No. S224853

IN THE SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS, et al.,

Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant,

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division One, Case Nos. B243788 & B247392

The Superior Court of Los Angeles County,
The Honorable John Shepard Wiley Jr.
Case Nos. BC336416, BC345918, & CG5444421

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Service on the Attorney General required per Bus. & Prof. Code, § 17209

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INTRODUCTION

This case involves a sweeping summary judgment ruling in which the trial court concluded that every single one of the millions of uninterrupted rest breaks ABM provided to its employees was invalid as a matter of law because those breaks *potentially* could have been interrupted, and on that basis awarded $90 million to over 14,000 class members. The trial court believed that "'if you are on call, you are not on break'" and that "'on-call breaks are all legally invalid.'" (*Augustus v. ABM Security Services, Inc.* (2015) 182 Cal.Rptr.3d 676, 682 (*Augustus*).) Under this view, if an employee carries a radio or cell phone during a rest break and *could possibly* be called back to work, such as in the case of an emergency, the employer has failed to provide a lawful rest break. In other words, the mere potential for interruption—without any additional restrictions—is tantamount to the complete denial of a rest break. The Court of Appeal unanimously reversed and held that the trial court's ruling was wrong as a matter of law. This Court should affirm.

Plaintiffs spend little time defending the trial court's unprecedented—and indefensible—conclusion that all on-call rest breaks are *per se* invalid. Indeed, Plaintiffs concede that time spent on call does not necessarily count as work, because some "on-call arrangements qualify as work, while others do not." (Respondents' Opening Brief on the Merits ("ROB") at p. 39.) Unable to justify the actual basis for the classwide summary judgment ruling that they have asked this Court to reinstate, Plaintiffs instead dwell on an irrelevant issue: whether California law permits employers to provide *on-duty* rest breaks in which employees are forced to continue performing work. But ABM has never suggested that "on duty" breaks were permissible, the record demonstrates that those were *not* the type of breaks provided to the class, and the Court of Appeal

repeatedly made clear that the Labor Code prohibits "working during a rest break." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 685.)

Rather, the actual issue here is "whether simply being on-call constitutes performing 'work,'" and the Court of Appeal correctly held that "it does not." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 685.) In reaching the conclusion that being available to resume work is not, without more, the same thing as working, the Court of Appeal rejected Plaintiffs' contention that the time ABM's guards spent on rest breaks was indistinguishable from the remainder of the work day. On the contrary, while "a guard on duty must observe the guarded campus and perform many tasks, for example, greeting visitors, raising or lowering the campus's flags, or monitoring traffic or parking," there is "[n]o evidence in the record [that] suggests an ABM guard taking a rest break is required to do any of these things." (*Id.* at p. 686.) And when "remain[ing] on call during their rest breaks," guards were "permitted to engage and did engage in various non-work activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet." (*Id.* at pp. 684–685.)

The Court of Appeal also concluded that the undisputed record revealed "class members regularly took uninterrupted rest breaks during which they performed no work." (*Augustus*, *supra*, 182 Cal.Rptr.3d at pp. 681–682.) Yet it is these uninterrupted, work-free rest breaks that the trial court held were *per se* invalid. Remarkably, the court awarded damages to *all* class members based on the assumption that they did not receive even a single valid rest break merely because of the theoretical possibility that their breaks could have been interrupted, even though Plaintiffs "fail[ed] to provide any example of a rest break having actually been interrupted," and ABM "submitted affirmative evidence that any rest period interrupted by a call back to service could be restarted after the

situation necessitating the callback was resolved." (*Id.* at p. 682.) The Court of Appeal properly rejected the indiscriminate awarding of windfalls to employees who had suffered no injury whatsoever.

Plaintiffs fault the Court of Appeal for not applying the "relieved of all duty" standard for *meal* breaks from this Court's decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). But they ignore both that this standard was expressly based on a portion of the wage order applicable *only* to meal breaks, and that there are inherent differences between unpaid 30-minute meal breaks and paid 10-minute rest breaks. Even if Plaintiffs were correct that the "relieved of all duty" standard applied equally to rest breaks, nothing in *Brinker* suggests that this standard—which was designed to ensure that employees have "a reasonable opportunity to take an uninterrupted" break—creates an inflexible *per se* rule that prohibits the mere *possibility* that a break might be interrupted. (*Brinker*, *supra*, 53 Cal.4th at p. 1040.)

Plaintiffs' reliance on this Court's decision in *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833 (*Mendiola*) is equally misplaced. As the Court of Appeal recognized, *Mendiola* and similar compensable-time cases address "[w]hat constitutes compensable work time," which is "not the issue here, as it is undisputed rest breaks are compensable." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 689.) In any event, *Mendiola* actually supports the Court of Appeal's decision, because it makes clear that a fact-intensive, multifactor test—not a *per se* one-size-fits-all rule—governs whether "on-call time" constitutes compensable "hours worked." (*Mendiola*, *supra*, 60 Cal.4th at pp. 840–841.) *Mendiola* holds, in direct conflict with the trial court's reasoning, that the "use of a pager" points *away from* finding that on-call time constitutes "hours

worked," because pagers can "ease restrictions" on employees. (*Id.* at p. 841.)

Adopting Plaintiffs' and the trial court's view of the rest break requirement would result in a tidal wave of similar claims and would almost certainly harm the very employees Plaintiffs claim they seek to protect. Eliminating the mere possibility that breaks might be interrupted is nearly impossible, but the prospect of liability based on the potential for interruption will likely cause employers to impose restrictions on employees' break time, such as prohibiting employees from bringing personal cell phones to work or from interrupting their breaks to address emergencies. The net result: an *increase* in employer control over break time, no appreciable benefit to employees, like the class members here, who already receive work-free rest breaks, and a substantial increase in litigation for California's employers and courts.

Accordingly, this Court should affirm the Court of Appeal's judgment, and direct the Court of Appeal to remand to the trial court with instructions that it enter judgment in favor of ABM.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Parties

"ABM employs thousands of security guards at locations in California." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 679.) At some sites—called "168 hour" locations—only a single guard works at any given time. (See, e.g., 10JA2966.) At larger sites, multiple ABM guards are on duty. (See 10JA2759 [approximately 75 ABM guards assigned to a single large office building].) Guards' job duties vary from site to site, from greeting visitors and checking identifications to patrolling building campuses and

parking facilities. (E.g., 21JA5933; 21JA5943; 21JA5946.) At many sites, ABM employs "rover" officers who relieve other guards during their meal and rest periods. (See, e.g., 9JA2660.)

Named plaintiffs "[Jennifer] Augustus, Emmanuel Davis, and Delores Hall worked for ABM as security guards." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 679.) Augustus worked as a security guard for ABM at multiple sites. (11JA3063.) At one site, Augustus escorted tenants in the evenings, and patrolled the building's perimeter and parking lots. (21JA6076–6078.) She was for a time a "relief supervisor," and in that role she "would relieve people for breaks." (4JA1011.) Davis worked as a security guard at a building with retail space and commercial offices in San Francisco. (8JA2308.) Working at a security console, Davis observed video monitors, remotely locked doors and elevators, and monitored traffic in and out of the building. (21JA6055–6056.) Davis claimed that he was not provided with rest breaks while he worked at ABM, but he testified that he took "about ten" informal cigarette breaks over the course of a normal work day. (11JA3076–3077.) Hall worked for ABM for 13 years, until 2006. (See 4JA1127; 4JA1119.) Hall's employee handbook stated that her "supervisor" would "schedule[] meal and break periods," but she claimed her supervisor did not provide her with meal and rest breaks. (4JA1125.)

B. ABM's Provision of Rest Breaks

ABM's written rest break policies informed guards that they were "authorize[d] and permit[ted]" to take rest breaks "as required by California law." (9JA2418; see also 3JA628.) And, in fact, many ABM guards stated in declarations that they received rest breaks. (E.g., 10JA2946 ["I also always receive 15 minute rest periods" twice per shift]; 11JA2995 ["I take my scheduled meal and rest breaks every day"]; 10JA2933 ["Each day I

take two rest breaks to use the bathroom or step outside for some fresh air"].) In many locations, rovers like Augustus herself were employed specifically to give guards an opportunity to take breaks. (E.g., 11JA3012–3013; 4JA1011; 9JA2660.)

Class member depositions revealed that while some employees believed they were required to carry radios and respond to calls during breaks (24JA6838), others did not carry their radios with them at all (24JA6814–6815). In fact, "ABM presented numerous depositions that indicated many guards took breaks without radios." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 682.) Additionally, ABM "submit[ed] substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves, that class members regularly took uninterrupted rest breaks during which they performed no work but engaged in such leisure activities as smoking, reading, and surfing the Internet." (*Id.* at pp. 681–682.) And while Plaintiffs "fail[ed] to provide any example of a rest break having actually been interrupted," ABM "submitted affirmative evidence that any rest period interrupted by a call back to service could be restarted after the situation necessitating the callback was resolved." (*Id.* at p. 682.)

C. ABM's Receipt of DLSE Rest Break Exemptions

ABM sought and received from the Division of Labor Standards Enforcement ("DLSE") two exemptions from the rest break requirement for some of its locations. (See 10JA2821.) The first exemption applied at 170 single-guard locations, and was effective from December 27, 2006 to December 26, 2007. (10JA2822.) On August 1, 2009, the DLSE granted ABM's request for renewal of its exemption, effective through July 31, 2010, but limited this exemption to swing- and night-shift security guards, leaving out day-shift guards at small or remote sites. (12JA3367.) ABM

did not take advantage of this exemption, believing it would be difficult to administer. (See 13JA3756.)

II. PROCEDURAL BACKGROUND

A. The Trial Court Grants Class Certification

Plaintiffs' "master complaint," filed in 2007, "alleges ABM 'fail[ed] to consistently provide uninterrupted rest periods,' or premium wages in lieu of rest breaks, as required by [Labor Code] section 226.7." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 680; see 1JA70.)

Plaintiffs moved for class certification in 2008, "arguing class certification was warranted because, inter alia, ABM had a uniform companywide policy requiring all guards to remain on duty during their rest breaks." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 681.) "Plaintiffs supported the motion with the deposition testimony of Fred Setayesh, an ABM senior branch manager, who admitted" that some employees would "not [be] relieved of all duties during rest breaks." (*Ibid.*) Setayesh clarified, "I said they're not relieved from all duties, but they are—they can take their breaks." (11JA3098; see also 12JA3504 [explaining that employees "would be taking a break as they need"].) Setayesh was specifically referring only to employees who worked at single-guard sites for which ABM had sought a rest break exemption from the DLSE; he did not describe the rest breaks provided to all employees during the class period. (See 11JA3096–3099.)

Nonetheless, "[t]he trial court granted certification in 2009, stating without elaboration that plaintiffs had 'provided substantial evidence that the common factual and legal issues predominate over individual factual and legal issues.'" (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 681.) The court certified a class of all ABM employees who worked "in any security guard

position in California at any time during the period from July 12, 2001 through entry of judgment ... [and] who worked a shift exceeding four (4) hours or major fraction thereof without being authorized and permitted to take an uninterrupted rest period of net ten (10) minutes per each four (4) hours or major fraction thereof worked and [had] not been paid one additional hour of pay at the employee's regular rate of compensation for each work day that the rest period was not provided." (7JA1999–2000.)

B. The Trial Court Grants Plaintiffs' Motion for Summary Adjudication on Their Rest Break Claim

"In 2010, plaintiffs moved for summary adjudication of their rest period claim, contending it was undisputed ABM's employees were required to remain on call during their rest breaks, which ... rendered them per se invalid." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 681.) "Plaintiffs supported the contention with Setayesh's" deposition testimony but "offered no evidence indicating anyone's rest period had ever been interrupted." (*Ibid.*)

ABM "submitt[ed] substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves, that class members regularly took uninterrupted rest breaks during which they performed no work but engaged in such leisure activities as smoking, reading, and surfing the Internet." (*Augustus*, *supra*, 182 Cal.Rptr.3d at pp. 681–682.) ABM also "submitted affirmative evidence that any rest period interrupted by a call back to service could be restarted after the situation necessitating the callback was resolved." (*Id.* at p. 682.) ABM cross-moved for summary adjudication of the rest break claim, for summary judgment on the meal period claim, and, in the alternative, for decertification. (7JA2040; 7JA2051.)

