Supreme Court Case No: S224611

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CHRISTOPHER MENDOZA, an individual, on behalf of himself and all other persons similarly situated
Plaintiffs – Appellant-Petitioner

MEAGAN GORDON,
Plaintiff-Intervenor-Appellant-Petitioner

v.

NORDSTROM, INC., a Washington Corporation authorization to do business in the State of California
Defendant –Appellee- Respondent

After a Request by the Ninth Circuit Court of Appeals
Case Nos.: 12-57130 consolidated with 12-57144

PLAINTIFF-INTERVENOR-APPELLANT-PETITIONER'S REPLY BRIEF

CLARK & TREGLIO
R. Craig Clark (SBN# 129219)
James M. Treglio (SBN# 228077)
205 W Date Street
San Diego, CA 92101
Tel: (619) 239-1321
Facsimile: (888) 273-4554

Attorneys for Plaintiff-Inervenor/Appellant/Petitioner

The Markham Law Firm
David R. Markham (SBN 71814)
750 B Street, Ste 1950
San Diego, CA 92101
Telephone: 619-399-3995
Facsimile: 619-615-2067

Attorneys for Plaintiff-Inervenor/Appellants/Petitioner

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Attorneys for Plaintiff-Inervenor/Appellants/Petitioner

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I.

INTRODUCTION

Once again, Defendant-Appellee-Respondent Nordstrom, Inc. (hereinafter "Nordstrom") asks the Court, as it did the Ninth Circuit and the District Court, to completely gut the very first protection California law provided to workers – the right to a day of rest. Indeed, if the Court interprets these statutes – Labor Code §§551, 552, and 556 – the way that Nordstrom requests, all the protections given to employees under these statutes will be illusory.

Consistently through this litigation, Nordstrom has argued that when it comes to Labor Code §§551, 552 and 556, the Court should to ignore the rules of California statutory construction, such as provisions of the Labor Code are supposed to be read to give the broadest protection to the employee as possible. *Murphy v. Kenneth Cole Productions, Inc.*, (2007) 40 Cal.4th 1094, 1103-1104. Or, rules that say statutes should be interpreted to avoid surplusage. *People v. Arias* (2008) 45 Cal. 4th 169, 180. And most importantly, rules that say the Court should avoid absurd results that undermine Legislative intent. *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control District* (1989), 49 Cal. 3d 408, 425. And consistently, Nordstrom's arguments violate the first and most important rule here – that statutes found in the Labor Code are supposed to be read to provide the broadest protections to employees as possible.

This is especially clear with Nordstrom's arguments regarding whether the employer-defined workweek – a creation of overtime statutes created forty years after the day of rest statutes were enacted – applies to Labor Code §§551 and 552. Yet after a careful review of the legislative and regulatory history, it is absolutely clear the term "workweek" never

appearing in the statutes or in the regulatory history of those statutes. Indeed, under Nordstrom's interpretation of the statutes, an employee can work 12 days consecutively without a day of rest so long as the 12 days straddle its defined workweeks. But the law and the relevant history is clear – the term "workweek" appears nowhere in any of the legislative history, nor the regulations of this law. So, what Nordstrom asks the Court to do is conflate "week," defined as seven consecutive days by §500 (b), with "workweek" which is a separate and distinct legal term in the Labor Code. Nordstrom asks the Court for such an interpretation to allow for flexibility – so it can schedule its employees for as many as 12 days without paying overtime, or suffering any legal recourse.

This fallacy also rears its head in Nordstrom's arguments regarding what it means to cause an employee to work more than six days in seven. Under Nordstrom's interpretation, an employer like Nordstrom can comply with Labor Code §§551 and 552 by simply letting some of its employees take days off sometimes. It does not need to have a policy where employees that give employees a day of rest once every six consecutive days of work. It does not need to tell its employees about the laws that guarantee their right to a day of rest. It does not need to get written waivers of an employee's right to a day of rest when an employee works seven or more days consecutively. Instead, it can, as Nordstrom does, tell its employees that they need to be flexible in their schedules so they can work at any time. After all, "Plaintiffs were not the victims of the harsh working conditions or exploitation that the labor laws were enacted to protect

against." (GER[1]022). Of course, it is not a single hour or day of work that is at issue here, but rather the culmination of hours and days of work.

This fallacy of legislative interpretation also arises in Nordstrom's arguments regarding Labor Code §556. As clearly stated in Plaintiff-Intervenor-Appellant-Petitioner's Opening Brief, and which is ignored by Nordstrom, the best interpretation of the statute is that Labor Code §§551 and 552 apply when employees work more than thirty hours in a seven-day period, and work more than six hours on any one day of the seven they work. Instead, Nordstrom argues that §556 requires that employees work more than thirty hours during a workweek, and that the employee work more than six hours in each and every day of that week. Under this interpretation, which has no legal basis, employees could work 365 days per year without a day of rest, so long as every seventh day they worked less than six hours. This interpretation only works if, as Nordstrom asks the Court to do, the Court reads the protections of the Labor Code as creating protections **for employers, not employees.**

Lastly, and not surprisingly, Nordstrom asks this Court to implement its interpretation of Labor Code §§551, 552 and 556 prospectively so as to avoid liability. While it is true that the Court is being asked to review statutes in a case of first impression, there is no indication that Nordstrom relied upon any interpretation these statutes, whether from an attorney, or from the California Department of Labor Standards and Enforcement (to whom it could have requested an opinion letter). In short, it utterly ignored the rights of its employees to receive days of rest.

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[1] As the Court will recall from the Opening Brief, GER refers to Gordon's Excerpts of Record.

