S224853

SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS et al.,

Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant.

2d Civil Nos. B243788 & B247392

(Los Angeles County
Super. Ct. Nos. BC336416, BC345918,
CG5444421)

REPLY BRIEF ON THE MERITS

After a Decision by the Court of Appeal
Second Appellate District, Division One

Service on Attorney General and District Attorney
[Bus. & Prof. Code § 17209; *See* CRC, Rule 29(b)]

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INTRODUCTION

ABM accuses the plaintiffs of spending the bulk of their opening brief addressing a straw man: whether California law permits employers to provide on-duty rest breaks. According to ABM, "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." (ABM ABOM, at 16.)

The plaintiffs see it differently. Jennifer Augustus's original complaint in this action alleged that ABM violated the law by making its guards work during their rest breaks. The rest-break class that the trial court certified consists of guards who had not been relieved of all duty during their rest breaks. The plaintiffs' successful summary-adjudication motion on their rest-break claim, as well as their follow-up summary-judgment motion, were grounded on ABM's admission that it failed to relieve its guards of all duties during rest breaks. Hence, from the plaintiffs' standpoint, since its inception this case has been about the propriety of on-duty rest breaks.

More significantly, when the plaintiffs petitioned this Court for review of the decision below, they sought review on two questions:

1. Does the relieved-of-all duty standard adopted in *Brinker*[1] for meal breaks apply to rest breaks, as well?

2. In light of the holding in *Mendiola*[2] that security guards were performing compensable "work" while they were on call, may employers require employees to remain on call during rest breaks?

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[1] *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040.
[2] *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833.

This Court granted review without re-phrasing the questions in a material way.[3] Hence, irrespective of what was argued below, at this stage the case would seem to be "about" those two questions. The purported "straw man" that ABM chides the plaintiffs for addressing in such detail is the first question.

It is not surprising that ABM would attempt to re-characterize this case as involving rest breaks that "*potentially* could have been interrupted" (ABOM, p.1), because that makes it much easier for ABM to argue that all rest breaks inherently contain the potential for interruption in case of emergency. But that has never been this case. As the trial court found, and as the Court of Appeal confirmed, ABM's guards were never relieved of all duty while on break. These guards, therefore, did not merely face the potential of being "called back" to work. Rather, they never stopped working.

ABM's desire to re-frame the case is also understandable because the text of section 226.7 and this Court's decisions interpreting it leave ABM with very little room to maneuver. ABM acknowledges, as it must, that section 226.7 prohibits employers from making their employees "work" during rest breaks. In *Murphy*,[4] this Court described rest breaks as a time when employees are "free from employer control." And *Brinker* held

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[3] This Court has slightly rephrased the questions in the case summary on its website, which frames the issues on which review was granted as: (1) Do Labor Code § 226.7, and Industrial Welfare Commission (IWC) wage order No. 4-2001 require that employees be relieved of all duties during rest breaks? (2) Are security guards who remain on call during rest breaks performing work during that time under the analysis of *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833? The plaintiffs have endeavored to answer those two questions in their briefing in this Court.

[4] *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1113.

that the prohibition on "work" during meal breaks requires an employer to relieve its employees of their duties during the break.

ABM's response is that in 1952, the IWC stated that employees who were able to rest while performing their jobs need not be relieved of all duty during rest breaks. It claims that this "rule" survives the enactment of section 226.7, because the Legislature's intent in adopting that statute was simply to strengthen enforcement of the existing regulatory framework. As for *Brinker*, ABM claims that its holding applies only to meal breaks, and should not be extended to rest breaks because of the "significant differences" between the two types of breaks. ABM urges the Court to adopt some type of unspecified "flexible" standard about what is permissible on rest breaks.

These arguments cannot withstand scrutiny.

The IWC's 1952 comment appears to refer to the availability of exemptions from the wage order's rest-break requirements, which already included the exemption process at that time. A similar comment by the IWC in 1976 explained that there was no need to change the wage order's rest-break requirements for workers who were "almost continually resting" because their employers could invoke the exemption process. The IWC reiterated this point in a 1982 comment.