The trial court granted Plaintiffs' motion. (13JA3765.) Citing two cases for the proposition that "the time an employee is on duty and subject to call is compensable work time" (13JA3757–3758), the trial court concluded that so long as guards "remain on call," "it is irrelevant that an employee ... may engage in leisure activities during" rest breaks (13JA3759–3760). That rest breaks were rarely interrupted, or that guards used breaks for "non-work related activities ... such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc." was irrelevant. (13JA3757–3758.) Instead, the trial court reasoned, "[w]hat is relevant is whether the employee remains subject to the control of an employer," because "a rest period must not be subject to employer control; otherwise a 'rest period' would be part of the work day for which the employer would be required to pay wages in any event." (13JA3760.) And "because [ABM's security guards] remain on call," the court posited, "the guards are *always* subject to [ABM's] control" (13JA3758, italics added), and no guard *ever* took a legally compliant rest break (13JA3761). ABM's motion for decertification of the rest break class was denied without explanation. (See 13JA3764–3765.)

C. The Trial Court Grants Plaintiffs' Motion for Summary Judgment on Their Rest Break Claim and Awards Damages to the Entire Class

"In 2012, plaintiffs moved for summary judgment on their damages claim, contending the only remaining task was to apply the court's earlier finding to undisputed facts." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 682.) "Plaintiffs contended that because ABM forced its security guards to remain on duty during their rest breaks, it owed each employee an additional hour of payment, a waiting time penalty, and interest for '*every single rest break taken by every single class member*, for the duration of the Class Period.'" (*Ibid.*, italics added.)

ABM concurrently moved to decertify the class, arguing that Plaintiffs' proposed trial plan violated due process and amounted to an impermissible "Trial by Formula," in violation of *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. ___ [131 S.Ct. 2541, 2561] because it prevented ABM from asserting defenses to individual claims. (20JA5717.) ABM argued that class member depositions showed "differing applications" of the alleged "policy found to be impermissible" in the summary adjudication order, which necessitated individualized inquiries that in turn prohibited classwide adjudication. (*Ibid.*)

"In a tentative ruling issued before the hearing, the trial court incorporated its prior summary adjudication ruling and stated that '[p]ut simply, if you are on call, you are not on [a rest] break.'" (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 682.) The court "acknowledged evidence existed that not all security guards were required to carry radios during their breaks." (*Ibid.*) And, in fact, "ABM presented numerous depositions that indicated many guards took breaks without radios." (*Ibid.*) But "the court ruled that whether a guard actually carried a radio was immaterial, as '[t]here are many alternatives to the radio for hailing a person back to work: cell phone, pager, fetching, hailing and so on.'" (*Ibid.*) In other words, the trial court ruled that if there was any possibility that a rest break might be interrupted, then that break was legally insufficient. On that basis, the court inferred "'that [ABM] required all its workers to be on-call during their breaks, and so these on-call breaks are all legally invalid.'" (*Ibid.*)

"After the hearing, the court adopted its tentative ruling[,] granted plaintiffs' motion[,] ... denied ABM's motion for decertification," and awarded plaintiffs approximately $89 million in damages. (*Augustus*, *supra*, 183 Cal.Rptr.3d at p. 683.) "Six months later, the court entered an amended judgment that awarded plaintiffs approximately $27 million in

attorney fees, representing 30 percent of the common fund, plus $4,455,336.88 in fees under Code of Civil Procedure section 1021.5." (*Ibid.*)

D. The Court of Appeal's Decision

In an opinion filed on December 31, 2014, and modified on January 29, 2015, the Court of Appeal unanimously reversed the trial court's summary adjudication and summary judgment orders, and affirmed the class certification order.

With respect to the summary adjudication and summary judgment orders, the Court of Appeal stated that the "issue" was "whether *simply being on-call* constitutes performing 'work.'" (*Augustus*, *supra*, 183 Cal.Rptr.3d at p. 685, italics added.) Based on the text of Wage Order No. 4 and Labor Code section 226.7, the Court of Appeal concluded that "it does not." (*Ibid.*) While "[t]he text of the wage order does not describe the nature of a rest period," section 226.7 makes clear "only that an employee cannot be required 'to work' during a break." (*Id.* at p. 684.) Applying this test to the facts here, the Court of Appeal reversed because guards who "were required to remain on call during their rest breaks[] ... were otherwise permitted to engage and did engage in various non-work activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet"—in other words, a "security guard who is on call performs few if any of the activities performed by one who is actively on duty." (*Id.* at pp. 684–686.) As a result, the court also reversed "the consequent order granting plaintiffs' attorneys' fees under Code of Civil Procedure section 1021.5." (*Id.* at p. 689.)

STANDARD OF REVIEW

On appeal from a grant of summary judgment, the Court "review[s] the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 334.) Summary judgment may be granted only if "'all the papers submitted show' that 'there is no triable issue as to any material fact.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, quoting Code Civ. Proc., § 437c, subd. (c).) The court must view all submitted evidence "in the light most favorable to the opposing party." (*Ibid.*)

ARGUMENT

I. THE COURT OF APPEAL PROPERLY REVERSED SUMMARY JUDGMENT BECAUSE ON-CALL REST BREAKS ARE NOT *PER SE* INVALID

The Court of Appeal correctly rejected the trial court's unprecedented conclusion that all on-call rest breaks are *per se* invalid as a matter of law. There is no prohibition of on-call rest breaks in the text of the relevant provisions of the Labor Code and wage order, and the history of these provisions conflicts with the trial court's conclusion that all on-call rest breaks are impermissible. The Court of Appeal also properly held that neither this Court's guidance regarding meal breaks in *Brinker*, nor cases such as *Mendiola* that address the circumstances under which time an employee spends is compensable "hours worked," provided any support for the trial court's and Plaintiffs' distorted view of the law. To the contrary, these cases demonstrate why the trial court's inflexible, *per se* rule against on-call breaks is not and cannot be the law.

A. The Text and History of Wage Order No. 4 and Labor Code Section 226.7 Demonstrate That On-Call Rest Breaks Are Not *Per Se* Invalid

The parties agree that Wage Order No. 4-2001 governs Plaintiffs' claims. (ROB at p. 21.) Subdivision 12, which pertains to rest breaks, provides:

> Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(Cal. Code Regs, tit. 8, § 11040, subd. (12)(A).)

The current text of subdivision 12 of Wage Order No. 4 has remained nearly unchanged since 1952, when the Industrial Welfare Commission ("IWC") adopted Wage Order No. 4-52. (See Aug. 28, 2015 Declaration of Theane Evangelis in Support of ABM's Motion for Judicial Notice ("Evangelis Decl."), Exh. C.) Significantly, when the IWC adopted the current language governing rest breaks in 1952, it "clarified that the Commission did not intend a completely off-duty rest period to be applicable in the case of an employee who is alone on a shift and has ample time to rest because of the nature of the work," such as "a night switchboard operator on a small board, a night hotel clerk, etc." (Evangelis Decl., Exh. D at p. 34.) "If employees in such positions are able to rest on the job," the IWC explained, "it is not intended that the employer provide a special relief employee." (*Ibid.*)

The scope of the rest break requirement remained virtually unchanged in the four decades that followed. In 1976, the IWC expanded

the definition of "employee" to include men (in addition to women and minors), and clarified that the ten minutes of rest must be "net"—i.e., exclusive of time in transit. (Evangelis Decl., Exh. F.) And in 2000, the IWC "added a provision to [subdivision 12] that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a rest period is not provided." (Evangelis Decl., Exh. E at p. 21.)

"At the same time that the IWC was adding the pay remedy, Assemblymember Darrell Steinberg introduced Assembly Bill No. 2509 (1999-2000 Reg. Sess.) (Bill No. 2509) to codify a pay remedy via proposed section 226.7." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1106 (*Murphy*).) The "stated purpose" of the bill, according to a report of the Assembly Committee on Labor and Employment, was to "strengthe[n] enforcement of existing wage and hour standards." (Evangelis Decl., Exh. A at p. 5.) Labor Code section 226.7 thus complemented the IWC's "[e]xisiting" regulatory framework by "mak[ing] any employer that requires any employee to work during a ... rest period [as] mandated by an order of the commission subject to a civil penalty[.]" (Evangelis Decl., Exh. B at p. 6.)

Section 226.7 provides that "[a]n employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health" and that "[i]f an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health

Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." (Lab. Code, § 226.7, subds. (b), (c).)

In sum, nothing in Wage Order No. 4 suggests that on-call rest breaks are legally invalid, as Plaintiffs here contend. To the contrary, the wage order is silent on the permissibility of such breaks. And its adoption history suggests that on-call breaks are entirely consistent with the purpose of rest breaks, as the IWC intended to create a flexible, industry- and job-specific standard that is concerned with whether, as a practical matter, an employee is allowed to rest during the work day. (See Evangelis Decl., Exh. D at p. 34 [IWC "did not intend a completely off-duty rest period to be applicable in the case of an employee who is alone on a shift and has ample time to rest because of the nature of the work"]; cf. *Brinker*, *supra*, 53 Cal.4th at p. 1040 [noting that what "will suffice" to satisfy an employer's obligation to provide meal breaks "may vary from industry to industry"].) Further, section 226.7 by its terms only prohibits requiring an employee "to work" during a rest or meal break, and nothing in section 226.7's legislative history suggests that it was intended to expand an employer's obligations with regard to rest breaks or otherwise disturb the IWC's well-established regulatory scheme. (See *Brinker*, *supra*, 53 Cal.4th at p. 1037 ["we begin with the assumption the Legislature did not intend to upset existing rules, absent a clear expression of contrary intent"].)

B. The Court of Appeal Correctly Held That the Mere Potential for Interruption Does Not Invalidate a Rest Break

The bulk of Plaintiffs' brief addresses a straw man: whether California law permits employers to provide "on-duty" rest breaks. The trial court's summary judgment ruling, however, was not premised on a finding that ABM provided its employees *on-duty* rest breaks. Rather, it was based on the erroneous legal conclusion that "'if you are on call, you are not on break.'" (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 682.) According to the trial court, the mere possibility that an employee could be "'hail[ed] ... back to work'" during a rest break, whether by "'cell phone, pager, fetching, hailing and so on,'" meant that all "'*on-call* breaks are *all* legally invalid.'" (*Ibid.*, italics added.) In other words, this case is not and has never been about whether California law permits *on-duty*, working rest breaks; it is about whether *on-call* rest breaks—i.e., breaks that could potentially be interrupted—are *per se* invalid under California law, as the trial court mistakenly believed. Because the Court of Appeal correctly rejected this reasoning, Plaintiffs now seek to equate being *on call* with being *on duty*, as if they are one and the same. They obviously are not.

As explained above, Labor Code section 226.7 supplies the only express guidance in either the Labor Code or the wage order regarding the nature of the rest breaks employers must provide, and it states that an "employer shall not require an employee *to work*" during a rest break. (Lab. Code, § 226.7, subd. (b), italics added.) The Court of Appeal concluded that the potential that "an on-call guard must return to duty if requested" does not render a rest break invalid under section 226.7, because "remaining available to work is not the same as performing work." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 686.)

Contrary to Plaintiffs' assertion, the Court of Appeal's reasoning is entirely consistent with this Court's description of the rest break obligation in *Murphy*. First, *Murphy* noted that "being forced to forgo rest and meal periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks." (*Murphy*, *supra*, 40 Cal.4th at p. 1113; see ROB at pp. 2, 30–33.) But the mere *potential* that a break may be interrupted cannot, without more, constitute a degree of employer control that would preclude employees from engaging in "personal tasks." Indeed, the Court of Appeal found that guards on rest breaks were "permitted to engage and did engage in various non-work activities." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 684.) Second, *Murphy* explained that if an employee is "denied two paid rest periods in an eight-hour work day, an employee essentially performs 20 minutes of 'free' work, i.e., the employee receives the same amount of compensation for working through the rest periods that the employee would have received had he or she been permitted to take the rest periods." (*Murphy*, *supra*, 40 Cal.4th at p. 1104; see ROB at p. 28.) But the Court of Appeal did not in any respect endorse "working" rest breaks. Rather, consistent with *Murphy*, the Court of Appeal clearly held that section 226.7 prohibits employers from requiring employees "to work" during rest breaks. (*Augustus*, *supra*, 182 Cal.Rptr.3d at pp. 684–685.)