For these reasons, Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon (hereinafter "Petitioner") respectfully requests the Court hold that §§551 and 552 give all employees the right to a day of rest in seven days regardless of workweeks, that an employer can cause its employees by requesting they come into work, and that Labor Code §556 be interpreted in a way that is consistent with the rules of statutory interpretation, and that this interpretation does not gut the right to a day of rest.

II.

ARGUMENT

A. This Court Has Consistently Held that Sections of the Labor Code Must Be Construed To Protect Employees over Employers

Nordstrom, at pp. 20-22, presents its version of how statutes must be construed by this Court, and how they should be interpreted. First, the Court must look to the plain meaning of the statutes, then it must look to statutory and/or regulatory framework, and then it must look back at the legislative history of the statutes. While that is instructive, Nordstrom neglects to mention that this Court has consistently held that the Labor Code must be liberally construed to protect employees. Per this Court:

> [In] light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection. . . They are not construed within the narrow limits letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished.

Industrial Welfare Com. v. Superior Court, (1980) 27 Cal.3d 690, 702;

Henning v. Industrial Welfare Com (1988) 46 Cal.3d 1262, 1269; *Kerr's Catering Service v. Department of Industrial Relations (Kerr's Catering)*, 57 Cal.2d 319, 330 (1962) ("[I]t is obvious that both the Legislature and our courts have accorded to wages special considerations other than merely fixing minimums, and that the purpose in doing so is based on the welfare of the wage earner.")

In *Murphy v. Kenneth Cole Productions, Inc.*, (2007) 40 Cal. 4th 1094, 1103, this Court held:

> **We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees.** (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340 [17 Cal. Rptr. 3d 906, 96 P.3d 194]; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal. Rptr. 2d 844, 978 P.2d 2] (*Ramirez*); *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 [4 Cal. Rptr. 2d 837, 824 P.2d 643].) Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94 [86 Cal. Rptr. 2d 893, 980 P.2d 441].)

(Emphasis Added). Thus, as this Court has consistently held, when a section of the Labor Code is ambiguous on its face, this Court interprets the statute as broadly as possible in favor of the employee. Again, per the California Supreme Court:

> In interpreting the scope of an exemption from the state's overtime laws, we begin by reviewing certain basic principles. First, "past decisions . . . teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal. 3d 690, 702 [166 Cal. Rptr. 331, 613 P.2d 579].) Thus, under

> California law, exemptions from statutory mandatory overtime provisions are narrowly construed. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal. App. 4th 555, 562 [38 Cal. Rptr. 2d 221]; see also *Phillips Co. v. Walling* (1945) 324 U.S. 490, 493 [65 S. Ct. 807, 808, 89 L. Ed. 1095, 157 A.L.R. 876].)

Ramirez v. Yosemite Water Co., (1999) 20 Cal. 4th 785, 794. Thus, this Court has ruled that statutes granting rights to employees under the Labor Code must be construed broadly, and exceptions to those rights be construed narrowly. Not surprisingly, it is this additional method of interpretation that Nordstrom conveniently forgets to include in its analysis of Labor Code §§551, 552, and 556. So even if these statutes are ambiguous, as the Ninth Circuit seems to think they are, that ambiguity must be construed in favor of the employees, not the employer.

B. Labor Code §§551 and 552 Are Not Limited by Employer Created Workweeks

1. The Plain Meaning of the Statutes Indicates They Are Not Measured on a Workweek Basis

Nordstrom at pp. 22-27, announces that the plain meaning of the rest day laws are to be measured on a workweek basis. In so doing, interestingly enough, it never actually quotes California's day of rest statutes, Labor Code §§551 and 552. To clarify for the record, Labor Code §551 states, "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Labor Code §552 states, "No employer of labor shall cause his employees to work more than six days in seven." In neither statute does the word "workweek" ever appear.

And in fact, the term "workweek" does not appear in any of the statutes dealing with days of rest. Labor Code §§551, 552, 553, 554, 555 and 556. Now, to get around that basic and obvious point, Nordstrom tries

to conflate the term "week" with the term "workweek." But under the Labor Code, these two terms are very different. Per Labor Code §500(b):

> "Workweek" and "week" mean any seven consecutive days, starting with the same calendar day each week. "Workweek" is a **fixed and regularly** recurring period of 168 hours, seven consecutive 24-hour periods.

(Emphasis added). Thus, per the Labor Code, the term "week" means seven consecutive days, and a "workweek" means seven consecutive days that occurs regularly throughout the year. Notably, the term workweek appears in the statutes dealing with the payment of overtime, Labor Code §§510-517, but does **not appear in any of the statutes dealing with days of rest**, Labor Code §§550-556. Similarly, the term "week," which as defined by Labor Code §500 (b) is neither fixed nor regularly occurring, appears only in Labor Code §556, which states the number of hours an employee must work in order to receive days of rest.

Further, and ignored by Nordstrom, Labor Code §554, which states the exceptions to the day of rest statutes, makes specific reference not to workweeks, but to seven or more consecutive days. Per the Labor Code §554(a) in the relevant part:

> Nothing in this chapter shall be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires that **the employee work seven or more consecutive days**, if in each calendar month the employee receives days of rest equivalent to one day's rest in seven. The requirement respecting the equivalent of one day's rest in seven shall apply, notwithstanding the other provisions of this chapter relating to collective bargaining agreements, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement respecting the hours of work of the employees, unless the agreement expressly provides otherwise.

(Emphasis Added). Further, the only regulation that exists elaborating on the day of rest statutes mirrors Labor Code §554 (a). As stated by the regulation regarding these statutes:

> The provisions of Labor Code Sections 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work **seven (7) or more consecutive** days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).