Hence, even if the Legislature's intent in adopting section 226.7 was simply to strengthen enforcement of the existing regulatory framework, that framework did not allow employers to require employees to work during rest breaks. The DLSE had concluded long before section 226.7 was proposed that rest breaks were supposed to be duty free. More important, ABM's argument overlooks the plain text of the statute, which flatly prohibits employees from being required to work during meal breaks or rest

breaks. ABM makes no attempt to square what it actually required of its security guards with the statutory text.

In *Brinker,* this Court concluded that the rule against making employees work during meal breaks required that they be relieved of all duty. Even if, as ABM contends, there are differences between meal breaks and rest breaks, section 226.7 does not treat them differently; it applies with equal force to both types of breaks. ABM cannot explain how activity that would be prohibited as "work" if performed by employees during meal breaks would cease to be "work" if performed during rest breaks. The relieved-of-all-duty standard therefore must apply equally to rest breaks and meal breaks.

ABM's request for a flexible standard for rest breaks cannot be squared with the unqualified command in section 226.7 that employees shall not be required to work during breaks. Nor is there any need for a flexible rule in light of the exemption process in the wage order. ABM's brief barely acknowledges the existence of exemptions, but their availability allows this Court to construe section 226.7 according to its terms. The flexibility that ABM seeks need not be shoehorned into the legal standard itself. Instead, employers who face a true hardship in trying to meet the clear standard can apply to the DLSE and lawfully obtain an exemption from it.

This Court's adoption of the relieved-of-all-duty standard for rest breaks would be dispositive of this case. ABM's person-most-knowledgeable admitted that ABM does not relieve its guards of all duties during rest breaks, and both the trial court and the Court of Appeal concluded as much. (ABOM at 42.) ABM never sought rehearing below, so

its argument that the Court of Appeal "misconstrued" this evidence comes too late.

As for the second issue for review, ABM argues that it is not in violation of the law because it merely requires its security guards to remain on-call during their breaks, to be summoned back to work only if required. Of course, this argument is purely hypothetical, since that is not what occurred in this case. ABM did more than require its guards to simply remain on-call during their breaks; it required them to continue working because they were never relieved of all of their job duties.

Nevertheless, *Mendiola* teaches that security guards who are simply kept "on call" at their employer's jobsite are, in fact, working for the purposes of compensability. The only way that a rule allowing employees to be similarly kept on call during rest breaks could be consistent with *Mendiola* would be for this Court to define what constitutes "work" under section 226.7 differently than what constitutes compensable work under the wage order.

ABM never advances any reason that would justify this result. Nothing in the text of the statute or its legislative history indicate that when the Legislature referred to "work" in section 226.7, it intended that term to mean something other than "compensable work" as that term is used in the wage order.

Giving the term "work" the same construction in both contexts avoids the peculiar outcome that ABM suggests — which would allow employers to require their employees to engage in compensable activity during their rest breaks, even though they are forbidden from "working" on those breaks. If this causes a particular employer a hardship, then the solution, as ABM itself invoked for a year, is for that employer to lawfully

obtain an exemption from the rest-break requirement from the DLSE. There is no need for this Court to muddle the law by assigning varying meanings to the term "work."

ARGUMENT

A. The relieved-of-all-duty standard applies to rest breaks

1. ABM has no answer for how an employer could comply with the no-work mandate in Labor Code section 226.7 without relieving its employees of all duty

The rule that employers must relieve their employees of all duty during rest breaks is supported by multiple sources of authority, as explained at pages 24 to 35 of the plaintiffs' opening brief. These include the essential concept of a "rest break" itself, which connotes a period where an employee is freed from performing work duties; and the default rule in the wage order that both meal breaks and rest breaks must be off duty. ABM had no comment on these points in its brief.