Nor does the Court of Appeal's reasoning conflict with other Court of Appeal decisions, as Plaintiffs wrongly contend. (See ROB at p. 25.) Neither *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220 (*Faulkinbury*) nor *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193 (*Bufil*) addressed whether an on-call requirement by itself renders a rest break *per se* invalid; rather, both cases addressed the propriety of class certification where evidence showed that the employers

did not provide rest breaks. (See *Faulkinbury*, 216 Cal.App.4th at p. 236 [employer "had no formal rest break policy" and employees claimed they were told "there are no breaks" and that they were "required to remain at their posts and were not provided with relief to take rest breaks"]; *Bufil*, 162 Cal.App.4th at p. 1206 [employees "were not authorized to lock the store, ignore customers, quit monitoring traffic, etc., in order to be off duty for a rest period of 10 consecutive minutes"].) *Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267 likewise bears no resemblance to this case. There, truck drivers were "encouraged ... not to take, or [were] prevented ... from taking, rest breaks"; the employer "provided no evidence of any formal policy on rest breaks"; there was "no indication drivers were, at a minimum, informed in any meaningful or consistent way that they could take rest breaks, or the definition of any such rest breaks"; and drivers "counted time in [a] truck, waiting in line at the Port ... as break time." (*Id.* at pp. 1286–1287 & fn. 21.) By contrast, ABM's written rest break policies informed guards that they were "authorize[d] and permit[ed]" to take rest breaks "as required by California law" (9JA2418; see also 3JA628), and "substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves," showed "that class members regularly took uninterrupted rest breaks during which they performed no work." (*Augustus*, *supra*, 182 Cal.Rptr.3d at pp. 681–682.)

In fact, Plaintiffs have not identified a single case, from any jurisdiction, holding that the mere fact that a break could potentially be interrupted renders it *per se* invalid or tantamount to an "on-duty" break. And those courts that have considered this theory of liability have uniformly rejected it. (See *Temple v. Guardsmark LLC* (N.D.Cal., Feb. 22, 2011, No. C 09-02124 SI) 2011 WL 723611, at p. *6 [an "'on call' rest period is acceptable" under California law, such that guards who

infrequently "needed to respond in case of emergency," and in that event "would receive another uninterrupted rest period," received valid breaks]; *White v. Salvation Army* (Wash.Ct.App. 2003) 75 P.3d 990, 995 [although Washington State's rest break statute required "relief from work or exertion" during breaks, employers could keep employees on call during rest periods to respond to telephone calls and customer needs].)

Plaintiffs' position boils down to the radical proposition that California law requires an employer to categorically prohibit its employees from ever being recalled to work while they are on rest breaks, regardless of the exigency, if it is to satisfy its obligation to provide work-free rest breaks. Nothing in law or logic supports imposing such an impractical and onerous requirement on California's employers.

C. Plaintiffs' Arguments Based on a Supposed "Overlap" Between Time Spent on Rest Breaks and Working Time Are Legally and Factually Meritless

As they did below, Plaintiffs assert that ABM never provided a valid rest break because, in their view, the time guards spent on rest breaks was "indistinguishable from any other part of the guard's workday." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 685; see also ROB at p. 38 ["Given the overlap between what ABM guards did while they were on duty and what they were required to do during their rest breaks, there can be no dispute that they were never relieved of all duties during their rest breaks. Accordingly, their rest breaks violated section 226.7"].) The Court of Appeal correctly deemed this contention to be "without merit" for two reasons. (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 686.)

First, the Court of Appeal reasoned that nothing in section 226.7 "require[d] that a rest period be distinguishable from the remainder of the workday." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 686.) Rather, section

226.7 "requires only that an employee not be required 'to work' during breaks," and thus "[e]ven if an employee did nothing but remain on call all day, being equally idle on a rest break does not constitute working." (*Ibid.*) Any contrary conclusion would be untenable and unworkable, as it would make it impossible to provide rest breaks to any employees whose job duties consist of remaining idle. (See *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133 [recognizing that "an employer, if he chooses, may hire a man to do nothing"].) Indeed, such a rule would violate the IWC's intention *not* to require "a completely off-duty rest period ... in the case of an employee who is alone on a shift and has ample time to rest because of the nature of the work," such as "a night switchboard operator on a small board, a night hotel clerk, etc." (Evangelis Decl., Exh. D at p. 34.)

Second, as a factual matter, the Court of Appeal found that, at ABM, "a security guard who is on call performs few if any of the activities performed by one who is actively on duty." (*Augustus, supra,* 182 Cal.Rptr.3d at p. 686.) The Court of Appeal explained that while "a guard on duty must observe the guarded campus and perform many tasks, for example, greeting visitors, raising or lowering the campus's flags, or monitoring traffic or parking," there was "*[n]o* evidence in the record [that] suggests an ABM guard taking a rest break is required to do any of these things." (*Ibid.*, italics added.) Rather, "class members regularly took uninterrupted rest breaks," and during these rest breaks guards were "permitted to engage and did engage in various non-work activities." (*Id.* at pp. 681–682, 684–685.) The court further noted that while Plaintiffs had "fail[ed] to provide any example of a rest break actually having been interrupted," ABM had "submitted affirmative evidence that any rest period interrupted by a call back to service could be restarted after the situation necessitating the callback was resolved." (*Id.* at p 682.)

The Court of Appeal's finding that the rest breaks ABM provided were distinct from the time guards spent working is firmly supported by the record. In many locations, rovers like Augustus herself were employed specifically to provide guards an opportunity to take breaks. (E.g., 11JA3012–3013; 4JA1011; 9JA2660.) Further, testimony from class members established that ABM guards did not have the "same responsibilities while they were on rest breaks" as they did while working. (ROB at p. 38.) For example, Stephen Kamau testified that as a security officer at a commercial building in San Francisco, he was "responsible for checking identification and badges" of building tenants and visitors each day, "as well as issuing badges and monitoring [his] post for security issues." (11JA3006.) He also testified that he understood he was "entitled to take two 15 minute rest breaks" during his shift, that "[e]very day" someone would relieve him for his meal and rest breaks, and that he "like[d] to go outside for both [his] meal and rest breaks to walk around and get something to eat at Subway or some other place." (11JA3006–3007.) Mr. Kamau, of course, did not have to continue "checking identification and badges," "issuing badges," and "monitoring [his] post" while he was walking around outside or purchasing food at Subway. Rather, he was plainly relieved from his duties during his rest breaks. Other class members were too. Albert Carey did "not do any work during [his] breaks." (3JA842–843.) Instead, he would "go to the break room, step outside, or sit in [a] nearby plaza." (3JA843.) Likewise, Johan Nowack would leave his building, go across the street, and place a lunch order at a taco truck during his rest breaks. (24JA6804.)

Plaintiffs nonetheless assert that there is a "clear overlap between what the guards were required to do while on duty and while on break," and claim this is supported by the Court of Appeal's conclusion that guards on

rest breaks may need "'to respond when needs arise, such as when a tenant wishes to be escorted to the parking lot, a building manager must be notified of a mechanical problem, or an emergency situation occurs.'" (ROB at p. 3, quoting *Augustus*, *supra*, 182 Cal.Rptr.3d at p. 680; see also ROB at pp. 39–41.) But the Court of Appeal was merely describing the type of work a guard might perform *if* she were *called back to duty*. It is unremarkable that a guard who is called back to duty would perform her work duties—that is the very nature of being called back to work. And, as the Court of Appeal found, it is undisputed that ABM allowed guards to restart any interrupted rest break. (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 682.)

Plaintiffs also assert that, while on rest breaks, "guards were required to perform their primary job duty by remaining vigilant at all times and available for an *instantaneous* response." (ROB at p. 39, italics added; see also ROB at p. 41 [claiming that guards were required "to provide an immediate response" to any callbacks].) There is no evidence whatsoever in the record supporting Plaintiffs' bald assertion that guards on rest breaks needed to provide an "immediate" or "instantaneous" response, which explains why Plaintiffs fail to provide any record citation to support it. Nor is there anything in the Court of Appeal's opinion suggesting that guards were required to immediately or instantaneously respond in the event of an emergency or other interruption.

D. The Court of Appeal's Ruling Is Consistent with *Brinker*

The Court of Appeal concluded that this Court's discussion in *Brinker* of the nature of an employer's obligation to provide *meal* breaks did not apply to *rest* breaks. This conclusion follows from the text of the wage order, and the differences between meal breaks and rest breaks. But

even if Plaintiffs were correct that *Brinker*'s "relieved of all duty" standard for meal breaks applies fully to rest breaks, the mere possibility that a break *might* be interrupted would not violate that standard.

1. *Brinker*'s "Relieved of All Duty" Standard Applies Only to Meal Breaks

Plaintiffs contend that the trial court's conclusion that the mere possibility for interruption renders a rest break *per se* invalid follows from this Court's holding in *Brinker* that an employer satisfies its obligation to provide meal breaks if it "relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (*Brinker*, *supra*, 53 Cal.4th at p. 1040; see ROB at pp. 2–4, 33–38.) The Court of Appeal properly rejected Plaintiffs' attempt to import *Brinker*'s standard for meal breaks to rest breaks.

First, Plaintiffs contend that the text of section 226.7 justifies application of *Brinker*'s "relieved of all duty" standard to rest breaks. (ROB at p. 34 ["Since section 226.7 forbids employees from being required to work during *either* meal breaks *or* rest breaks, the relieved-of-all-duty standard must necessarily apply to both meal breaks and rest breaks"].) The text of the relevant provisions compels the opposite conclusion. (*Microsoft Corp. v. Franchise Tax Board* (2006) 39 Cal.4th 750, 758 ["any issue of statutory interpretation" must "begin with the text of the relevant provisions," and if that "text is unambiguous and provides a clear answer, [a court] need go no further"].) The term "relieved of all duty" comes not from section 226.7 but from the wage order, and it appears *only* in a section that addresses meal breaks. (See Cal. Code Regs., tit. 8, § 11040, subd. (11)(A) ["Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period

and counted as time worked"]; accord Cal. Code Regs., tit. 8, § 11050, subd. (11)(A).) As the Court of Appeal correctly recognized, "subdivision 11(A) of Wage Order No. 4 obligates an employer to relieve an employee of all duty on an unpaid meal break," while "Subdivision 12(a)"—which obligates an employer to provide rest breaks—and section 226.7 "contain[] no similar requirement." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 689.)

This explains why this Court in *Brinker* identified the text of the Wage Order No. 5—not section 226.7—as containing "the key language giving content to the employer's duty" to provide meal breaks. (*Brinker*, *supra*, 53 Cal.4th at p. 1035.) Indeed, *Brinker*'s holding that employees must be "relieved of all duty" during meal breaks stems directly from the wage order's express "further definition of what an employee is to receive" during a meal break. (*Ibid.*) Further, this Court in *Brinker* was specifically interpreting Labor Code section 512, subdivision (a)'s command that an employer must "provid[e] the employee with a meal period." (*Id.* at p. 1037.) Plaintiffs' position that *Brinker*'s guidance regarding meal breaks applies equally to rest breaks thus "lacks any textual basis in the wage order or statute" and should be rejected. (*Id.* at p. 1038.)

Second, even if there were a textual basis for applying *Brinker*'s "relieved of all duty" standard to rest breaks (there is not), doing so would ignore the differences between meal breaks and rest breaks. In rejecting Plaintiffs' contention that "the *Brinker* standard applies with equal force to both meal and rest breaks," the Court of Appeal recognized two significant distinctions between meal breaks and rest breaks: "[m]eal breaks are unpaid while rest breaks are paid" and "[m]eal breaks last 30 minutes; rest breaks last 10 minutes." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 689.) These distinctions require a standard that is tailored specifically to the unique nature of rest breaks.

By treating time spent on rest breaks "as hours worked for which there shall be no deduction from wages" (Cal. Code Regs., tit. 8, § 11040, subd. (12)(A)), the wage order implicitly recognizes that the level of employer control over an employee during a rest break, in practice, will likely exceed to some degree the level of control during a meal break, due to the inherent practical limitations on a brief, 10-minute rest break. It is likely for this same reason—the brief duration of a rest break—that the DLSE has recognized that "rest periods differ from meal periods" in that employees must be allowed to "leave the employer's premises" during meal breaks, but not during rest breaks. (Dept. Industrial Relations, DLSE Opn. Letter No. 2002.01.28 (Jan. 28, 2002) p. 1.)

Brinker did not address the legal issue at the heart of this case—whether a *rest* break potentially subject to interruption is *per se* invalid—because it did not address the nature of the rest break obligation. The Court of Appeal thus correctly rejected applying *Brinker*'s "relieved of all duty" standard to assess the rest breaks ABM provided. Of course, this does not mean, as Plaintiffs erroneously assert, that the "Court of Appeal's approach would allow employers to require their workers to remain on duty" and render "rest breaks indistinguishable from any other portion of the work day." (ROB at p. 28.) To the contrary, the Court of Appeal clearly and repeatedly held that section 226.7 *prohibits* "work on a rest break." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 689.) That prohibition, however, does not require relief of "all duty"—much less the supposed "duty" of being available to potentially resume work while on a break—and nothing in *Brinker* suggests otherwise.