8 C.C.R. §11170 (5) (G). (Emphasis added.) Thus, the plain meaning of the statutes do not, as Nordstrom suggests, limit the day of rest statutes to the "workweek," but rather to seven consecutive days, defined by the Labor Code as a "week." And those seven consecutive days are, unlike the workweek, neither fixed, nor regularly scheduled.

Moreover, the cases cited by Nordstrom, *In Re Boheme* (1936) 12 Cal.App.2d 424, 429, and *Deese v. City of Lodi* (1937) 21 Cal.App.2d 631, 639, for the proposition that "since at least 1936, California courts have interpreted day of rest laws to apply on a workweek basis" (Answering brief at 23, fn. 62), do not use the term "workweek" at all. Rather, both Courts, in *dicta*, state that there is no need to force businesses to be closed on Sundays to protect employee health, because the law already gives them one day off per week. *Id.* And, again, Labor Code §500 (b) defines a week as seven consecutive days, that is neither fixed, nor regularly occurring. There is no basis to Nordstrom's claim that the plain meaning of the statutes supports its theory that the day of rest statutes are constrained by a workweek.

2. The Statutory Framework Does Not Constrain Days of Rest to Nordstrom's Workweek Theory

Nordstrom next argues, at pp. 27-29, that because overtime is defined as working more than forty hours in a workweek, and that overtime must be paid on the seventh day of work in any one workweek, that the Legislature must have meant to limit the day of rest provisions of the Labor Code to the workweek. Leaving aside Nordstrom's continued assertion that a workweek and a week defined the same under the Labor Code (which, as seen above, they are not), this argument ignores two major points.

First, the Chapter in which the day of rest statutes are found, Labor Code §§500-558, are separated into two sections – the provisions having to do with the payment of overtime and meal periods, Labor Code §§500-517, and the provisions having to do with the day of rest, Labor Code §§550-556. These provisions use different terminology ("workweek" is used in the former section, "week" is used exclusively in the latter), and deal with different rights (the regulation of working hours versus the regulation of days of work).

Second, Nordstrom ignores the fact that the Chapter in question provides overlapping protections to employees. While §§551 and 552 provide for a day of rest in seven, the right to a day of rest is faced with the broad exceptions of Labor Code §§554 (a) and 556. So, the overtime requirements of §510 do not so much undermine the day of rest statutes as they describe what happens when an employee falls within the exceptions of §§554 and 556. Similarly, and as Nordstrom so helpfully sets out, Labor Code §510 would allow employees to work eight hours a day for ten consecutive days without ever being eligible to receive overtime compensation. (Answering Brief at 28). It is in that instance, and in the

instance of Meagan Gordon and Christopher Mendoza, that the protections of §§551 and 552 are supposed to come into play, and prevent such overwork from occurring.

Indeed, as this Court has previously held, employment laws are remedial in nature – they exist not to punish the employer, but to shape their conduct. *See Pachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal. 4th 217, 222. As this Court held in *Murphy v. Kenneth Cole Productions, Inc., supra,* 40 Cal. 4th at, 1109:

> As has been recognized, in providing for overtime pay, the Legislature simultaneously created a premium pay to compensate employees for working in excess of eight hours while also creating a device "for enforcing limitation on the maximum number of hours of work ... , to wit, it is a maximum hour enforcement device ... ."
>
> . . . .
>
> Describing overtime pay as both a "penalty" and as "premium pay" acknowledges that, while its central purpose is to compensate employees for their time, it also serves a secondary function of shaping employer conduct. However, neither the behavior-shaping aspect of overtime pay nor the fact that courts have referred to the remedy as a "penalty" transforms overtime wages into a "penalty" for the purpose of statute of limitations. (*Cortez, supra*, 23 Cal.4th at p. 167.)

In that context, it is not at all surprising that the Legislature would subject working more than seven consecutive days in a workweek to a penalty (payment of time and a half) for those employees who fall within the exceptions of Labor Code §§551 and 552, and flatly prohibit employees from working more than six days consecutively for those employees who are not excepted. After all, the whole point of both statutes is to prevent employers from overworking their employees.

3. Neither the Legislative nor the Regulatory History Constrains §§551 and 552 to Nordstrom's Workweek Basis

Nordstrom next argues that the legislative and regulatory history of Labor Code §§551 and 552 indicates that the Legislature intended that the day of rest provisions be constrained to Nordstrom's defined workweek. (Answering Brief at 29-35.) And once again, Nordstrom asks this Court to conflate the term "workweek," which is defined as a regularly occurring and fixed set of seven consecutive days per Labor Code §500(b), and "week," which is defined as seven consecutive days. Again, these are two distinct and separate terms.

With that said, as of today, there is currently one regulation regarding California's day of rest statutes, which again states:

> The provisions of Labor Code Sections 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work **seven (7) or more consecutive** days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).

8 C.C.R. §11170 (5) (G) (emphasis added.) Per the terms of this regulation, §§551 and 552 are clearly not constrained by an employer-defined workweek. Instead, the days of rest are determined, as Nordstrom puts it, on a rolling basis. This, of course, makes sense, given that "week" is defined as being neither fixed nor regularly occurring. Labor Code §500(b). So, while the history of the Wage Orders is fascinating, it has nothing to do with how the law is currently defined under California law.

At best, the Wage Orders found in Nordstrom's legislative history, indicate that the Industrial Wage Commission defined when women and children (who were covered by the wage order) took their day of rest.

(RJN, Exs. 31-39). This makes sense given that the purpose of wage orders is to enumerate the details of statutes. They cannot, however, provide a lesser protection than the statutes. *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal. 3d 690, 725-729.