But the principal justification for the rule that rest breaks must be duty free is the text of section 226.7 itself. As ABM correctly explains, "Labor Code section 226.7 supplies the only express guidance in either the Labor Code or the wage order regarding the nature of rest breaks that employers must provide, and it states that 'an employer shall not require an employee *to work*' during a rest break." (ABOM at 16, emphasis in original.) ABM concedes that, "section 226.7 by its terms . . . prohibits requiring an employee to 'work' during a rest or meal break . . . ." (ABOM at 15.)

Yet, ABM asserts that the prohibition in section 226.7 on work during rest breaks "does not require relief of 'all duty'" during rest breaks. (*Id.* at 25.) This conclusion not only defies common sense, it also cannot be reconciled with the text of the statute, and ABM makes no attempt to do so. Instead, it tries to minimize the import of what section 226.7 actually says

by claiming that the Legislature's purpose in enacting it was simply to strengthen enforcement of existing labor standards. (ABOM at 14.) It argues that when section 226.7 was adopted in 2000 that the existing standard under the wage order did not require that employees be relieved of all duties during rest breaks.

It bases this contention on a single comment made by the IWC in 1952, not the text of the wage order itself. The comment itself is somewhat cryptic, in that it says that the IWC "clarified" that it did not intend that employees who had ample time to rest while at work would have to be relieved of all duty during rest breaks. (ABOM at 13.) It is not clear what clarification the comment refers to. But based on similar comments by the IWC in later years, it appears that this is a reference to the availability of the exemption process, which was included in the Wage Order in 1952. (See ABM RFJN, Exh. C, para. 26.)

As the plaintiffs explained in their opening brief, in 1976 the IWC published a comment explaining that the availability of an exemption from the wage order's rest-break requirements obviated the need to modify the wage order to accommodate situations where employees hold jobs where they are "almost continuously resting." (OBOM at 36.) The IWC made a similar comment in 1982, explaining why it declined to weaken the "relieved of all duty" requirement for rest breaks in the wage order. (*Id.* at 37.)

ABM's contention that the 1952 comment by the IWC established that the wage order did not require a duty-free rest period is belied by the DLSE's longstanding interpretation of the wage order. The DLSE's position has been that "rest periods must be, as the language implies, duty free." (DLSE Opinion Letter 2002.02.22); *see also* DLSE Opinion Letter

1994.09.28, ["the employer cannot require that the employee perform duties during the paid rest break"].)[5]

Accordingly, even if the Legislature's purpose in adopting section 226.7 was simply to enhance the enforcement of existing standards, there is no indication that the Legislature understood that those standards allowed employers to make their employees work during rest breaks. Certainly the text of the statute, which flatly prohibits that employees be made to "work" during meal breaks and rest breaks, undermines ABM's thesis.

"Work" is a synonym for "job" — a paid position of regular employment.[6] Jobs generally consist of a series of responsibilities or duties that the employer requires the employee to perform. (*See, e.g., Green v. State* (2007) 42 Cal.4th 254, 257 [holding that disability-discrimination plaintiffs under the FEHA must prove that they can perform "the essential duties of the job"].) So when the Legislature prohibited employers from requiring their employees to "work" during rest breaks, it meant that employers could not require employees to continue to perform their jobs during those breaks. This rule can be restated in simpler but equivalent terms: Employees cannot be required to perform their job duties on a rest break.

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[5] ABM also offers no response to the point that in 2001, the IWC modified the rest-break provision in wage order 5, which governs the public housekeeping industry, to allow a limited exception for off-duty rest breaks for certain workers in 24-hour residential-care facilities. The rule the IWC adopted, in effect, is the rule that ABM claims applies to all workers under the wage orders' rest-break provisions. If that were true, then the IWC would not have not needed to carve out an exception to establish the rule in wage order 5. (See OBOM at 29.)

[6] Oxford Pocket Dictionary of Current English.