2. On-Call Breaks Are Not *Per Se* Invalid Under *Brinker*'s "Relieved of All Duty" Standard

Even if *Brinker*'s "relieved of all duty" standard for meal breaks applied equally to rest breaks, that would not change the result. *Brinker* established a flexible, fact- and industry-specific test for the sufficiency of meal breaks that in no way renders all on-call rest breaks *per se* invalid.

Nothing in *Brinker* supports the remarkable proposition that employers must guarantee that employees will not be interrupted during their breaks (even in cases of emergency), or that the mere *potential* for interruption, without more, is enough to make a break invalid. On the contrary, *Brinker* emphasized that an employer must provide an employee only "a *reasonable opportunity* to take an uninterrupted 30-minute [meal] break." (*Brinker*, *supra*, 53 Cal.4th at p. 1040, italics added.) Plaintiffs' contention that *Brinker* renders *all* on-call rest breaks illegal—regardless of whether employees actually had, in practice, a reasonable opportunity to take uninterrupted rest breaks—cannot be squared with this Court's guidance.

In Plaintiffs' view, no obligation that relates to employment in any way may continue to apply while an employee is on break, because any such obligation would be a "duty." (E.g., ROB at p. 37.) Under this extreme interpretation of *Brinker*'s "relieved of all duty" standard, a restaurant could not require its cooks to wash their hands after using the restroom and before returning from a break. Nor could a retail store require a salesperson to maintain a professional appearance if he chooses to spend his break inside the store. But this Court in *Brinker* expressly disclaimed its ability to "delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker*, *supra*, 53 Cal.4th at p. 1040.) And contrary to Plaintiffs' and the trial court's rigid, one-size-

fits-all approach, *Brinker* also made clear that the sufficiency of a meal break "may vary from industry to industry." (*Ibid.*) If, as Plaintiffs contend, *Brinker*'s "relieved of all duty" standard actually prohibited subjecting an employee to any conceivable form of work-related obligation while on a break, then there would be no need for a flexible standard that varies from industry to industry. (Cf. ROB at p. 37 [suggesting that "the range of permissible duties while on break" should not "vary by job type and industry"].)

Consistent with *Brinker*'s focus on whether employees were provided with a "reasonable opportunity" to take uninterrupted breaks, the DLSE has repeatedly refused to "take the position that simply requiring [a] worker to respond to call backs is so inherently intrusive as to require a finding that the worker is under the control of the employer" during meal breaks. (Dept. Industrial Relations, DLSE Opn. Letter No. 1993.03.31 (Mar. 31, 1993) p. 4; Dept. Industrial Relations, DLSE Opn. Letter No. 1994.02.16 (Feb. 16, 1994) p. 4.) Not surprisingly, the DLSE has taken no steps to change its policy on this issue since *Brinker* was decided, and no court has suggested that *Brinker* somehow repudiated the DLSE's longstanding view that on-call *meal* breaks are permissible.

The trial court's ruling that "'if you are on call, you are not on break'" (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 682) thus cannot be squared even with *Brinker*'s "relieved of all duty" standard.

E. Plaintiffs' Reliance on *Mendiola* and Other Compensable-Time Cases Is Misplaced

Plaintiffs also attempt to defend the trial court's sweeping rule that all on-call rest breaks are *per se* invalid by focusing on cases—such as this Court's recent decision in *Mendiola*—that concern whether time spent by

employees constitutes "hours worked" that must be compensated, not the nature of an employer's obligation to provide rest breaks. In any event, these cases actually support ABM's position that the mere potential for a rest break to be interrupted does not, without more, transform that break into working time and render it *per se* invalid.

1. Cases Addressing Whether Time Constitutes "Hours Worked" Say Nothing About the Obligation to Provide Rest Breaks

The question this Court addressed in *Mendiola*—whether time spent by employees constituted "hours worked"—is simply not at issue in the rest break context, where employers are required by law to pay for all time spent on rest breaks. (Cal. Code Regs., tit. 8, § 11040, subd. (12)(A) ["Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages"].)

Plaintiffs attempt to justify their reliance on *Mendiola* and other compensable-time cases by drawing a parallel between the phrase "to work" in section 226.7 and "hours worked." (ROB at pp. 42–46.) But there is a difference between compensable "hours worked" and the "work" that is prohibited under subdivision (b), which was not, as Plaintiffs suggest, invented by the Court of Appeal. Indeed, in a different but related context, this Court in *Mendiola* recently explained the distinction between compensable "hours worked," on the one hand, and suffering or permitting an employee "to work," on the other. (*Mendiola*, *supra*, 60 Cal.4th at p. 839.) Under the wage order, the phrase "hours worked" simply refers to the time for which an employer must "pay" an employee. (*Ibid.*) Time constitutes compensable "hours worked" *either* because it is "time the employee is suffered or permitted to work" *or* because it is "time during which an employee is subject to the control of an employer." (*Ibid.*)

Plaintiffs' unsupported assertion that *Mendiola* and other compensable-time decisions must apply to rest breaks under section 226.7 simply ignores this distinction.

The Court of Appeal thus correctly held that "[w]hat constitutes *compensable* work time is not the issue here, as it is undisputed that rest breaks are compensable." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 689, italics added.) Rather, the question here is whether "on-call rest breaks are *permissible*," and the Court of Appeal properly concluded that they are. (*Ibid.*, italics added.)

2. *Mendiola* Confirms That On-Call Rest Breaks Cannot Be *Per Se* Invalid

In any event, *Mendiola* and other compensable-time cases actually *support* the Court of Appeal's conclusion that "simply being on-call" does not "constitut[e] performing 'work.'" (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 685.)

This Court made clear in *Mendiola* that not all "on-call time constitutes hours worked," and that courts must instead weigh a host of factors to determine whether on-call time is compensable in any given case. (*Mendiola*, *supra*, 60 Cal.4th at pp. 840–841.) "It is well established that an employee's on-call or standby time *may* require compensation" only in certain circumstances. (*Id.* at p. 840, italics added.) Specifically, "California courts considering whether on-call time constitutes hours worked have primarily focused on the extent of the employer's control," and that inquiry turns on "various factors ... : '(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was

unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time.'" (*Id.* at pp. 840–841, quoting *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 523–524 (*Gomez*).) "[N]one" of those factors "is dispositive." (*Gomez*, 173 Cal.App.4th at p. 523; see also *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403, 411–412 [disapproving of opinions "analyzing the single restriction of on-call status [as] controlling"].)

Significantly, *Mendiola* confirmed the longstanding principle of California law that the "use of a pager could ease restrictions" for on-call employees and thus weighs *against* a finding that on-call time is compensable. (*Mendiola*, *supra*, 60 Cal.4th at p. 841.) Indeed, the DLSE has repeatedly instructed that "the simple requirement that the employee wear a beeper and respond to calls, without more, is not so inherently intrusive as to require a finding that the employee is subject to the employer's control so as to require the employee be paid for all hours the beeper is worn." (Dept. Industrial Relations, DLSE Opn. Letter No. 1998.12.28 (Dec. 28, 1998) p. 4); accord Dept. Industrial Relations, DLSE Enforcement Policies & Interpretations Manual (June 2002 rev.) § 47.5.5.)[1]

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[1] Decisions applying the Fair Labor Standards Act are in accord. In *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, for example, the Ninth Circuit held that coroners were not entitled to compensation for on-call time, reasoning that "the coroners' use of pagers *eases* restrictions while on-call and permits them to more easily pursue personal activities," and emphasizing that "[t]he inquiry is ... whether [employees] *actually* engage in personal activities during on-call" time. (*Id.* at pp. 1184–1185, italics added.)

Applying these factors can often lead to divergent results regarding whether on-call time constitutes compensable "hours worked." For example, the Court of Appeal in *Gomez* rejected employees' claims for compensation "for the entire time they were on call during the evenings and weekends waiting for patient calls, but when they were *not* actually responding to pages telephonically or in person." (*Gomez*, *supra*, 173 Cal.App.4th at p. 523.) Applying the "nonexclusive list of factors" detailed above, the court determined "that the on-call waiting time did not unduly restrict plaintiffs' ability to engage in personal activities." (*Id.* at pp. 523–524.) It observed that "[p]laintiffs were provided pagers," and "[p]laintiffs' depositions confirmed that they had engaged in some personal activities while on call[.]" (*Id.* at p. 524.) By contrast, in *Mendiola*—where trailer guards were "required to 'reside' in their [employer-provided] trailers as a condition of employment and spend on-call hours in their trailers or elsewhere at the worksite"—this Court concluded that the guards' on-call time was so restricted as to be compensable. (*Mendiola*, *supra*, 60 Cal.4th at p. 841.) The Court emphasized that "guards could not leave the worksite" at all "if no relief could be secured," and "[r]estrictions were placed on nonemployee visitors, pets, and alcohol use." (*Id.* at p. 841.) In short, as even Plaintiffs are forced to concede, "[s]ome ... on-call arrangements qualify as work, while others do not." (ROB at p. 39.)

Yet despite citing *Mendiola* more than 20 times in their brief and admitting that some on-call time does not "qualify as work," Plaintiffs fail to acknowledge, let alone grapple with, *Mendiola*'s multifactor analysis. Plaintiffs thus ignore a core legal defect in the trial court's ruling: in adopting a *per se* rule that on-call rest breaks are *always* invalid, the trial court disregarded the factors that California courts and the DLSE have long considered when determining whether on-call time is compensable at all.

Instead, the trial court erroneously concluded that, so long as "a guard must remain available and must keep his or her pager or cell phone" during a paid rest break, it does not matter whether guards' rest breaks were rarely interrupted, or that guards used breaks for "non-work related activities ... such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc.," and "it is irrelevant that an employee may read or engage in other personal activities during 'down time.'" (13JA3757–3760.) Thus, even by *Mendiola*'s lights, the legal premise of the trial court's classwide summary judgment ruling was erroneous.

The trial court also ignored that the "use of a pager could *ease* restrictions" on on-call employees. (*Mendiola, supra*, 60 Cal.4th at p. 841, italics added.) Not only did the trial court disregard this factor, but it seized upon the use of pagers and similar devices as the very *reason* why it found all ABM rest breaks invalid. The trial court reached the unprecedented and erroneous conclusion that simply carrying a radio, pager, or cell phone, or otherwise being reachable during a break, *by itself* invalidated guards' rest breaks. (See 13JA3757–3758.) That conclusion turns California's compensable-time analysis on its head and cannot be reconciled with *Mendiola.*

The trial court's *per se* rule also disregards other important factors recognized in *Mendiola.* For example, while *Mendiola* holds that one relevant factor is "whether the frequency of calls was unduly restrictive" (*Mendiola, supra*, 60 Cal.4th at p. 841), the trial court ignored evidence "that interruptions are so rare that [ABM's] guards [were] effectively getting their breaks" (13JA3757; see also *Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361, 375 ["emergencies were rare and ... plaintiffs were seldom called back to the ship"]). Another *Mendiola* factor asks "whether the employee had actually engaged in personal activities during

call-in time" (*Mendiola*, *supra*, 60 Cal.4th at p. 841), but the trial court inexplicably concluded that "it is irrelevant that an employee may read or engage in other personal activities during 'down time'" (13JA3760). That factor also supports the Court of Appeal's decision to reverse the trial court's summary judgment ruling. Indeed, the Court of Appeal found "that class members regularly took uninterrupted rest breaks," during which ABM's guards were "permitted to engage and did engage in various non-work activities." (*Augustus*, *supra*, 182 Cal.Rptr.3d at pp. 681–682, 684–685.)

Of course, some *Mendiola* factors are clearly irrelevant to rest breaks. As a practical matter, the short duration of rest breaks *itself* imposes "geographical restrictions on employee's movements" and, by definition, "fixe[s]" an employee's required response time. (*Mendiola*, *supra*, 60 Cal.4th at p. 841.) And the most "critical" factor—whether employees are "required to sleep at the employer's premises" (*Seymore*, *supra*, 194 Cal.App.4th at p. 376)—has no practical application to rest breaks. Thus, to the extent a multifactor analysis is even appropriate here, only three *Mendiola* factors could even potentially be relevant in the rest break context—(1) "whether the frequency of calls was unduly restrictive"; (2) "whether use of a pager could ease restrictions"; and (3) "whether the employee had actually engaged in personal activities during call-in time." (*Mendiola*, *supra*, 60 Cal.4th at p. 841.) Additional relevant factors might include, for example, whether the employee is permitted to restart a rest break from the beginning following an interruption, and whether on-call rest breaks are warranted by the nature of the employee's job duties. Under any multifactor test that accounts for the unique nature of rest breaks, the rest breaks provided to ABM guards—during which employees "performed

no work" and engaged in "various non-work activities"—were plainly valid. (*Augustus*, *supra*, 182 Cal.Rptr.3d at pp. 681–682.)