And here, the Industrial Wage Orders do not do so. Again, Nordstrom ignores the importance of Labor Code §§554 and 556, which create exceptions to the rule that employees cannot work more than six days consecutively. The provisions of the Industrial Wage Orders provided by Nordstrom, notably do not allow for any exceptions to the required for a day of rest, and provide for a greater protection to women and children. *Cal. Labor Fed'n, AFL-CIO v. Indus. Welfare Comm'n* (1998) 63 Cal.App.4th 982, 998.

Additionally, Nordstrom's analysis of the history of the day of rest laws is interesting, but altogether not illuminating. While the Legislature clearly intended for the day of rest statutes to apply to Sundays, this Court continually overturned such laws as violating the Establishment Clause. *Ex Parte Newman* (1858) 9 Cal. 502; *Ex Parte Andrews* (1861) 18 Cal. 678; *Ex Parte Westerfield* (1880) 55 Cal. 550; *Ex Parte Koser* (1882) 60 Cal. 177. It was only when the Legislature passed §§551 and 552 in their current form, which provides employees a day of rest within seven days, that the statute was constitutional. But regardless of history, the statute and its colorful history in this Court preceded the creation of the term workweek by almost fifty years. (*See* 29 U.S.C. §207, defining hours of work, passed by Congress in 1938). To claim that the Legislature, and this Court intended to shackle the day of rest statutes to a term that had yet to exist stretches the imagination.

But even if that were the case, the statutes at issue here, located in Cal. Labor Code §§ 500 et seq., underwent thorough revision in 1999 following the introduction of AB 60 titled, "The Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999." (1999 Cal. Legis. Serv. Ch. 134 (A.B. 60). AB 60 sought to amend §§510, 554, 556, and 1182.1 of the Labor Code and to add sections 500, 511, 512, 513, 514, 515, 516, 517, and 558. It was this time the word "workweek" was added in §500, but **not** added to §§551, 552, 554 or 556. In the meantime, the Legislature defined the term "week" differently than "workweek" and kept the term "seven or more consecutive days" in Labor Code §554.

4. The Workweek Interpretation Does Not Benefit Employees

Incredulously, Nordstrom, at pp. 35-38, argues that the workweek interpretation it espouses benefits employees. And yet, not ten pages earlier, on page 28, it provides a prime example of why Labor Code §§551 and 552 need to exist. "Indeed the Legislature enacted Section 510, with its weekly overtime standards, knowing full well an employee could work ***up to 10 consecutive days*** on a rolling basis at 8 hours per day ***for 80 hours of work with no overtime due***." (Answering Brief at 28, emphasis in original.) The reason for that, of course, is employers like Nordstrom can create work schedules that straddle multiple workweeks, specifically to avoid paying overtime.

Indeed, here, during their stretches of working seven or more days consecutively, both Petitioners worked would have been eligible for considerable overtime had the stretches occurred during one workweek. (GER 459:21-460:4; MER03783-84, MER03789, MER03974-95). Despite that fact, Ms. Gordon received only a few hours of premium pay, and Mr. Mendoza received none. (Id.). While it may be true that some employees

want to work more hours, the fact is that limiting the rest day statute to a workweek would only help employers.

C. Nordstrom Cannot Avoid Liability by "Making Rest Days Available"

Nordstrom argues about the importance of "flexibility" when it comes to employee working hours. It notes that employees may elect (with proper procedures) to work an alternative schedule, or that they may choose to work through meal periods. (Answering Brief at pp. 47-50.) In so arguing, Nordstrom asks the Court to accept its premise that if employees work through a rest day, then they must have chosen to do so, despite, as in this case, the employees are never informed of their right to a day of rest, nor are they even asked if they would like to waive their rights to a day of rest.

Further, the so-called flexibility that Nordstrom alludes to is much less flexible than Nordstrom would have the Court believe. Alternative workweeks (where employees can work four days a week at ten hours a day before the employer incurs overtime), can only exist if two-thirds of the employees agree to the alternative schedule by **secret ballot**. Labor Code §511(a). Employees may waive their right to work through a meal period, pursuant to Labor Code §512, but if they do so, the employer must keep and maintain records of that waiver. *Safeway, Inc. v. Superior Court* (2015) 238 Cal. App. 4th 1138, 1159-60.

Here, the flexibility that Nordstrom is advocating is total – that if an employee works seven or more consecutive days, it must be because they chose to do so, even where the evidence indicates otherwise. Both Meagan Gordon and Christopher Mendoza were asked to work additional shifts by their supervisors, and felt compelled to do so. (GER 348:10-25;

MER01311:16-19; MER00893-915). In fact, Meagan Gordon acquiesced to working additional days because **she believed her job was in jeopardy**. (GER 348:10-25).

1. The Plain Meaning of the Statutes Does Not Require Nordstrom Force an Employee to Work

Labor Code §551 states that, "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." The next section of the Labor Code, §552, states that, "No employer of labor shall cause his employees to work more than six days in seven." Thus, from these two sections, it is clear that employees have the right to not work more than six consecutive days and that it is unlawful for an employer to "cause" his employees to work seven or more days.

As stated in the opening brief, Black's Legal Dictionary, which was published in 1891, defines cause as "that which produces an effect; whatever moves, impels or leads." Black's Legal Dictionary, 1st Ed. (1891) at p. 181. (GER675-GER677.) Given that this was the legal dictionary in use at the time the statute was passed, it is probably the most appropriate to use in this instance. Despite that fact, Nordstrom presupposes that §552 must be read similarly to Labor Code §§512 and 226.7, which provide meal periods. And using that analogy, it argues that the Court should read §552's "cause" as analogous to §226.7 (b)'s "fails to provide" standard.