This view of the meaning of section 226.7 is consistent with this Court's observation in *Murphy* that the Legislature's purpose in enacting section 226.7 was to address the problem that "employees [were] being forced to work through their meal and rest periods." (*Id.*, 40 Cal.4th at p. 1106.) This Court observed that both rest periods and meal periods were time when employees were "free from employer control." (*Id.* at p. 1113.)

This logic, in turn, formed the basis for this Court's holding in *Brinker* that, with respect to meal breaks, California law required that employees be relieved of all duty and that employers relinquish control over how the employees spend their time during the break. (*Brinker*, 53 Cal.4th at pp. 1038, 1040-1041.)

ABM's brief does offer a response to the plaintiffs' reliance on *Murphy* and *Brinker*. With respect to *Murphy*, it acknowledges that section 226.7 "prohibits employers from requiring employees to 'work' during rest breaks," but it claims that its position is consistent with *Murphy*'s view of an employer's obligation to provide work-free rest breaks. (ABOM at 17.) ABM contends that it does not violate section 226.7 because it merely keeps its guards on call during their rest breaks, and that "without more," this does not constitute work. In making this argument ABM appears to concede that the relieved-of-all duty standard applies to rest breaks. Its argument that it has not violated that legal standard presents a different issue, which is addressed *infra* at pages 17-21.

As for *Brinker*, ABM asserts that the standard it adopted applies only to meal breaks, for two reasons. First, it claims that the term "relieved of all duty" is not derived from section 226.7, but from the wage order, where it applies only to meal breaks. (ABOM at 23.) ABM maintains that *Brinker* was only construing Labor Code section 512, which deals with meal breaks.

ABM therefore asserts that the plaintiffs' contention that the relieved-of-all-duty standard applies with equal force to rest breaks "lacks any textual basis in the wage order or statute, and should be rejected." (*Id.*) Second, ABM argues that, even if there was a textual basis to apply the relieved-of-all-duty standard to rest breaks, "doing so would ignore the differences between meal breaks and rest breaks." (*Id.* at 24.)

ABM's first argument fails because section 226.7 did play a key role in this Court's analysis in *Brinker*. It had to, since that statute speaks directly to what employers cannot require from employees during meal breaks (and rest breaks). It is true that the term "relieved of all duty" does not appear in section 226.7, which prohibits "work" during rest breaks and meal breaks. But this prohibition necessarily requires that employees be relieved of all duties on breaks, because unless employees are relieved of their job duties, they are working — which the statute forbids. Accordingly, there is a clear "textual" basis for the relieved-of-all-duty standard, even though the statute expresses that requirement in different language.

It is also true that *Brinker* considered Labor Code section 512. But this does not mean that the Court did not also rely on section 226.7. In fact, the Court clearly explained that in addressing the issues presented in *Brinker*, it was considering both the scope of the duties imposed by the wage order *and* by "several related statutes," which it then specified: Labor Code sections 226.7, 512, and 516. (*Brinker*, 53 Cal.4th at p. 1027.)

The Court also explained that if an employer relieved its employees of all duties and relinquished control over how they spent their time on meal breaks, then the employer would not incur liability under the wage order or section 226.7. (*Id.*, 53 Cal.4th at p. 1041.) ABM therefore has no basis to suggest that 226.7 played no role in the *Brinker* analysis.

ABM's second argument is that because there are "significant distinctions" between meal breaks and rest breaks, the Court should formulate "a standard that is tailored specifically to the unique nature of rest breaks." (ABOM at 24.) Putting aside the fact that the two distinctions that ABM points to are not particularly significant,[7] ABM's argument misses the point. The Legislature has specifically directed in section 226.7 that employees cannot be required to "work" on either meal breaks or rest breaks.[8] ABM has never explained why, if relief of all duty is what is required to satisfy the statute with respect to meal breaks, a different (and presumably less stringent) standard should govern what is acceptable on rest breaks.