Thus, to the extent that cases from the compensable-time context are relevant, the trial court's failure to even cite, let alone weigh, the requisite multifactor analysis that California appellate courts have long applied to assess the compensability of on-call time constituted plain legal error. Simply put, if on-call time—particularly time during which an employee must simply respond to a cell phone or pager—typically does not even constitute "hours worked" (as California courts and the DLSE have long recognized), then it cannot be possible that *all* on-call paid rest breaks are legally invalid.

3. Plaintiffs' Analogy to *Mendiola* and *Morillion* Fails

Plaintiffs' failure to engage in the requisite multifactor analysis is fatal to their attempt to justify the trial court's summary judgment ruling through reliance on compensable-time cases. Their attempt to analogize the facts of this case to the stringent restrictions imposed by the employers in *Mendiola* and *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*) fares no better. (See ROB at p. 40.)

Plaintiffs contend that this case is similar to *Mendiola* and *Morillion* simply because, in each case, employees "were free to engage in various non-work activities." (ROB at p. 40.) But unlike ABM, the employers in *Mendiola* and *Morillion* placed stringent additional restrictions on their employees' ability to engage in non-work activities.

In *Mendiola*, guards "were required to 'reside' in their trailers as a condition of employment and spend on-call hours in their trailers or elsewhere at the worksite," and "[r]estrictions were placed on nonemployee

visitors, pets, and alcohol use." (*Mendiola, supra*, 60 Cal.4th at p. 841.) "Guards could not easily trade on-call responsibilities," and "could only request relief from a dispatcher and wait to see if a reliever was available." (*Ibid.*) "If no relief could be secured, as happened on occasion, guards could not leave the worksite." (*Ibid.*) "Even if relieved," the Court explained, "guards had to report where they were going, were subject to recall, and could be no more than 30 minutes away from the site." (*Ibid.*)

In *Morillion*, this Court held that "time agricultural employees are required to spend traveling on their employer's buses is compensable ... because they are 'subject to the control of an employer' and do not also have to be 'suffered or permitted to work' during this travel period." (22 Cal.4th 575 at p. 578.) There, the employer "required [employees] to meet" at specified "assembly areas" to be transported, "in buses that Royal provided and paid for," to and from the fields where they worked. (*Id.* at p. 579). The employer's "work rules prohibited employees from using their own transportation to get to and from the fields." (*Ibid.*) The employees thus were "under [the employer's] control during the required bus ride" because they could not "use 'the time effectively for [their] own purposes'"—they "could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car" by virtue of "travel that the employer specifically compels and controls." (*Id.* at pp. 586–587.)

By contrast, the trial court here did not find that ABM placed *any* restrictions on guards' personal activities during rest breaks. Rather, the trial court concluded that the mere possibility that a guard's rest break might be interrupted and restarted at a later time was alone sufficient, without more, to invalidate the rest break. As discussed above, the Court of Appeal properly rejected that conclusion, after finding that "class members

regularly took uninterrupted rest breaks during which they performed no work" and instead engaged in "various non-work activities." (*Augustus*, *supra*, 182 Cal.Rptr.3d at pp. 681–682, 684–685.) And none of the additional restrictions that drove this Court's decisions in *Mendiola* and *Morillion* are present here.

F. Plaintiffs' Interpretation of the Rest Break Requirement Would Harm Employees and Employers Alike

Plaintiffs contend that their inflexible, zero-tolerance interpretation of the rest break requirement, under which all on-call rest breaks are *per se* invalid, will help protect workers and reduce litigation by providing clear guidance to employers. (ROB at pp. 35–37.) Nothing could be farther from the truth. On the contrary, this Court's adoption of Plaintiffs' interpretation of the rest break requirement would open the floodgates to claims against all California employers who provide entirely uninterrupted, work-free rest breaks to their employees based on the theory that the *potential* for interruption, without more, renders all such breaks legally invalid. Employers will be forced to adopt highly restrictive rest break policies that will actually *reduce* employee freedom, as they attempt to comply with an effectively impossible requirement to shield rest breaks—which are in the vast majority of cases taken on the employer's premises—from any possibility of interruption.

Plaintiffs' view of rest breaks suffers from the same shortcoming of the proposed "ensure" standard for meal breaks that this Court rejected in *Brinker*. The plaintiffs in *Brinker* unsuccessfully advanced an interpretation of the Labor Code under which employers would be required "to ensure that employees do no work during meal periods." (*Brinker*, *supra*, 53 Cal.4th at p. 1038.) This view of the law, if it had prevailed, would have led employers to adopt policies that prohibited employees from

voluntarily choosing to work during meal breaks, and subjected employees to punishment if they refused to take work-free meal breaks. As this Court recognized, that result would have been "inconsistent with the fundamental employer obligations associated with a meal break: to relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time." (*Id.* at pp. 1038–1039.)

The same would occur if this Court adopted the trial court's unprecedented view that on-call rest breaks are *per se* invalid under California law. To avoid suits based on this new interpretation of the law, employers would be forced to take steps to ensure that employees' breaks could never be interrupted, such as prohibiting employees from bringing or using personal cell phones at work, and instructing employees to ignore emergency situations while on breaks. Thus, far from protecting workers and reducing litigation risk for employers, Plaintiffs' proposed rule would have the opposite result and should be rejected.

* * *

Plaintiffs staked their entire case, including the classwide summary judgment ruling they obtained, on a manifestly erroneous legal proposition. But Labor Code section 226.7's prohibition on requiring employees "to work" during rest breaks is not violated merely because of the potential that an employee might have to resume "work."

Accordingly, this Court should affirm the Court of Appeal's judgment and, because "fairness" dictates that class action "defendants who prevail on [the] merits ... obtain the preclusive benefits of [any] victories against an entire class" (*Brinker*, *supra*, 53 Cal.4th at p. 1034), direct the

Court of Appeal to remand to the trial court with instructions that it enter judgment in favor of ABM.[2]

II. EVEN IF ON-CALL BREAKS WERE *PER SE* INVALID, TRIABLE ISSUES OF FACT PRECLUDE CLASSWIDE SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS

The Court should affirm the Court of Appeal's decision rejecting the trial court's rule that on-call rest breaks are *per se* invalid as a matter of law. But even if this Court were to hold that on-call rest breaks are *per se* invalid, numerous triable issues of material fact would nonetheless preclude classwide summary judgment *against* ABM in this case and would require decertification of the class, including:

- Whether ABM had a uniform policy requiring every class member to carry radios or stay on call during rest breaks;
- Whether any such policy was uniformly applied;
- Whether all class members actually were required to remain on call during rest breaks every day of their employment at ABM; and
- Whether employees were subject to discipline for failing to carry radios or respond to calls on rest breaks.

Plaintiffs never even attempted to prove that every rest break ABM provided to class members was, in fact, an on-call break, and introduced no evidence that ABM had uniform "policies" mandating that employees carry radios or cell phones or remain on call during rest breaks. The trial court

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[2] At minimum, the Court should vacate the summary judgment and class certification rulings, and direct the Court of Appeal to remand to the trial court for reconsideration of those rulings in light of any clarification of the law. (See, e.g., *Brinker*, *supra*, 53 Cal.4th at pp. 1050–1051 ["We remand to the Court of Appeal with directions to, in turn, remand to the trial court for it to reconsider meal period subclass certification in light of the clarification of the law we have provided"].)

instead rested its summary adjudication ruling on a supposed "acknowled[gment]" that ABM never made and "policies" that never existed. (13JA3757.)

The Court of Appeal, in turn, incorrectly determined that "the trial court could reasonably conclude ABM possessed a uniform policy of requiring its security guards to remain on call during their rest breaks." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 690.) But as the Court of Appeal itself acknowledged, "ABM presented numerous depositions that indicated many guards took breaks without radios." (*Id.* at p. 682.) Additionally, ABM "submit[ed] substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves, that class members regularly took uninterrupted rest breaks during which they performed no work but engaged in such leisure activities as smoking, reading, and surfing the Internet." (*Id.* at pp. 681–682.)

Because Plaintiffs failed to present evidence that every class member was denied a rest break every day she worked at ABM, and because ABM provided sworn class member depositions corroborated by manager testimony and company documents disproving that allegation, Plaintiffs were not and cannot be entitled to classwide summary judgment.

A. ABM Did Not Require All Class Members to Carry Radios or Cell Phones and Stay On Call During Breaks

The testimony of numerous ABM employees specifically countered Plaintiffs' contention (and the conclusion of the courts below) that ABM had a uniform policy requiring on-call rest breaks. For example, David Swagerty testified that he did not take his radio with him on his rest breaks. (24JA6815; see also 24JA6814 ["Q. When you are on your 10:00 a.m., 1:00 p.m. or 4:05 p.m. breaks, do you carry your radio? A. No."].) Stephen

Powell testified that he had the option to put his radio away before rest breaks. (14JA3902.) Stephen Kamau testified that "[e]very day, someone comes to relieve [him] for rest and meal breaks" and that on these breaks he is able "to go outside" and "walk around" or "get something to eat at Subway or some other place." (11JA3006–3007.) Albert Carey declared that he had "never been refused a rest or lunch break," that he took his breaks "every day," that he would "go to the break room, step outside, or sit in the nearby plaza during these breaks," and that he "d[id] not do any work during these breaks." (3JA843.) And Johan Nowack testified that he would go across the street from his building during his morning rest break to place an order at a café or taco truck so that he could pick up his order at lunch and without waiting in line. (24JA6804.)

ABM employees (including those who carried radios on breaks) did not uniformly testify that they were required to respond to emergencies during rest breaks. Powell testified that he knew of no policy that would require him to respond to emergencies if he were on break. (24JA6828.) Jesse Wright, who did carry a radio, testified that he was not required to respond to emergencies while on breaks, but in some instances had voluntarily chosen to respond. (See 23JA6779.) Rather than being "called off break" by an ABM manager, Wright would "hear about it and ... just go ... [He] never had [a supervisor] go, ['']I need you to go to wherever.['']" (*Ibid.*) And even though Nowack carried a radio, he was never called back from a rest break. (24JA6806.) He testified that when he took a break, another officer "relieve[d]" him of his duties. (*Ibid.*)

ABM's managers corroborated this evidence. Fred Setayesh emphasized repeatedly that ABM's practice with respect to on-call rest breaks varied depending on the location and circumstances of the job site. Glenn Gilmore, ABM's Regional Vice President for Northern California,

testified that ABM's rest break policies "depend[] on the kind of location we are servicing, because we don't operate the exact same way." (6JA1570.) Milan Morgan, a site manager, testified that ABM did not "all the time" have a way to reach an employee during a break, and when asked specifically whether guards had radios, he responded, "Not all the locations, no." (23JA6762.)[3]

Moreover, ABM's "New Hire Orientation" materials stated that "[ABM] authorizes and permits employee[s] to take ... paid, 10-minute rest break as required by California law," but nowhere required employees to remain on call during rest breaks. (9JA2412, 2418.) ABM's employee handbook also did not require on-call rest breaks. (12JA3512–3538.)

B. Plaintiffs Failed to Satisfy Their Burden to Show That There Are No Triable Issues of Material Fact

Plaintiffs never presented actual evidence showing that every class member was on call for every rest break provided by ABM. Nonetheless, they sought, and the trial court awarded, damages as though this showing had been made.

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[3] The trial court excluded this testimony for lack of foundation. But Morgan was an ABM manager who was "responsible for approximately 30 accounts in the Los Angeles area" and he "talk[ed] to the officers who work[ed] at these accounts, to ensure there [were] no problems, and that they [were] performing their job duties in compliance with company policy." (5JA1331.) Because a reasonable jury could have concluded that Morgan had personal knowledge of the use of radios at different ABM locations, ABM met its burden to present "evidence sufficient to sustain" such a finding. (Evid. Code, § 403.) Under any standard of review, the trial court's exclusion of this testimony was erroneous. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.)

