argument that construing "action" to mean "cause of action" would mean that a single case with nine causes of action would constitute nine "proceedings" in a court of justice. (IAB, 44 (citing Code. Civ. Proc. § 22).) Further, Immoos does not respond to Kirby's reliance on *Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212 or the Legislature's use of these terms throughout the Labor Code. (See OB, 37-39.) Instead, Immoos quotes Black's Law Dictionary's definition of "Right of Action" without disclosing Black's definition of "Action," which reads as follows:

> A civil or criminal judicial proceeding ... 'An action has been defined to be an ordinary proceeding in a court of justice ... More accurately, it is defined to be any judicial proceeding . . . .
>
> Black's goes on to state:
>
> The terms 'action' and 'suit' are nearly if not quite synonymous. But lawyers usually speak of proceedings in courts of law as 'actions,' and those in courts of equity as 'suits.'

(Black's Law Dict. (9th ed. 2009).)

The second paragraph of section 218.5 is a single, simple sentence. Workers should be able to rely on its plain meaning without being subjected to the risk of financial ruin for seeking to enforce their right to have minimum labor standards upheld.

CONCLUSION

For the reasons set forth above and in the Opening Brief, this Court should reverse the Third District Court of Appeal's decision below.

Dated: May 10, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to California Rule of Court 8.204(c)(1) that Appellants' Reply Brief on the Merits contains 8,392 words, excluding the table of contents, table of authorities, and this certificate. Counsel relies on the word count of the computer program used to prepare this brief

Dated: May 10, 2011

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Analysis
As of: May 09, 2011

BEN LOPEZ, Plaintiff, v. UNITED PARCEL SERVICE, INC., Defendant.

No. C 08-05396 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 136352

December 14, 2010, Decided
December 14, 2010, Filed

PRIOR HISTORY: *Lopez v. UPS, 2010 U.S. Dist. LEXIS 95772 (N.D. Cal., Sept. 14, 2010)*

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JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEYS' FEES

Defendant's motion for attorneys' fees is currently set for hearing on December 16, 2010. Pursuant to *Civil Local Rule 7-1(b)*, the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the hearing. Having considered the papers submitted, and for good cause shown, the Court DENIES defendant's motion.

BACKGROUND

This litigation concerns a wage and hour dispute between plaintiff Ben Lopez and defendant United Parcel Service, Inc. ("UPS"). Plaintiff contended that UPS improperly classified [*2] him as an employee exempt from overtime compensation under California law. Plaintiff brought suit in September 2008 based on his alleged misclassification in five full-time supervisor positions he held at UPS between March 2001 and June 2008: Hub Supervisor, Preload Supervisor, On-Road Supervisor, Training and Retention Supervisor, and On-Job Supervisor. A jury trial was held with respect to the first four positions in April 2010. The jury found that

plaintiff was properly classified as exempt in the Hub Supervisor, Preload Supervisor, and Training and Retention Supervisor positions, and that although UPS did not meet its burden of proving that plaintiff was properly classified as exempt in the On-Road Supervisor, plaintiff had failed to prove that he worked any overtime hours or missed any meal breaks during his tenure in this position.

Due to statute of limitations issues, plaintiff's claim with respect to the On-Job Supervisor position was brought under California's Unfair Competition Law ("UCL"), *Cal. Bus & Prof. Code § 17200 et seq.*, rather than under California wage and hour law. See *Murphy v. Kenneth Cole Prods., 40 Cal. 4th 1094, 56 Cal. Rptr. 3d 880, 155 P.3d 284, 289 (Cal. 2007)* (statutory wage claims are subject [*3] to a three-year statute of limitations; penalty claims are subject to a one-year statute); *Cal. Bus. & Prof. Code § 17208* (UCL claims subject to four-year statute). The claim was tried to the Court on July 15, 2010. The Court ruled in favor of UPS on the UCL claim. Doc. 268.