In their opening brief, the plaintiffs explained that, given the prohibition in section 226.7 on "work" that occurs during either meal breaks or rest breaks, the only way that the standard could be different for the two types of breaks would be if the very concept of what constituted "work" was somehow different for meal breaks than for rest breaks. (OBOM at 34.) While both ABM and the Court of Appeal have suggested that the rule adopted in *Brinker* for meal breaks should not apply to rest breaks, neither has suggested that an employer should be allowed to require employees to perform job-related activities on a rest break that would otherwise be prohibited as "work" if they occurred during a meal break. In sum, there is simply no support in the statute or legislative history for the

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[7] The two differences are the different lengths of the breaks, and the fact that rest breaks count as "hours worked, while off-duty meal breaks do not. (ABOM at 24.)

[8] Work is permissible during meal breaks, of course, but only when the employee has entered into a valid agreement waiving the right to an off-duty meal break.

notion that "work" means different things in the statute, depending on what type of break is involved.

Accordingly, the test for what is required to satisfy the no-work mandate in section 226.7 for meal breaks — which is the relieved-of-all-duty standard articulated in *Brinker* — should apply with equal force to rest breaks.

2. The relieved-of-all-duty standard, coupled with the exemptions available under the wage order, provides a clear, workable standard for employers and employees; ABM offers no viable alternative

ABM urges this Court to adopt what it calls a "flexible standard" that is "tailored specifically to the unique nature of rest breaks." (ABOM at 24.) But section 226.7 does not lend itself to a flexible standard. It mandates an unqualified prohibition on "work" during meal breaks and rest breaks. By asking for a flexible standard, ABM is really just asking the Court to re-write the statute to allow employers to require their employees to perform *some* work during rest breaks, which is contrary to what the statute allows. "An employer shall not" cannot legitimately be read as "some employers may." Nor should the word "work" be subject to linguistic contortions.

There is no need to adopt a standard that is less stringent than what the statutory language mandates as a buffer to prevent the statute from operating too harshly. If enforcement of the no-work mandate in the statute causes a particular employer hardship, then that employer can seek an exemption from the rest-break requirement from the DLSE — just as ABM did for its single-guard sites in 2006.[9]

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[9] The fact that ABM obtained a lawful exemption from the rest-break requirement for one year plainly suggests that ABM has at all times understood that rest breaks must be duty free. If ABM had in good faith

In their opening brief, the plaintiffs explained that the no-work standard not only complies with the Legislature's mandate, it also provides a clear, easily-administered standard that allows employees to know what their rights are, and employers to know what their responsibilities are. ABM responds with a contrived parade of horribles.

For example, ABM claims that if the relieved-of-all-duty standard was applied to rest breaks, then "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." (ABOM at 26.)

ABM's argument is silly. The relieved-of-all-duty standard already applies to meal breaks under *Brinker*. The plaintiffs are unaware of any problems that standard has caused with respect to unsanitary cooks or disheveled workers, and ABM has pointed to none. Applying the same standard to rest breaks therefore seems safe. ABM admits that its frightening outcomes are not actually generated by the relieved-of-all-duty standard itself, but instead from what it admits is an "extreme interpretation" of that standard, which it attributes to the plaintiffs. (ABOM at 26.)

Under this extreme standard, "any obligation that relates to employment in any way" constitutes a job duty and therefore cannot be enforced during breaks. (*Id.*) But ABM confuses workplace rules with job duties. Compliance with workplace rules is not work, and section 226.7 and

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believed that the law allowed it to require its guards to perform some work while on rest breaks, ABM would not have bothered to seek and obtain an exemption.

the wage order only forbid employees from being required to work during breaks; they do not forbid employers from enforcing workplace rules. For example, an employer who forbids employees from sexually harassing customers would not be requiring its employees to work during rest breaks, even though it enforced that rule during breaks.

ABM also claims that adoption of the relieved-of-all-duty standard for rest breaks would also force employers to reduce employee freedom on rest breaks because employers will be forced to adopt "highly restrictive rest break policies." (ABOM at 36.) Once again, ABM warns about dire consequences that would supposedly flow from a legal standard that is already in force for meal breaks. And once again, it cannot point to any proof that its warning is based on any real-world experience with that legal standard.