1. Before the trial court, Plaintiffs relied heavily on the deposition testimony of ABM manager Fred Setayesh. They claimed that Setayesh had testified that "ABM ha[d] a uniform company-wide policy requiring all security guards to remain on duty during their rest breaks," that this was true regardless of how many guards worked at a particular location, and that "the circumstances regarding the security guards' rest breaks were the same both before and after the exemption was granted." (10JA2693.) Plaintiffs argued that Setayesh's testimony alone proved that "ABM's security guards [were] required to remain on duty for their entire shift," and that this policy had "always" been in effect "at every one of ABM's locations." (*Ibid.*)

The trial court adopted this theory wholesale, stating that ABM "acknowledge[d] that a guard's rest break is always an on-duty rest break" and that "Defendant's policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed." (13JA3757.) The Court of Appeal took a similar view of Setayesh's testimony, concluding that Setayesh "admitted ABM guards are not relieved of all duties during rest breaks," and "testified that if the magnitude of the emergency was large enough, every security officer would be required to respond regardless of what they were doing at the time." (*Augustus*, *supra*, 182 Cal.Rptr.3d at p. 681.) But this misconstrues Setayesh's testimony in three critical ways.

First, the context of Setayesh's statement that employees are "not relieved from all duties" on breaks demonstrates that he was referring only to employees who worked at single-guard sites for which ABM had sought a rest break exemption from the DLSE; he did not describe the rest breaks provided to all employees during the entire class period. (See 11JA3098.) Even Plaintiffs' counsel understood this, as she subsequently asked whether Setayesh's statement was "true for officers at the locations with multiple officers which are not listed in the application for exemption."

(11JA3099.) Setayesh responded: "I would say it var[ies] because it depends on the number of the multi officers." (*Ibid.*) He emphasized that "[i]t could really vary from scenario to scenario, location to location" (11JA3100); "it may vary from scenario to scenario," "[t]hey vary from the time frame of the day," and "[i]t may vary from the location" (11JA3101); and "there is no stand [sic] rule that if something happen[s], everybody should respond" (*ibid.*).

Second, Setayesh's statements never established that ABM had "policies" that made "all rest breaks subject to interruption." (13JA3757.) In fact, Setayesh did not describe any ABM policy during rest breaks. Yet Plaintiffs' only evidence that ABM had a uniform policy not to provide duty-free rest breaks was Setayesh's statement discussed above that some employees were not, in fact, "relieved of all duties." (10JA2693.) This statement did not describe any ABM policy; at most, it assessed the actual experience of the subset of ABM employees who worked at single-guard locations covered by the DLSE exemption.

Third, even if Setayesh had purported to describe a uniform rest break policy (which he did not), Plaintiffs still could not rely on his testimony because it would constitute an inadmissible legal conclusion. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1179 [testimony from city's "person most knowledgeable" that ordinance was ambiguous constituted inadmissible legal opinion].) Whether Setayesh, who is not a lawyer, believed that being "on call" constitutes being "on duty" is an irrelevant and inadmissible opinion about the law.

2. Before the Court of Appeal, Plaintiffs relied heavily on supposed "judicial admissions" in their attempt to justify the trial court's summary judgment ruling. But those purported admissions were nothing more than

"fragmentary and equivocal concessions" that cannot sustain a summary judgment. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 962.) Courts refuse to "give conclusive effect to ... ambiguous statement[s]," on summary judgment, especially where other "facts submitted in opposition to [the] summary judgment motion indicate the existence of a material factual issue." (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1066–1067.)

The centerpiece of Plaintiffs' judicial admission argument was ABM's "Additional Fact 33" in response to Plaintiffs' 2010 summary adjudication motion, which stated that "[g]uards simply must keep their radios or pagers on in case an emergency ... should arise to ensure the safety of the facility and its tenants." (See Court of Appeal Respondent's Brief ("RB") at pp. 2, 12, 33, 35, fn. 10; see also ROB at pp. 10–12.) But contrary to Plaintiffs' suggestion that this statement implied that *all* guards, at *all* sites, at *all* times were provided *only* on-call rest breaks, the statement is just as susceptible to the alternative reading that *some* guards, at *some* sites, at *some* times were required to be on call during rest breaks. And in context, the latter view is plainly better supported. ABM cited Additional Fact 33 to support the proposition that a worker who was engaged in "non-work activities" could be "taking a break, even if his or her cell phone or pager may (*in some instances*) still be on." (10JA2914, italics added; ROB at p. 11.) That remains ABM's position today: that some, but certainly not all, guards were required to carry radios or other equipment and respond to emergency calls during rest breaks.

Plaintiffs' claims of other "judicial admissions" were (and are) similarly defective. First, Plaintiffs suggested that ABM admitted it failed to provide any compliant rest breaks to every single one of its employees based on a handful of statements ABM made below regarding its ability to

provide *meal breaks* (see RB at pp. 1, 8, 11–13, 31), and because ABM asked most, but not all, of its employees to sign on-duty *meal* period agreements, which apply where "'the nature of security work prevents guards from being relieved of all duty.'" (RB at p. 31, quoting 7JA2050; see also ROB at pp. 8–9.) But ABM's statements regarding what is possible during *meal* breaks are, of course, irrelevant to whether ABM actually provided legally valid *rest* breaks.

Second, by pointing to Setayesh's testimony that "guards simply must keep their radios or pagers on in case an emergency should arise," ABM merely repeated testimony that, by its own terms, applied only to *some* guards at *some* sites. (10JA2914–2915; see also ROB at p. 11.) And ABM's contention that "the only way it could comply with the Labor Code was by requiring employees *at single-guard sites* to keep their radios, pagers or cell phones on during breaks" was explicitly limited to the same subset of sites that Setayesh described. (ROB at pp. 11–12.)

3. The significant variation in the record also precluded any *classwide* summary judgment ruling, because numerous class members routinely took rest breaks that were not in any sense "on call." As the Court of Appeal noted, "ABM ... submitt[ed] substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves, that class members regularly took uninterrupted rest breaks during which they performed no work but engaged in such leisure activities as smoking, reading, and surfing the Internet." (*Augustus*, *supra*, 182 Cal.Rptr.3d at pp. 681–682.) Further, "ABM presented numerous depositions that indicated many guards took breaks without radios." (*Id.* at p. 682.) While the Court of Appeal concluded that this evidence "indicat[es]" only that ABM's purported "policy was not uniformly applied," it actually shows that ABM did *not* "posses[s] a uniform policy of

requiring its security guards to remain on call during their rest breaks." (*Id.* at pp. 690–691.)

The "'dissimilarity'" within the class "'undercut[s] the prospects for joint resolution of class members' claims through a unified proceeding.'" (*Brinker*, *supra*, 53 Cal.4th at p. 1022, fn. 5, quoting Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L.Rev. 97, 131.) This is not a case like *Brinker*, in which the plaintiff had "presented evidence of, and indeed [the employer] conceded at the class certification hearing the existence of, a common, uniform rest break policy" that was "equally applicable to all ... employees." (*Id.* at p. 1033.) Nor is it like *Faulkinbury*, in which "Plaintiffs presented evidence that [the defendant] had no formal rest break policy," including "46 declarations that Plaintiffs submitted from putative class members stat[ing] the employee was not given or was rarely given a rest break, or could not leave the assigned post for a rest break except to use the bathroom." (*Faulkinbury*, *supra*, 216 Cal.App.4th at p. 236.)

Instead, given the evidence that ABM's rest break policies varied widely in practice, adjudication of this case "would have had to continue in an employee-by-employee fashion." (*Brinker*, *supra*, 53 Cal.4th at p. 1052.) And resolving the claims of every class member despite these clear material differences among the class through a classwide summary judgment ruling would effectively alter the underlying substantive law, deprive ABM of its due process right to present individualized defenses, and award windfalls to uninjured class members. (See *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 35 ["Under Code of Civil Procedure section 382, just as under the federal rules, 'a class action cannot be certified on the premise that [the defendant] will not be entitled to litigate its ... defenses to individual claims.' [Citation.] These principles derive from both class

action rules and principles of due process."]; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 ["Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."]; U.S. Const., 14th Amend.)

* * *

In sum, the evidence belies Plaintiffs' assertion that ABM had a uniform policy requiring guards to remain on call during their rest breaks, and numerous triable issues of fact preclude any classwide summary judgment *against* ABM, even if on-call rest breaks were *per se* invalid.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Court of Appeal's judgment, and direct the Court of Appeal to remand to the trial court with instructions that it enter judgment in favor of ABM.

DATED: August 31, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned certifies that this Answer Brief on the Merits contains 13,925 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the cover information, the signature block, and this certificate.

DATED: August 31, 2015 By: _____

Theodore J. Boutrous, Jr.

Temple v. Guardsmark LLC
(N.D.Cal., Feb. 22, 2011, No. C 09-02124 SI)
2011 WL 723611

[Attached pursuant to California Rules of Court, rule 8.115(c)]

2011 WL 723611
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Phillip TEMPLE, Plaintiff,
v.
GUARDSMARK LLC, Defendant.

No. C 09–02124 SI. | Feb. 22, 2011.

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ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND GRANTING DEFENDANT'S MOTION TO DENY CLASS CERTIFICATION

SUSAN ILLSTON, District Judge.

*1 On February 18, 2011, the Court heard argument on plaintiffs' Motion for Class Certification and defendant's Motion to Deny Class Certification. Having considered the arguments of counsel and the papers submitted, the Court hereby DENIES plaintiffs' motion and GRANTS defendant's motion. [1]

1 Because the arguments raised in and evidence presented with the two motions overlap to a considerable degree, the Court will analyze the question of class certification only once

BACKGROUND

In this proposed class action, named plaintiffs Phillip Temple and Johnny McFarland bring several claims against defendant Guardsmark, which employed plaintiffs to work as security guards for third party clients. On May 14, 2009, plaintiff Temple filed a class action complaint making a variety of allegations of violation of California law relating defendant's method of payment for the maintenance of uniforms and its alleged failure to provide appropriate rest periods. Compl. (Doc. 1); First Am. Compl. (Doc. 6). Among other things, and in relation to the uniform maintenance claim, plaintiff Temple alleged that defendant failed to provide "accurate wage statements." *See* Compl. at ¶ 13. On April 7, 2010, the Court granted summary judgment to defendant on the claim of failure to provide reimbursement for maintenance of uniforms. Doc. 51.

On June 23, 2010, plaintiff Temple filed a second amended class action complaint in which Johnny McFarland was named as a plaintiff for the first time. Although defendant stipulated that it did not oppose the Court granting plaintiff leave to file the second amended complaint, defendant did reserve its right to make statute of limitations-based arguments. Doc. 66.

In this operative complaint, plaintiffs attempt to bring two claims on behalf of two subclasses of California employees who worked shifts during which they were the sole Guardsmark security officer at the client site. Plaintiffs would bring one set of claims based on defendant's alleged failure to provide ten minute rest periods as required by California law. *See* Second Amended Complaint (doc. 69). [2] Both named plaintiffs argue that defendant required security guards working alone to be alert and attentive at all times, which effectively precluded them from being able to take proper "off duty" rest periods. Plaintiff McFarland would bring a second set of claims based on defendant's alleged failure to provide accurate wage statements with respect to overtime. *Id.* Plaintiff McFarland argues that the wage statements produced by defendant do not have a double over time column—that is, a separate statement of the number of hours worked for which the employee is entitled under California law to two times the employee's regular rate of pay.

2 In 2006, the District Court for the Central District of California denied a motion for class certification in a case brought against defendant that raised a similar claim. *See Lanzarone v. Guardsmark Holdings, Inc.*, No. CV06–1136, 2006 WL 4393465 (C.D.Cal. Sept. 7, 2006).

I. Facts regarding the rest period claim

A. Policies

Defendant has certain written policies that both defendant and plaintiffs agree apply to the prospective class members. These policies are contained in (1) a national policy handbook

called General Orders, Regulations And Instructions For Uniform Personnel ("GORI"); (2) a California employee manual called "Guardsmark means this to you"; and (3) individual Mission Partnership Statements ("MPSs") that exist for each of defendant's clients. In addition, California employees who are scheduled to work shifts by themselves sign agreements foregoing their right to an off-duty meal period. Qualls Decl., Ex. D.