But if "fails to provide" is the appropriate standard, then certainly Nordstrom would, per this Court's decision in *Brinker Restaurant Group v. Superior Court* (2012) 53 Cal. 4th 1004, have an affirmative duty to provide statutorily appropriate days of rest in the form of a lawful day of rest policy. Per this Court:

> An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it.

Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal. 4th 1004, 1033.

As the Court in *Bradley v. Networkers International, LLC* (2012) 211 Cal. App. 4th 1129, 1142-44 clarified:

> First, with respect to the rest break subclass, **the *Brinker* court clarified that the applicable wage order requires employers to provide an employee with a 10-minute rest break for shifts lasting three and one-half hours to six hours, and a 20-minute rest break for shifts lasting six hours to 10 hours. (*Brinker, supra*, 53 Cal.4th at p. 1029.) However, under the *Brinker* employer's written rest period policy, the employees were provided only one rest break for every four hours worked (when they should be provided a second break after six hours).** (*Id.* at p. 1033.) On these facts, the California Supreme Court held the trial court properly certified the class because "[c]lasswide liability could be established through common proof" showing that "under this uniform policy," the employer "refused to authorize and permit a second rest break for employees working shifts longer than six, but shorter than eight, hours."

(Emphasis Added). In other words, if, as Nordstrom argues, a day of rest is supposed to be treated like a meal period, it had a duty to provide them by having a legally compliant rest day policy. Nordstrom did not have such a policy.

But the standard of §552 is actually lower than the standard set by §226.7. It states that an employer violates the statute if it causes an employee to work more than six days in seven. Further, we know from

Nordstrom's legislative history that §552 was passed with the intent that all employers would be closed on Sundays. *Ex Parte Newman* (1858) 9 Cal. 502; *Ex Parte Andrews* (1861) 18 Cal. 678; *Ex Parte Westerfield* (1880) 55 Cal. 550; *Ex Parte Koser* (1882) 60 Cal. 177. So, it could be that simply being open and allowing employees to work seven days in a row was what the Legislature meant by "cause." After all, the essence of employment is the power to control the activities of another person. *Martinez v. Combs* (2010) 49 Cal. 4th 35, 58-59. Thus, it makes more sense that an employer, particularly one that disciplines employees for failing to show up to work, causes an employee to work more than six consecutive days when it allows the employee to work.

The examples of Meagan Gordon and Christopher Mendoza bear this out. Both were in varying degrees of trouble with Nordstrom. (GER348:10-25; MER01311:16-19, MER01287:10-19, MER00893-915, MER01336:3-10, MER01339:18-24, MER01287:21-25, MER01288:1-9, MER01288:14-21, MER01286:23-MER01287:4, MER01300:4-10). Gordon believed that her employment was at risk, and Mendoza feared for his future with Nordstrom. In both cases, they agreed to work more shifts than originally scheduled when asked to do so by their supervisors. Neither were aware of their right to a day of rest, and neither felt capable of asserting a right to a day of rest. And as employees of Nordstrom, both were under Nordstrom's control during their working hours.

2. Neither the Statutory Framework nor the Regulatory Framework Confirm Nordstrom's Theory That to Cause is to Require

Contrary to Nordstrom's next argument, the statutory scheme does not support its position that an employer need only allow its employees to

take rest days in order to comply with the law. In fact, Labor Code §§551 and 552 predate the rest of the Labor Code by almost forty years. As noted above, the Labor Code is supposed to be read broadly in light of the employee, not the employer. *See Industrial Welfare Com. v. Superior Court*, 27 Cal.3d 690, 702 (1980) (emphasis added); see also *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1103-1104 (2007); *Henning v. Industrial Welfare Com*, 46 Cal.3d 1262, 1269. (1988); *Kerr's Catering Service v. Department of Industrial Relations (Kerr's Catering)*, 57 Cal.2d 319, 330 (1962). Again, where there is ambiguity, employee protections are supposed to remain sacrosanct. Thus the fact that there are provisions of the Labor Code that allow for employees to work alternative schedules does not mean that employers can schedule their employees without any regard for §§551 and 552.

For instance, Nordstrom notes that Labor Code §510 and Wage Order 2001-7 both contain provisions that state an employee can work more than six days within a workweek provided that the employee receives overtime compensation. Of course, that does mean that §§551 and 552 are effectively repealed. Such an interpretation would render their words surplusage, another violation of statutory interpretation. *People v. Arias* (2008) 45 Cal. 4th 169, 180; Accord *California Manufacturers Assn. v. Public Utilities Commission*, 24 Cal. 3d 836, 844 ["Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided."]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal. App. 4th 1099, 1110; *Said v. Jegan* (2007) 146 Cal. App. 4th 1375; *Cal. State Employees' Ass'n v. State Pers. Bd.* (1986) 178 Cal. App. 3d 372; *Woodmansee v. Lowery* (1959) 167 Cal.

App. 2d 645. Black, Henry Campbell, *Handbook of Statutory Construction, 2nd Ed.* (1911) West Publishing, §60, p. 165.