In reality, the Legislature has already determined that it would be deleterious for employees to be made to work during their rest breaks. That is why it has forbidden the practice in section 226.7. The plaintiffs merely ask the Court to enforce the law as it is written. Even if, as ABM predicts, enforcing that standard might have problematic effects, that is ultimately a problem for the Legislature to address, not a reason to decline to enforce the statute.

B. Since ABM failed to relieve its guards of all duties on their rest breaks, the summary judgment against it should be affirmed

1. The plaintiffs have consistently maintained, since this case was filed in 2005, that ABM improperly required its guards to work during their rest breaks

ABM's contention that "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 . . . are *per se* invalid under California law" is not an accurate reflection of the record. As pointed out in the plaintiffs'

discussion of the procedural history of this action in their opening brief, the plaintiffs have consistently argued that ABM failed to comply with California law concerning rest breaks because it required its guards to perform work during those breaks, and that ABM admitted that it never relieved its guards of all duty during their rest breaks. (OBOM at 5-10.)

Hence, Augustus's original complaint in 2005 alleged that ABM violated California law because it required its security guards to work during rest periods and that ABM had not obtained an exemption from the mandatory rest-period requirement. (1JA 2-3 [paras. 9, 10], 4 [para. 17].)

The plaintiffs' 2008 class-certification motion sought certification of a rest-break subclass, predicated on ABM's admission that it did not provide guards with duty-free rest periods. (1JA 111.)

The plaintiffs sought and obtained summary-adjudication of their rest-break claim in July 2010. The principal argument advanced in the motion, which is reflected in Fact Number 1 in their supporting separate statement, was that "Defendant's security guard employees are not relieved of all duties at any time." (10JA 2708.) The evidentiary support for this fact came from ABM's own testimony, through Setayesh, that it had a company-wide policy and practice of not relieving its security guards of all duties during their rest breaks. (10JA 2693.)

ABM both opposed the motion and filed its own cross-motion, seeking summary judgment or class decertification. In defending the claims against it concerning meal breaks, ABM argued that its meal-break waivers were valid because "the nature of security work prevents guards from being relieved of all duty." (7JA 2050.) ABM has repeatedly noted that this concession was made in the context of defending its use of meal-break waivers. This is true, but it does not make the admission any less relevant

with respect to rest breaks. ABM's concession reveals why it did not relieve its guards of all duties during any of their breaks. ABM did not treat meal breaks any differently than it did rest breaks. Its security guards were on duty all the time because it claimed its business demanded it. (See OBOM at 8-10.)

When ABM opposed the plaintiffs' summary-adjudication motion, it did *not* argue that there was a triable issue of fact about whether or not it relieved its guards of all duties on rest breaks. In fact, while ABM supported its opposition with declarations from two dozen guards (declarations that ABM's counsel drafted), not one of those declarations stated that the guard had been relieved of all duty during rest breaks.[10]

Rather, ABM argued that its policy of allowing the guards to engage in some "leisure activities" while on rest breaks was legally sufficient to comply with its rest-break obligations. (See OBOM at 10, 11.) It also argued that Setayesh's testimony should be understood to mean that ABM required its guards to keep their radios or pagers on in case guards were needed to respond to an emergency or other business demands. (See OBOM at 11, 12.)

This is exactly what Judge Kuhl understood ABM's position to be when she granted the plaintiffs' motion, finding that the law required ABM to relieve its guards of all duties during rest breaks, and that ABM failed to do this. (See OBOM at 14, quoting Judge Kuhl's order.)