1. The GORI

***2** In relevant part, the GORI discusses what it means for a security officer to be "On Duty." It first provides that an officer is "On Duty" until "properly relieved ... at the specified time, or on instruction of [a] superior officer, or on instruction of a client." Qualls Decl., Ex. B, at 22. It then defines being "On Duty" to mean a variety of things, including "remain[ing] on duty the full time called for or until properly relieved"; "be[ing] alert and carefully watch[ing] everything in your area of responsibility"; "tak[ing] quick and proper action when the situation requires it; report[ing] to your superior at once all information, complaints or observations about protection problems." *Id.* at 22–23. In contrast, an "On Duty" officer must *not* "smoke," except in certain areas; "carry any reading material, radios, television sets, tape recorders, tools or other material on the job site except that provided by Guardsmark or furnished by the client"; "sleep"; "lean against walls or objects"; "let ... any person ... go through a gate or enter a restricted area in violation of regulations"; "leave your post except when properly relieved, or with permission of your superior officer or supervisor, or when told to do so by the client, or to act on a complaint, to assist an injured person, or in case of a fire or similar situations" (and "[i]f you leave your post for these reasons, you must notify another Guardsmark employee or the client and take whatever steps are necessary for the protection of your post while you are absent"); "eat or drink while on duty unless authorized by the Manger in Charge." *Id.* at 23–24.

2. Guardsmark means this to you

The California employee manual "Guardsmark means this to you" contains a more specific statement about rest periods. The manual was amended during the class period. From 2005 until 2008, the manual stated:

> Separate and apart from meal breaks, all security officers are also required to take ten-minute off-duty rest breaks for every four hours worked.... Under no circumstances are you to skip or shorten your rest breaks.... Your site supervisor or manager may provide instruction on when breaks should be taken.

East Decl. Ex. B at 4. From 2008 until the present, the manual stated:

> Separate and apart from meal periods, and regardless of any other instructions, all California security officers are authorized and permitted to take rest periods of at least ten minutes in length once during every four-hour period worked.... If a rest break is interrupted due to an emergency or client need, the affected officer is authorized and permitted to take a new and complete ten-minute rest period in place of the interrupted rest period.
>
> Your supervisor may provide site specific instructions on where or when, during your shift, such rest periods may or may not be taken. If you feel you are not receiving proper rest periods, you should contact your supervisor, Manager or Manager in Charge. Officers are paid during rest periods, and unless instructed otherwise, are to remain at or near the client account during rest periods.... In order to ensure that officers remain alert, Guardsmark encourages officers to take all of their allotted rest periods for the full ten minutes each.

***3** *Id.* Ex. A at 3–4.

3. Mission Partnership Statements

The parties did not provide the Court with copies of the MPSs. However, they did stipulate that the MPSs in California all contain the following provision:

> As a security officer, you must be mentally capable of responding quickly to instructions and remain constantly alert at your post, ready to react to any situation. Carry out orders promptly. Be an astute observer. And *never* sleep on the job.

Qualls Decl. Ex. A at ¶ 3 (emphasis in original).

4. Signed off-duty meal break waivers

California employees who are scheduled to work shifts by themselves sign agreements forgoing their right to an off-duty

meal period. Qualls Decl., Ex. D. These agreements refer to the "nature of the work" as sometimes preventing solo shift workers from being able to take off-duty meal periods.

B. Practices

The record before the Court also contains a variety of declarations from individuals who are prospective class members, each discussing how and why that employee did or did not take rest breaks. [3]

3 Plaintiffs object to the admissibility of the 96 declarations submitted by defendant. Defendant first disclosed the identity of the 96 declarants as people with knowledge about the case in a supplemental disclosure filed November 4, 2010, the same day as defendant filed its motion to deny class certification and the accompanying declarations. Plaintiffs object that this was not "a timely" supplement, as required by Federal Rule of Civil Procedure 26(e)(1). They argue that it interfered with plaintiffs' ability to conduct discovery, especially since defendant had refused to provide plaintiffs with the identities of putative class members during discovery, and so there was no other way for plaintiffs to learn about these declarants.

Defendant replies by arguing, in essence, that class action litigation is always conducted this way. Defendant also argues that plaintiffs could have gotten the names of prospective class members by agreeing to a compromise proposed by defendant, or by moving to compel production; that plaintiffs also disclosed the identity of their declarants at the last moment; and that plaintiffs could have attempted to conduct further discovery in the four months since the 96 names were disclosed, but that it has chosen not to.

Without condoning the method in which defendant conducted disclosure or discovery in any way, the Court denies plaintiffs' request to exclude the declarations. It does not appear that plaintiffs were harmed by the tardiness of the disclosure. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 n. 1 (9th Cir.2001) (citing Fed.R.Civ.P. 37(c)(1)). The Court would have been more sympathetic to plaintiffs' objection if, instead of merely objecting to the declarations two months after they were filed, plaintiff had attempted to depose the declarants to test their assertions, or if plaintiff had worked more diligently to secure the names and contact information of a broader swath of potential class members.

1. Plaintiffs' declarations

Plaintiff presents fourteen declarations from individuals who would be members of the class. *See* Index of Decl. of Proposed Class Members & Exs. A–N (Doc. 108). The employees state that they were required to remain "on-duty" throughout their solo shifts, which some explain meant that they were required to remain alert and attentive to, and actively observe, site conditions. *Id.* Of these fourteen employees, seven (including the two named plaintiffs) worked in the San Francisco Bay Area and had Mike Kahrimanian as a supervisor at some point. *Id.* Exs. A, B, D, E, F, J, K. Many credit Kahrimanian specifically as telling them to remain alert during their rest periods. *See, e.g., id.* Ex. D ¶ 2. Two worked in Palm Springs. *Id.* Exs. G, H. The remaining five worked in one or more of the following offices: San Diego, Oakland, San Francisco, Orange County, and San Mateo. *Id.* Exs. C, I, L, M, N.

2. Defendant's declarations

Defendant submits declarations from 96 employees who are potential class members. Doc. 93. All attest that they worked solo shifts and were "authorized and permitted" to take rest breaks. All explain how it was that they were able to go off duty even though they were working alone. Some closed their posts and/or left them unattended. Some were relieved by clients. Some put up a sign. Some spent their breaks in the security office or breakroom. Each declaration also includes a sentence that begins with "During my rest breaks, I generally like to...." Different employees indicate that they generally like to go to the breakroom, make phone calls, listen to an MP3 player, read a newspaper, sit down, have a snack or drink, take a walk, read, smoke a cigarette, watch tv, relax, check email, send text messages, play video games, draw, etc.

The declarants also listed the account for which they work all or almost all of their hours. The 96 declarants listed approximately 64 different accounts.

II. Facts regarding the wage statement claim

*4 Non-party Commercial Data Corporation ("CDC") creates employee wage statements for defendant. Qualls Decl. Ex. H (Essary Depo.) (Doc. 102–2) at TR 13:13–13:25. The last time CDC modified the program that it uses to create these statements was in 2000. *Id.* at TR 12:7–12:11.

Plaintiff McFarland worked over twelve hours on at several occasions in 2005, 2006, 2007, and 2008. His pay stubs do not separately list the hours over twelve that he worked, or the rate of pay to which he was entitled for those hours. *See, e.g.,*

McFarland Decl. (Doc. 109, Ex. B), Ex. 1, JM 0248 & Ex. 6, JM0381. According to the pay stubs plaintiff McFarland submitted, the most recent day that he worked over twelve hours was November 30, 2008. [4]

4 Plaintiffs' motion for class certification says that plaintiff McFarland worked longer shifts in 2010 and 2009. However, it appears that these are typographical errors, as the documents that plaintiffs cite in support list dates in 2005 and 2008, respectively. *Compare* Pl. Mot. for Class Cert. at 12–13 *with* McFarland Decl. Ex. 1, JM 0248 & Ex. 6, JM 0381.

On May 14, 2009, plaintiff Temple sent notice to the California Labor Workforce Development Agency ("LWDA"), specifically mentioning that he was bringing a civil action for his uniform and rest period claims. Bern Decl. (Doc. 118–2), Ex. F. He did not specifically state that his wage statements were inaccurate. However, he did say that "said conduct ... violates each Labor Code section as set forth in California Labor Code § 2699.5." *Id.* Section 2699.5 of the Labor Code references subdivision (a) of Section 226, and Section 226(a) requires wage statement to show "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee."

On May 12, 2010, the day after plaintiffs sought leave to file the second amended complaint, plaintiff McFarland sent his own LWDA notice. It specifically alleges that defendant failed to provide accurate wage statements in violation of Labor Code Section 226. Bern Decl. (Doc. 118–2) Ex. F.

LEGAL STANDARD

The decision whether to certify a class is committed to the discretion of the district court within the guidelines of Federal Rule of Civil Procedure 23 ("Rule 23"). *See* Fed.R.Civ.P. 23; *Cummings v. Connell,* 316 F.3d 886, 895 (9th Cir.2003). A court may certify a class if a plaintiff demonstrates that all of the prerequisites of Rule 23(a) have been met, as well as at least one of the requirements of Rule 23(b). *See* Fed.R.Civ.P. 23; *Valentino v. Carter–Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir.1996).

Rule 23(a) provides four prerequisites that must be satisfied for class certification: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a).

A plaintiff seeking certification must also establish that one or more of the grounds for maintaining the suit are met under Rule 23(b), including (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. Fed.R.Civ.P. 23(b).

***5** In determining the propriety of a class action, the court must focus solely on whether the requirements of Rule 23 are met, not whether the plaintiff has stated a cause of action or will prevail on the merits. *Staton v. Boeing Co.,* 327 F.3d 938, 954 (9th Cir.2003). Accordingly, the court must accept as true the substantive allegations made in the complaint. *In re Petroleum Prods. Antitrust Litig.,* 691 F.2d 1335, 1342 (9th Cir.1982). However, although the court may not require preliminary proof of the substance of the plaintiff's claims, it "need not blindly rely on conclusory allegations which parrot Rule 23 requirements," but may also "consider the legal and factual issues presented by plaintiff's complaint." 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 7.26 (4th ed.2005). The court should conduct an analysis that is as rigorous as necessary to determine whether class certification is appropriate. *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

DISCUSSION

I. The rest period claim

California mandates that employers "authorize and permit" their employees to take ten minute rest periods for every four hours worked. *See* Cal. Labor Code § 226.7(a); 8 Cal.Code Reg. § 11040(12)(A). If an employer fails to do so, it must pay the employee an additional hour of wages per rest period not provided. *See* Cal. Labor Code § 226.7(b); 8 Cal.Code Reg. § 11040(12)(B). An Opinion Letter from California's Division of Labor Standards Enforcement further explains that the ten minutes must be consecutive, and the rest period must be "duty-free." DLSE Opinion Letter of Feb. 2, 2002, Re: Rest Period Requirements. If "the nature of the work prevents an employee from being relieved of all duty," and

if the employee consents in writing, an employer is allowed to provide an on-duty lunch period instead of an off-duty lunch period. *See* 8 Cal.Code Reg. § 11040(11)(A). No such exception exists for rest periods.

Plaintiffs allege that defendant violated their right to ten minute rest periods and ask the Court to certify a class of plaintiffs to proceed with that claim. The proposed class would consist of all persons employed by defendant in California between May 14, 2005, and the present, who worked as the sole security officer at a client work site for a shift of a certain length. There is a question of law common to this class: whether or not the class members were permitted to take a duty-free rest period as required by California law. The main question that the parties disagree about is whether common questions predominate. Fed.R.Civ.P. 23(b)(3). [5]

5 Plaintiffs do not argue that they are able to satisfy the requirements of Rule 23(b)(1) or Rule 23(b)(2).

Plaintiffs argue that common factual questions predominate, because they will be able to rely primarily on common, written policies, as common proof of a rest period violation. Plaintiffs argue that the GORI, the MPSs, and the signed off-duty meal break waiver all interact to show one thing: security officers working alone were not allowed to leave their posts, and indeed that they were "On Duty" as defined by the GORI at all times during their shift. This means that solo shift employees were required to remain alert to site conditions and respond as required, even during their ten minute rest periods, and this is contrary to California law. They could not sleep, they could not leave their post, they could not block their ability to hear.

***6** Defendants argue that plaintiffs will not be able to prove their case by relying on the existence of common policies. Rather, defendants argue, there is a narrow California-specific policy about rest periods that complies with California law on its face. The security officers were "subject to recall," defendants say, but that just means that they were on call, needed to respond in case of emergency, and in the uncommon instance that their rest periods were interrupted they would receive another uninterrupted rest period. Additionally, defendants argue, they have declarations from ninety-six potential class members who were all provided lawful rest periods that fit defendant's description of rest periods "subject to recall"—and who all took them much of the time. Thus, even if plaintiffs have isolated one general question of whether the narrow California-specific policy displaced the general, national always-on-duty police, that question does not have a common answer. Rather the question would need to be asked and asked again on an employee-by-employee, site-by-site, or supervisor-by-supervisor basis.