DISCUSSION

UPS argues that it is entitled to a portion of its fees pursuant to California statute. *California Labor Code § 218.5(a)* provides that "[i]n any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action." This provision specifically states, however, that it "does not apply to any action for which attorney's fees are recoverable under [*Cal. Labor Code §] 1194*." *Id. California Labor Code § 1194*, in turn, states that a prevailing employer cannot recover fees in an action for nonpayment of minimum wage or overtime compensation; rather, fees in such an action may only be recovered by a prevailing employee. *Cal. Labor Code § 1194(a); Earley v. Superior Court, 79 Cal. App. 4th 1420, 95 Cal. Rptr. 2d 57, 62 (Cal. Ct. App. 2000).*

UPS [*4] seeks to recover the fees it has incurred in defending against plaintiff's non-overtime claims, which included (1) his claims for missed meal and rest breaks, and (2) his claim for straight-time wages in the event he was found to be exempt from overtime under the Motor Carrier Act. UPS suggests that the Court should apportion the recoverable and non-recoverable fees in this action, and award those fees that were incurred as a result of the claims not covered by *Labor Code § 1194.*

The Court disagrees. *Labor Code § 218.5* expressly states that its provisions do not apply "to any action" brought to recover overtime wages, and this was fundamentally an overtime action. UPS argues that plaintiff's straight-time claims were separable from his overtime claims. However, the straight-time claims in this case would not even come into play unless plaintiff was found non-exempt.

In other words, any claims for which plaintiff would recover at a straight-time rate, rather than an overtime rate, were inextricably linked with the issue of whether he was entitled to overtime. UPS is therefore not entitled to fees pursuant to statute. [1]

> 1 UPS relied on *Kirby v. Immoos Fire Protection, Inc., 186 Cal. App. 4th 1361, 113 Cal. Rptr. 3d 370 (2010)*, [*5] in its opening brief. Before plaintiff filed his opposition brief, the Supreme Court of California granted review of the case. *117 Cal. Rptr. 3d 658 (2010).* In its reply, UPS urges the Court to consider the reasoning in *Kirby*, even though the opinion is no longer precedential in California. In particular, UPS expresses concern that plaintiffs in the future will bring baseless non-overtime claims and then insulate themselves from attorney fee liability by pleading overtime claims as well. The Court is not persuaded that this is a likely outcome of the Court's ruling that the fee issue is determined by *Labor Code § 1194* when the non-overtime claims are *inextricably linked* with the issue of whether a plaintiff is entitled to overtime.

CONCLUSION

For the foregoing reasons and for good cause shown, UPS's motion for attorneys' fees is DENIED. (Doc. 272.)

IT IS SO ORDERED.

Dated: December 14, 2010

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

Analysis
As of: May 09, 2011

DANIEL KLINE, Plaintiff, v. UNITED PARCEL SERVICE, INC., Defendant.

No. C 09-00742 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 69623

June 22, 2010, Decided
June 22, 2010, Filed

PRIOR HISTORY: *Kline v. UPS, 2010 U.S. Dist. LEXIS 46237 (N.D. Cal., Apr. 7, 2010)*

COUNSEL: [*1] For Daniel Kline, Plaintiff: Mark Christopher Peters, LEAD ATTORNEY, Duckworth, Peters & Lebowitz, San Francisco, CA; John Allen Furutani, Furutani & Peters LLP, Pasadena, CA.

For United Parcel Service Inc., Defendant: Elena Renee Baca, LEAD ATTORNEY, Paul, Hastings, Janofsky & Walker LLP, Los Angeles, CA; Katherine C Huibonhoa, Ryan Coby Hess, LEAD ATTORNEYS, Paul, Hastings, Janofsky & Walker, LLP, San Francisco, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEYS' FEES

Defendant's motion for attorneys' fees is currently set for hearing on June 25, 2010. Pursuant to *Civil Local Rule 7-1(b)*, the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the hearing. Having considered the papers submitted, and for good cause shown, the Court DENIES defendant's motion.

BACKGROUND

Plaintiff Daniel Kline filed this action on September 26, 2008, alleging that defendant United Parcel Service, Inc. ("UPS") misclassified him as exempt from overtime compensation during his employment with UPS from May 1999 to September 2003. On April 7, 2010, the Court issued an order granting UPS's motion for summary judgment. [*2] The Court held that plaintiff released all existing claims arising out of the parties' employment relationship as part of a settlement agreement reached in 2004 ("2004 Settlement Agreement") in a prior action in California state court, *Kline v. United Parcel Service,* Alameda County Super. Ct. Case No. RG03112427. In the motion now before the Court, UPS seeks to recover the attorneys' fees incurred in defending against plaintiff's suit.