Accordingly, this case has never been about whether employees can be called back from their breaks in the event of an emergency. Interrupting a

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[10] *See,* 10JA 2925, 2926 [identifying opposition declarations]; *see, e.g.,* 11JA 2995, 3000, 3006, 3046, 3147, 3143 [a sample of six of the largely-identical opposition declarations].

lawful off-duty rest break because of an emergency does not mean that the rest break policy was illegal. Here, of course, ABM's security guards did not merely face the prospect of being called back from lawful rest breaks. They were performing some of their job duties the whole time, and thus were never given a lawful rest break to begin with. ABM's attempt to recast this case as anything other than that is belied by the record, as explained below.

2. ABM is foreclosed from attacking the facts stated in the Court of Appeal's opinion because it never challenged the accuracy of the Court's factual discussion in a rehearing petition

As ABM acknowledges, the Court of Appeal credited Setayesh's testimony in its opinion, concluding that ABM "admitted [that] ABM guards are not relieved of all duties during rest breaks." (ABOM at 42, citing *Augustus v. ABM Security Services, Inc.* (2014) 182 Cal.Rptr.3d 679, 681.)

As noted by the plaintiffs in their opening brief, the Court of Appeal also specifically detailed the principal duties that ABM required its guards to perform while they were on duty, and the principal duties that ABM required the guards to perform during rest breaks. The plaintiffs placed that discussion into a chart on page 3 of their opening brief. Because that chart is relevant to the parties' arguments here, the plaintiffs will again set forth the chart below, for the Court's convenience:

Principal job duties of ABM security guard while on duty	**ABM guard responsibilities during rest breaks**
"The primary responsibility of Security at a guarded facility is to provide an immediate and correct response to emergency/life safety situations (i.e. fire, medical emergency, bomb threat, elevator entrapments, earthquakes, etc.) In addition, the Security officers must provide physical security for the building, its tenants and their employees. The security officer can accomplish this task by observing and reporting all unusual activities. In essence, the officer is the eyes and ears of the Building Management." (*Augustus,* 182 Cal.Rptr.3d at pp. 679-680.)	"ABM admitted it requires its security guards to keep their radios and pagers on during rest breaks, to remain vigilant, and 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." (*Augustus,* 182 Cal.Rptr.3d at p. 680.)

ABM has not suggested in its answering brief that the chart somehow misquotes the Court of Appeal's opinion. In fact, ABM never referred to the chart. Nor did ABM contend in the Court of Appeal that any aspect of the court's opinion was factually inaccurate. ABM did not file a rehearing petition seeking the correction of any portion of the opinion below. To the contrary, ABM filed a request asking the Court to publish its opinion without asking for any changes in the opinion.

Rule of Court 8.500(c) makes clear that this Court will generally accept the statement of the facts and issues contained in a Court of Appeal's opinion, "unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a

petition for rehearing." This Court has consistently enforced this rule. (*See, e.g., People v. Brown* (2015) 61 Cal.4th 968, 978-979; *People v. McCullough* (2013) 56 Cal.4th 589, 591; *People v. Correa* (2012) 54 Cal.4th 331, 334, fn. 3; *People v. Anderson* (2010) 50 Cal.4th 19, 23, fn. 3.) The Court has also noted that refusing to allow a party to attack the Court of Appeal's factual discussion is particularly appropriate, where, as here, the party making the attack not only failed to seek rehearing, but filed a publication request. (*People v. Brown*, 61 Cal.4th at p. 979.)

ABM should therefore be foreclosed from attempting to re-argue the facts in this Court. (*See, e.g.,* ABOM at 42-43 [arguing that the Court of Appeal's reliance on Setayesh's admission was misplaced because it "misconstrues Setayesh's testimony in three critical ways"; *Id.* at 44 [arguing that ABM's admission in its summary judgment opposition that "guards simply must keep their radios or pagers on" should be construed to mean that "*some* guards, at *some* sites, at *some* times, were required to be on call during rest breaks."(emphasis in text)].)