Rather, the interpretation that not only provides the best protection for the employee, as required by *Murphy*, and that does not render §§551 and 552 meaningless is the interpretation provided by Petitioner – that §510 and the Wage Order refer to how an employee is paid when they are exempted from the day of rest requirements of §§551 and 552. It should be noted that these exemptions are extensive. Per Labor Code §554:

> (a) Sections 551 and 552 shall not apply to any cases of emergency nor to work performed in the protection of life or property from loss or destruction, nor to any common carrier engaged in or connected with the movement of trains. This chapter, with the exception of Section 558, shall not apply to any person employed in an agricultural occupation, as defined in Order No. 14-80 (operative January 1, 1998) of the Industrial Welfare Commission. Nothing in this chapter shall be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires that the employee work seven or more consecutive days, if in each calendar month the employee receives days of rest equivalent to one day's rest in seven. The requirement respecting the equivalent of one day's rest in seven shall apply, notwithstanding the other provisions of this chapter relating to collective bargaining agreements, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement respecting the hours of work of the employees, unless the agreement expressly provides otherwise.
> (b) In addition to the exceptions specified in subdivision (a), the Chief of the Division of Labor Standards Enforcement may, when in his or her judgment hardship will result, exempt any employer or employees from the provisions of Sections 551 and 552.

Additionally, part-time employees who are exempt under Labor Code §556 from the requirements of Labor Code §§551 and 552, are also eligible for

overtime under §510. Taken together, Labor Code §§554 and 556 exempt a large number of employees, and as such, it is not at all surprising that the State of California would enact laws to protect those employees from overwork as well.

3. Even if Days of Rest are to be Treated as Meal Periods, Nordstrom Had a Duty to Provide Days of Rest, Which It Did Not.

As noted above, Nordstrom tries to conflate §552's "cause" standard with §226.7's higher "require" standard. And as previously discussed, the standard for liability is actually, "failing to provide" a meal period. Labor Code §226.7 (b). Either way, Nordstrom contends that all it needs to do is to make rest days available to employees, and if the employee works through the day, Nordstrom has no liability. (Answering Brief, pp. 66-70.) But even under that fairly loose standard, Nordstrom failed to provide anything because it never had a policy to allow employees to take one rest day in seven, which is how this Court has interpreted the requirements of the "fails to provide" standard of Labor Code §226.7. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1033; *see also Bradley v. Networkers International, LLC* (2012) 211 Cal. App. 4th 1129, 1142-44.

Thus, even if Nordstrom is correct in conflating the requirements of meal periods to days of rest, the correct legal standard of determining whether or not Nordstrom made rest days available would require some policy that required a day of rest each sixth day. The evidence clearly indicated that Nordstrom had no written policy about giving employees days off. (GER 670:21-671:21, 687:1-2, 774:4-11). The only "policy" was the informal standard of two days off per Nordstrom defined workweek which would allow employees to work up to ten days consecutively. And

even that was not deemed a hard and fast rule. (GER 774:4-11). In fact, Nordstrom studied whether or not to create a policy, and **chose not to do so**. (GER 784:8-785:25, 504:3-25). So, even under the *Brinker* standard, Nordstrom never provided days of rest.

This is again, essential to the analysis because without a policy, or without an acknowledgement of the employees' rights, there is no effective way for an employee to assert his or her right to a day of rest, particularly when they are being evaluated, in part, on their willingness to work, and disciplined for failing to show up for work.

Indeed, as noted in Petitioner's opening brief, the California Court of Appeal in *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal. App. 4th 220, noted it made a similar error in its earlier holding. Per the Court:

> An employer is required to permit and authorize the required rest breaks, and if it adopts a uniform policy that does not do so, then "it has violated the wage order and is liable." (*Ibid.*) In other words, the employer's liability arises by adopting a uniform policy that violates the wage and hour laws.

Id. at 235. As such, even if Nordstrom is correct that §552 term "cause" must be read in the same way as §226.7(b)'s "failing to provide," Nordstrom had, at minimum, an affirmative duty to provide a day of rest policy to its employees. It did not.

4. If Nordstrom Had a Policy to Provide Rest Days, and Petitioners Refused to Take Such Days, Nordstrom Had a Duty to Get their Consent in Writing

Nordstrom argues throughout its brief that the Court should use the lesser standard of "fails to provide" rather than "suffers or permits" when §552 states cause because doing so would allow more flexibility for the employer and the employees. Of course, the reality is that the flexibility

would be for the employer to simply straddle working days over workweeks so as to avoid paying overtime. With that said, even if Nordstrom's argument is correct, that an employer need only make such days available, it is asking employees to waive a statutory right absent any writing.

For instance, while it is not disputed that Meagan Gordon that she swapped shifts with another co-worker, which led to her working on January 18, 2011, Meagan Gordon testified that she worked on January 19, 2011 because the co-worker she swapped shifts with did not show up for work, and if no one showed up, she would be subject to discipline. (GER 335:23-337:5.). Further, she stated that she was afraid that if she did not show up on January 19, 2011, she would be terminated. (GER 448:10-25). And indeed, this is all the evidence that we have as to why Ms. Gordon agreed to work eight consecutive days, waiving her right to a day of rest.

As noted in previous briefs to the Ninth Circuit, the party alleging waiver has the duty to prove waiver by clear and convincing evidence. *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108. Thus, assuming that waiver is a defense, Nordstrom would have to show **by clear and convincing evidence** that (1) Meagan Gordon knew she had the right to not work seven or more days consecutively; and (2) that knowing this right, she chose to waive it. There is no such evidence.

Further, the recent decision of *Safeway Inc. v. Superior Court* (2015) 238 Cal. App. 4th 1138, following the concurrence of Justice Werdegar in *Brinker*, held that where an employee works through a meal period at the request of his or her employer, that the employer should obtain the employee's written consent. Per the Court:

> As explained in *Brinker*, an employer discharges its duty to provide an off-duty break "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.) When the employer does so, its knowledge that an employee is working through a meal break establishes no violation of the duty to pay premium wages, though the employer must still compensate the employee for the time worked. (*Id.* at fn. 19.) In contrast, if the employer knows that meal breaks are missed, shortened, or unduly delayed because the employer has instructed the employee to work, or has otherwise impeded the taking of breaks, that duty is contravened, absent a suitable waiver or agreement by the employee. (See *id.* at pp. 1039–1040, 1049.)
>
> . . . .
>
> An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, ... the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it.