After viewing the evidence presented by each party, the Court concludes that plaintiffs have not met their burden to establish that common issues of law and fact will predominate. The parties agree generally on what California law requires ("on call" rest period is acceptable, "on duty" is not). They disagree about what defendant actually permits. Therefore, although the same general legal question frames the case, the primary questions will be factual. The parties also agree generally on what their written policies say. They disagree about how the written policies interact in practice. This is the disagreement that is at the heart of this case

In this case, how the written policies interact in practice is not one question but many, and plaintiffs have not shown a way that those questions would be susceptible to common proof. Contrary to plaintiffs' assertions, they will not be able to prove their claim by arguing that the written policies are facially insufficient. From 2005 to 2008, California employees were informed in writing that they were required to take "off-duty rest breaks." East Decl. Ex. B at 4. After 2008, California employees were informed more specifically that the rest period policy existed "regardless of any other instructions." *Id.* Ex. A at 3–4. Moreover, the later policy explained that, "[i]n order to ensure that officers remain alert, Guardsmark encourages officers to take all of their allotted rest periods for the full ten minutes each," thus *contrasting* the officers' activity during the rest period with the general requirement that security officers remain alert. *See id.*

Although the off-duty lunch waivers would help plaintiffs prove their case by common proof, plaintiffs have not convinced the Court that the waivers are as powerful a piece of evidence as plaintiffs believe. First, it is not clear how often solo shift workers ate lunch on duty—only that they were asked to consent to doing so. And the inference that plaintiffs ask the Court to make from the waivers (which they later will later ask the trier of fact to make) is not a uniformly logical inference. [6] Compare an officer who must check in every truck or employee entering a site, with an officer who must walk a certain number of circuits every hour to monitor the perimeter of a site. It might be impossible for either to stop working for half an hour to eat lunch. But the latter employee might easily be able to take a ten minute off-duty rest period without worry.

6 Plaintiffs argue that the reference to the "nature of the work" in the waivers means unequivocally that there is a security requirement that a security officer be "on post" at all times. Pl. Reply at 1. For this proposition, plaintiffs cite the deposition testimony of Coley Buellesfeld. Although the deposition transcripts in this case are exceptionally difficult to understand at times, due in no small part to the fact that defendant's attorney objected at least once to almost every question that was asked during each deposition, it does seem that Buellesfeld in fact testified that *some* posts served by solo shift workers needed to be manned at all time, not that all or even most posts did. The portion of the Buellesfeld transcript cited by plaintiffs reads as follows:

> Q. What are the security duties that are such that a meal period must be on duty?
> MR. BERN: Objection. Overbroad, vague and ambiguous, calls for speculation. BY MR. QUALLS:
> Q. You can answer.
> MR. BERN: And outside the scope of the designated topics and outside the scope of the litigation.
> THE WITNESS: Repeat the question now.
> (Record read by the reporter)
> THE WITNESS: It would depend—it would be—it would depend on the security requirements that —for example, that the post could not be—has to be manned at all times. It depends on the post. Everyone is—I mean not everyone, but many are different.

Qualls Suppl. Decl. Ex. A at TR 27:25–28:16.

*7 The declarations in this case also support the Court's conclusion that plaintiffs have not carried their burden to show that common issues will predominate. A class action defendant does not win a Rule 23(b)(3) battle merely by presenting more declarations than the plaintiffs. In this case, however, while plaintiffs have presented fourteen declarations that seem to show a common policy, the declarations do not support plaintiff's argument that the class claim is susceptible to common proof. Many of the declarations focus on how individual supervisors explained the interaction of the different written policies to the declarant. Most of the declarations are written in extremely broad terms, raising the question of what many of the declarants mean when they say that solo shift workers must remain "alert" to site conditions—and perhaps more importantly, what the supervisors meant who communicated that oral policy. Moreover, half of the declarations are written by employees who were supervised at one point or another by Mike Kahrimanian, raising the distinct possibility that Mike Kahrimanian gave idiosyncratic directions to his employees based on a personal misunderstanding of defendant's policies.

Defendant's declarations, in contrast, are from 96 employees who worked primarily on 64 different accounts. Many of the declarants state that they were permitted to do activities that are not consistent with a policy requiring guards to remain alert to site conditions (as opposed to remaining on call to respond in case asked to go off break), such as leaving their post, sleeping, listening to music, etc.

Finally, the Court notes that the parties have stipulated to the numerosity requirement, and perhaps because of this, plaintiffs did not provide the Court with any estimate of the number of potential class members in their briefing. Nor did plaintiff provide the Court with any estimate of how many class members were supervised by Mike Kahrimanian, or might have worked in similar situations to plaintiffs' fourteen declarants. At the hearing, plaintiffs stated that there would be perhaps 5,000 people in the class; defendant stated that the number would likely be smaller; but neither party provided a source for its estimate. Plaintiffs make it impossible for the Court to know whether the 96 declarations presented by defendant are a sizable portion of the class or not, and plaintiffs make it impossible for the Court to know how similarly situated plaintiffs' declarants are to the remaining absent class members.

The Court will not certify the rest period class.

II. Wage statement claims

California Labor Code Section 226(a) requires wage statements to show "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." California law also requires that employees be paid double their regular rate of pay for every hour worked over twelve hours in a single day. Cal. Labor Code § 510. Finally, California requires that an "aggrieved employee or representative ... give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation," *before* bringing a civil action based on violation of Section 226(a) of the Labor Code. Cal. Labor Code §§ 2699.3, 2699.5. Courts have held, and the parties agree, that a one-year statute of limitations applies to an inaccurate wage statement claim. *See, e.g., Harris v. Vector Marketing Corp.,*

No. C–08–5198, 2010 WL 56179, * 3 (N.D.Cal. Jan.5, 2010) (citing Cal.Code Civ. Pro. § 340(a) and cases).

***8** The second subclass would make claims based on defendant's alleged failure to provide accurate wage statements with respect to overtime. *Id.* Only plaintiff McFarland brings this claim, and he argues that the wage statements produced by defendant do not have a double over time column—that is, a separate statement of the number of hours worked for which the employee is entitled under California law to two times the employee's regular rate of pay. [7]

7 Plaintiff McFarland does not argue that defendant failed to pay him the appropriate wage.

Defendant's main argument in opposition to certification of this subclass is that plaintiff McFarland cannot actually bring a claim for violation of Section 226(a) of the Labor Code, and therefore, at the very least, he fails to meet the adequacy requirement of Rule 23(a). The filing of an administrative LWDA notice is a prerequisite of bringing suit. Plaintiff McFarland did not file notice until over a year after his last 12–hour–plus shift. Thus, even if the second amended complaint could be said to relate back to the first (and defendant believes it could not), it would not matter, because the statute of limitations is calculated from the time that the precondition of suit is met.

Plaintiff's only argument in response is that the second amended complaint relates back to the first, and the first tolled the statute of limitations for all class members.

Several courts have explained that

> A subsequent pleading which sets out the subsequent performance of a condition precedent to suit cannot relate the time of performance of the condition back to the time of the filing of the original complaint and thereby toll the running of the period of limitation, since the rule of relation back does not operate to assign the performance of a condition precedent to a date prior to its actual occurrence.

Harris, 2010 WL 56179, at * 3; *accord Moreno v. Autozone, Inc.*, No. C05–04432, 2007 WL 1650942, at *2 (N.D.Cal. June 5, 2007); *Wilson v. People ex rel. Dep't of Public Works,* 271 Cal.App.2d 665, 669, 76 Cal.Rptr. 906 (1969). That is to say, a condition precedent is a condition precedent. Thus, it would seem, in order for plaintiff McFarland to be permitted to calculate the statute of limitations from the date of the filing of the first amended complaint, he needs to show not merely that the first amended complaint gave defendant notice of his claim, but also that the condition precedent to suit had already been met. This raises the question of whether plaintiff Temple's LWDA notice allows plaintiff McFarland's claim to proceed now.

In other contexts, where a *single* plaintiff's administratively exhausted claims developed or changed during litigation, courts have looked to see whether (1) the claim in the law suit comes "within the scope" of the original exhausted claim or (2) an untimely-filed administrative claim can "relate back" to a timely-filed administrative claim. [8]

8 It appears that it must be decided on a statute-by-statute basis whether the relation-back doctrine is applicable to administrative charges, based at least in part on the statute's purpose. *See, e.g., Rodriguez v. Airborne Express,* 265 F.3d 890, 898 (9th Cir.2001) (accepting state agency's conclusion that the relation-back doctrine is applicable to administrative charges filed pursuant to California's Fair Employment and Housing Act); *Peterson v. City of Wichita,* 888 F.2d 1307, 1308–09 (10th Cir.1989) (upholding regulation permitting EEOC to allow relation-back of amendments, and listing other courts in accord). The Court assumes, without deciding, that the relation-back doctrine is applicable to this part of the California Labor Code.

For example, discussing California's Fair Employment and Housing Act ("FEHA"), which also has an administrative exhaustion requirement, the California courts and the Ninth Circuit explain that the allegations in a civil suit are within the scope of an administrative complaint if they " 'can reasonably be expected to grow out of the charge' " made to the administrative agency. *Rodriguez v. Airborne Express,* 265 F.3d 890, 897 (9th Cir.2001) (quoting *Sandhu v. Lockheed Missiles & Space Co.*, 26 Cal.App.4th 846, 859, 31 Cal.Rptr.2d 617 (1994)); *see also Sandhu,* 26 Cal.App.4th at 859, 32 Cal.Rptr.2d 193 (adopting in FEHA cases and calling the Ninth Circuit's EEOC test a " 'like or reasonably related' standard"). In *Rodriguez,* the Ninth Circuit explained that a lawsuit for disability discrimination is not within the scope of an administrative claim for race discrimination. *Id.* "The two claims involve totally different kinds of allegedly improper

conduct, and investigation into one claim would not likely lead to investigation of the other." *Id.*

***9** Next, the *Rodriguez* court considered whether an untimely-filed administrative claim could be said to relate back to an original, timely filed claim. The court discussed the two basic standards used by different circuits when dealing with the relation back of an EEOC complaint. Some prohibit amendments introducing a new theory of recovery. Others permit such amendments, as long as the new legal theory is based on the same general facts. The Ninth Circuit decided to use a variation on the latter test, requiring in addition that "the factual allegations ... be able to bear the weight of the new theory added by amendment." *Id.* at 899.

The tests used in the FEHA and EEOC context are fairly permissive. The parties have not briefed, and the Court need not rule, on whether the statute here should be interpreted to permit such broad expansion and development of exhausted claims. Even under the FEHA/EEOC standards, and even assuming that plaintiff McFarland can rely on an administrative LWDA notice filed by another Guardsmark employee, plaintiff McFarland's double-time wage statement claim cannot be said to come "within the scope" of the original exhausted claims, and his administrative filing cannot be said to "relate back" to the timely-filed LWDA notice. In his LWDA letter, plaintiff Temple contended

> that his employer Guardsmark failed to properly compensate him, and similarly aggrieved Guardsmark employees, for uniform maintenance as required by California Labor Code section 2802, and that Guardsmark failed to provide him and other security guards with off-duty rest periods in violation of California Labor Code § 226.7. Said conduct, in addition, violates each Labor Code section as set forth in California Labor Code § 2699.5.

Bern Decl. (Doc. 118–2), Ex. F. Investigation into these two claims would not likely lead to an investigation as to whether Guardsmark pay statements accurately list double-overtime hours and compensation. Nor do the factual allegations in the LWDA letter "bear the weight" of this new theory.

On this record, the Court concludes that plaintiff McFarland is not an adequate representative of the class claims, and therefore the Court will not certify this class.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant's motion to deny class certification and DENIES plaintiff's motion for class certification. (Docs. 88 & 102.)

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 723611

End of Document

CERTIFICATE OF SERVICE

I, Carol J. Aranda, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, California 94105, in said County and State. On August 31, 2015, I served the within:

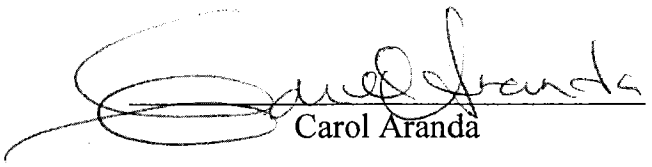
ANSWER BRIEF ON THE MERITS

to each of the persons named below at the address(es) shown, in the manner described.

SEE ATTACHED SERVICE LIST

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated on the attached service list for collection and mailing at my business location, on the date mentioned above, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the proof of service.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this certificate was executed on August 31, 2015 at San Francisco, California.



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