DISCUSSION

I. Contractual Fee Provision

UPS first contends that it is entitled to recover attorneys' fees pursuant to a fee provision in the 2004 Settlement Agreement. According to UPS, the 2004 Settlement Agreement reflects a "clear intent" by the parties that attorneys' fees would be available to the prevailing party in any future dispute related to the enforcement of the Agreement. The relevant language in the Agreement states:

> All claims arising out of breach of this Agreement and/or to enforce this Agreement shall be subject to arbitration pursuant to the Employment Dispute Resolution rules of JAMS/Endispute, in San Francisco, California. The arbitrator is hereby authorized to award the fees and costs of arbitration, including advanced fees, in the [*3] arbitrator's sole discretion to the prevailing party.

2004 Settlement Agreement, Baca Decl. Ex. E, at 13.

The Court finds that the language of the Agreement, on its face, does not entitle UPS to attorneys' fees in this action. Although UPS introduced evidence of the 2004 Settlement Agreement in order to defeat plaintiff's wage and hour claims in this action, this action did not involve a claim arising out of a breach of the Agreement or a claim to enforce the Agreement. The plain language of the provision does not indicate an intent to encompass actions in which the 2004 Settlement Agreement is raised as a defense to an unrelated claim, especially actions brought outside the context of arbitration.

Accordingly, the Court finds that UPS is not entitled to fees pursuant to contract.

II. *California Labor Code § 218.5*

UPS argues next that it is entitled to a portion of its fees pursuant to California statute. *California Labor Code § 218.5(a)* provides that "[i]n any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests [*4] attorney's fees and costs upon the initiation of the action." This provision specifically states, however, that it "does not apply to any action for which attorney's fees are recoverable under [*Cal. Labor Code §] 1194.*" *Id. California Labor Code § 1194*, in turn, states that a prevailing *employer* cannot recover fees in an action for nonpayment of minimum wage or overtime compensation; rather, fees in such an action may only be recovered by a prevailing *employee. Cal. Labor Code § 1194(a); Earley v. Superior Court, 79 Cal. App. 4th 1420, 95 Cal. Rptr. 2d 57, 62 (Cal. Ct. App. 2000).*

UPS seeks to recover the fees it has incurred in defending against plaintiff's non-overtime claims, which included (1) his claims for missed meal and rest breaks, and (2) his claim for straight-time wages in the event he was found to be exempt from overtime under the Motor Carrier Act. UPS suggests that the Court should apportion the recoverable and non-recoverable fees in this action, and award those fees that were incurred as a result of the claims not covered by *Labor Code § 1194.*

The Court disagrees. *Labor Code § 218.5* expressly states that its provisions do not apply "to any action" brought to recover overtime wages, and this [*5] was fundamentally an overtime action. UPS argues that plaintiff's straight-time claims were separable from his overtime claims. However, the straight-time claims in this case would not even come into play unless plaintiff was found non-exempt. In other words, any claims for which plaintiff would recover at a straight-time rate, rather than an overtime rate, were inextricably linked with the issue of whether he was entitled to overtime. UPS is therefore not entitled to fees pursuant to statute.

UPS's motion for attorneys' fees is DENIED. [1]

1 The Court also DENIES all evidentiary objections made in connection with this motion.

CONCLUSION

For the foregoing reasons, and for good cause shown, UPS's motion for attorney's fees is DENIED. (Docket No. 97).

IT IS SO ORDERED.

Dated: June 22, 2010

/s/ Susan Illston

SUSAN ILLSTON

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 1629 Telegraph Avenue, Fourth Floor, Oakland, California 95612. I am employed by the Law Office of Ellyn Moscowitz, P.C.

On May 10, 2011, I served the within Appellants' Reply Brief on the Merits in *Anthony Kirby et al. v. Immoos Fire Protection, Inc.*; California Supreme Court Case Number S185827 [Third Appellate District Court of Appeal Case Number C062306] upon the following:

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XXXX: BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE. I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or diver authorized by the express carrier to receive documents.

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

XXXX: BY MESSENGER SERVICE. I served the documents by placing them in an envelope or package addressed to the persons at the addresses I listed above and providing them to a professional messenger service.

I certify under penalty of perjury that the above is true and correct. Executed at Oakland, California on May 10, 2011.

Andy Morales