Id. at 1155, 1159-60. And again, Ms. Gordon worked eight days consecutively because **she was asked to do so by her employer**. GER 335:23-337:5; 448:10-25). As a result, even if Nordstrom is right that employees can waive their right to a statutory day of rest, it is up to Nordstrom to prove that waiver with some form of writing.

D. Labor Code §556 Exists Only for Part-Time Employees

In both above and in Petitioner's Opening Brief, Petitioner has provided California law requiring that interpretation of the California Labor Code is to be read as broadly as possible to protect workers. *See Industrial Welfare Com. v. Superior Court*, 27 Cal.3d 690, 702 (1980) (emphasis added); *see also Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th

1094, 1103-1104 (2007); *Henning v. Industrial Welfare Com*, 46 Cal.3d 1262, 1269. (1988); *Kerr's Catering Service v. Department of Industrial Relations (Kerr's Catering)*, 57 Cal.2d 319, 330 (1962). Petitioner has also provided the Court with California law regarding the avoidance of rendering any provision of the law surplusage. *See People v. Arias* (2008) 45 Cal. 4th 169, 180. Additionally, there is the golden rule of statutory interpretation. Per this Court:

> "[Where] the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." (*Clements* v. *T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233 [273 P.2d 5].) This principle has been called a "'golden rule of statutory interpretation.'" (*Armstrong* v. *County of San Mateo* (1983) 146 Cal. App. 3d 597, 615 [194 Cal. Rptr. 294], quoting 2A Sutherland, Statutory Construction (4th ed.) § 45.12, p. 37.) Stated differently, "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc.* v. *Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) A court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose.

Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control District (1989), 49 Cal. 3d 408, 425; Accord *People ex rel. Lungren v. Superior Court* (1997) 14 Cal. 4th 294.

Now, given that Labor Code §556 states that "Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof," and that the term "week" is defined by Labor Code §500 (b) is defined as seven consecutive days (as opposed to "workweek" which is

defined as seven consecutive days that is fixed and recurring), there are only two appropriate interpretations of this statute that protect employees, avoids rendering any portion of the statute surplusage, and that makes sense.

The first interpretation is that the employee must *in any week of their employment* work more than thirty hours, and the employee *on any day of their employment* work more than six hours. And in fact, when the statute was originally chaptered, it read as follows: "This chapter shall not apply to any employer or employee when the total hours of employment do not exceed thirty hours in **any week**, or six hours in **any one** day thereof." (RJN 91 and 93, emphasis added.) So, since the statute uses the word "any" to modify both week and day, it appears that the requirements of §556 deal with the overall employment of the employee, and not the just seven-day period where the employee worked seven days consecutively.

The second interpretation is the one Petitioner proffered in her Opening Brief, which is that during the seven-day period when the employee works seven days consecutively, that employee works (1) more than thirty hours in that week; and (2) that employee works more than six hours on any one of the days making up the seven-day period.

Nordstrom, in its answering brief, altogether ignores the word "any" and states that the only interpretation of §556 is that an employee must work six or more hours for each and every day of a workweek. (Answering Brief at pp. 38-45). That simply makes no sense. First, and as discussed in earlier sections, there is no workweek requirement for §556 – the term "workweek" is not present in the statute! Rather, the statute refers to "any week," which is defined by §500(b) as any group of seven consecutive days. Second, if Nordstrom's interpretation is correct, then there would be

no need for a thirty-hour requirement as every employee would work forty-two hours per workweek. But as the Court is aware, it must read the statute as a whole, and insure that every word in the statute has meaning. *People v. Arias* (2008) 45 Cal. 4th 169, 180. Lastly, such an interpretation as Nordstrom suggests, would lead to an utterly ridiculous result – employees could work 365 days a year, for eight hours a day, and never be entitled to a day of rest if every seventh day they worked less than six hours.

So while the statute is somewhat ambiguous, the Court should be mindful that again, where there is an ambiguity in a Labor Code statute, the Court should read the statute to provide the greatest protection to the employee. *Industrial Welfare Com. v. Superior Court*, (1980) 27 Cal.3d 690, 702. The interpretation that Nordstrom does not create the greatest protection to employees, rather it protects employers from ever having to worry about providing their employees with a day of rest.

E. The Court Should Not Apply Any Interpretation of the Day of Rest Laws Prospectively

Nordstrom's last argument is that even if the Court were to find that Nordstrom uniformly violated §§551 and 552 for what is now 76,000 times, it should not be held liable because it relied upon its incorrect interpretation of these statutes. Answering Brief at 76-78. Now, as was stated at trial, Nordstrom's human resources manager, who is not an attorney, and who consulted neither the Department of Labor Standards and Enforcement, nor any attorney, formulated that Nordstrom relied upon. (GER at 504:12-16, 505:15-21, 506:1-18;GER 670:21-671:13, 461:12-462:8). So, the reliance, to the extent it existed, could hardly be reasonable.

And because Nordstrom's argument is based, in part on Ms. Blumenthal's interpretation, there is no need to apply these laws to

Nordstrom prospectively. As this Court held in *Claxton v. Waters* (2004) 34 Cal. 4th 367, 378-79:

> Although as a general rule judicial decisions are to be given retroactive effect [citation], there is a recognized exception when a judicial decision **changes a settled rule on which the parties below have relied**. [Citations.] '[C]onsiderations of fairness and public policy may require that a decision be given only prospective application. [Citations.] Particular considerations relevant to the retroactivity determination include the **reasonableness of the parties' reliance on the former rule**, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule. [Citations.]' " (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372 [127 Cal. Rptr. 2d 516, 58 P.3d 367]; accord, *Woods v. Young* (1991) 53 Cal.3d 315, 330 [279 Cal. Rptr. 613, 807 P.2d 455].)

(Emphasis Added.) As with everything, the devil to Nordstrom's defense is in the details. Had there been a judicial interpretation of the law, an opinion letter from the California Department of Labor Standards and Enforcement, or a memorandum from an attorney such as Richard Simmons, then Nordstrom could argue that it reasonably relied upon an earlier interpretation. In fact, Nordstrom studied whether or not to create a policy, and **chose not to do so**. (GER 784:8-785:25, 504:3-25).

Lastly, not only could Nordstrom have asked the California Department of Labor Standards and Enforcement for an opinion letter interpreting these statutes, under Labor Code §554(b), it could have asked to be exempted from the day of rest requirements. It did not.

III.

CONCLUSION

For the foregoing reasons, Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon respectfully requests the Court insure that these statutes truly provide one day's rest in seven days, not one day within an employer-defined workweek. She respectfully requests the Court insure that the part-time exemption of Labor Code §556 apply to people who are truly part-time, not those, like her, who worked over fifty hours during her eight consecutive days of work. Lastly, she respectfully requests the Court recognize that employers, not employees, control the hours and days an employee works, and that, as such, only the employer can cause an employee to work seven or more days consecutively. In short, she respectfully requests the Court insure that all California employees finally receive their right to a day of rest granted to them over a hundred and twenty years ago.

Respectfully Submitted,

Dated: October 22, 2015

CLARK & TREGLIO

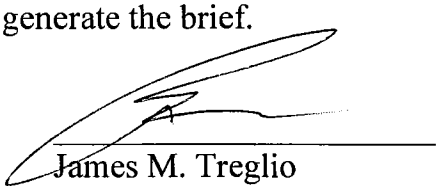
By: _____

R. Craig Clark
James M. Treglio
Attorneys for Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8.204

In compliance with Rule of Court 8.204, the text of this brief is in 13 point type, with left and right margins of one and a half inches. The text of this brief consists of 8,336 words as counted by the Microsoft Word for Mac 2011 word-processing program used to generate the brief.

Dated: October 22, 2015



James M. Treglio

PROOF OF SERVICE AND FILING

Documents: Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon's Reply Brief

Caption: Christopher Mendoza, et. al., v. Nordstrom, Inc.

Filed: California Supreme Court

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

I am a citizen of the United States and a resident of or employed in the City of San Diego and County of San Diego, California, I am over the age of eighteen years and not a party to the within action; my business address is 205 West Date Street, San Diego, CA 92101. On this date, I caused Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon's Reply Brief to be filed in the California Supreme Court and served the following persons interested in said action, pursuant to California Rule of Court 8.25(a) and (b). On October 22, 2015, I sent via Federal Express Overnight Service, one original and 8 copies of Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon's Reply Brief, and a copy to all parties and interested persons, and one copy to the District Court and to the Ninth Circuit Court of Appeal by the placing of true copies of Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon's Reply Brief enclosed in a sealed envelope via Federal Express Overnight Service addressed as follows:

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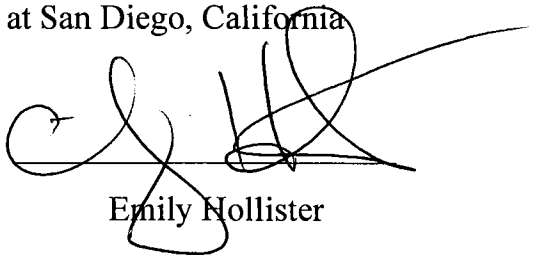
I certify and declare under penalty of perjury that the foregoing is true and correct. Executed on October 22, 2015 at San Diego, California.



Emily Hollister

SERVICE LIST

Mendoza, et al., v. Nordstrom, Inc.
California Supreme Court Case No. S224611

PLAINTIFF-INTERVENOR-APPELLANT-PETITIONER'S REPLY BRIEF

Julie A. Dunne, Esq.
Lara K. Strauss, Esq.
LITTLER MENDELSON
501 W. Broadway, Suite 900
San Diego, CA 92101
Attorneys for Defendant/Appellee/Respondent Nordstrom Inc.,

Michael G. Leggieri, Esq.,
LITTLER MENDELSON, P.C.
500 Capitol Mall, Suite 2000
Sacramento, CA 95814
Attorneys for Defendant/Appellee/Respondent Nordstrom, Inc.

Andre E. Jardini, Esq.
K.L. Myles, Esq.,
Knapp, Petersen & Clarke
550 North Brand Blvd., Ste 1500
Glendale, CA 91203
Attorney for Plaintiff/Appellant/Petitioner Christopher Mendoza

David R. Markham
The Markham Law Firm
750 B Street, Ste 1950
San Diego, CA 92101
Co-Counsel for Plaintiff –Intervenor/Appellant Meagan Gordon

The Honorable Susan P. Graber,
Circuit Judge United States Court of Appeals for the Ninth Circuit
100 S.W. Third Avenue
Portland, OR 97204
The Honorable Ronald M. Gould
Circuit Judge United States Court of Appeals for the Ninth Circuit
1010 Fifth Avenue
Seattle, WA 98104

The Honorable Consuelo M. Callahan
Circuit Judge United States Court of Appeals for the Ninth Circuit
501 I Street
Sacramento, CA 95814

The Honorable Cormac J. Carney
United States District Court for the Central District of California
411 West Fourth Street #1053
Courtroom 9
Santa Ana, CA 92701