3. ABM guards were not relieved of all duty while they were on rest breaks

As Judge Kuhl found when she granted summary adjudication, and as the Court of Appeal's opinion makes clear, when ABM guards were on duty, their "principal responsibility" was to remain alert to situations that required some type of response, and then to provide the appropriate response, such as calling the police, calling for an ambulance, notifying building management of a problem, or simply providing assistance such as escorting a tenant to her car. (*Augustus*, 182 Cal.Rptr.3d at pp. 679-680; 13JA 3757-3758.) This was what the guards were paid to do, and this is the service that ABM sells its customers, who hire it to provide security for their facilities.

The opinion below also explains that when guards were on break, ABM still expected them to "remain vigilant" and 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." (*Augustus*, 182 Cal.Rptr.3d at p. 680.) In other words, as the chart clearly shows, ABM did not relieve its guards of all duties during their rest breaks; rather, it required the guards to continue to perform some of their principal job duties.

ABM's response is to suggest that the Court of Appeal's description of what ABM required from its guards during rest breaks merely described "the type of work a guard might perform *if* she were *called back to duty*." (ABOM at 22, emphasis in original.) That is an imaginative spin, but it suggests that security guards —or police or firefighters —are not actually working until a situation occurs that requires a response from them.

In making this argument, ABM is taking the losing side in an argument that was settled long ago. As the plaintiffs pointed out on page 44 of their opening brief, both this Court and the U.S. Supreme Court have held that "readiness to serve may be hired, quite as much as service itself." (*Mendiola*, 60 Cal.4th at p. 840, citing *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133.) Hence, "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." (*Id.*)

ABM expects its guards to be ready, alert and vigilant, and then if something does happen, to deal with it. That is the essence of their job and it is their principal job duty. The record plainly shows that ABM requires its guards to perform this function both while they are on duty, *and* while they are on their rest breaks. This is why, when both Judge Kuhl and Judge Wiley applied the relieved-of-all-duty standard to ABM's practice

concerning rest breaks, they correctly concluded that ABM did not comply with California law.

C. ABM cannot articulate a justification for allowing employers to require their employees to perform compensable work during rest breaks

In *Mendiola*, this Court held that, "under the California wage order covering security guards, these plaintiffs are entitled to compensation for all on-call hours spent at their assigned worksites under their employers' control." (*Id.*, 60 Cal.4th at p. 836.) The guards in *Mendiola* were required to be at their employer's jobsite, in trailers, where they could read, watch television, use the internet, or even sleep. But because they had to respond to calls or to any suspicious activity that they became aware of, they were under their employer's control, and therefore entitled to compensation for the entire time they were "on call." (*Id.*, 60 Cal.4th at p. 842.)

While ABM's guards were on rest breaks, they too were expected to respond to any situation that developed at the work site.[11] Hence, under *Mendiola*, ABM guards were engaged in compensable work under the wage order while they were on rest breaks. ABM does not suggest otherwise. Of course, since the wage order specifies that time spent on rest breaks is counted as "hours worked," there is no compensability issue presented here.

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[11] ABM argues in its brief that there is nothing in the record to allow the Court to conclude that an "immediate" response was required from its guards while they were on rest break. (ABOM at 22.) But the chart on page 18, above, refutes ABM's point. While on duty, ABM guards were expressly required to provide an "immediate" response to any situation while on duty. The guards' duties while on rest breaks mirrored this requirement, since guards were required to remain vigilant and to respond "when needs arise." Nothing suggests that guards could defer their response until their rest breaks were over and they were back on duty.

Rather, the issue is whether what constitutes "work" as that term is used in section 226.7 is the same as what qualifies as "hours worked" under the wage order. Stated differently, the inquiry here is whether the test for "work" under section 226.7 is, or should be, different than the test for "hours worked" under the wage order. In their opening brief, the plaintiffs explained that there was neither a textual nor a policy justification for construing "work" in section 226.7 more narrowly than "hours worked" in the wage order. (OBOM at 42-46.) As a result, the holding in *Mendiola* , that guards were working while on call at the job site, dictates that ABM's rest breaks are not valid.

Specifically, wage order 4 requires employers to pay their employees for all "hours worked." (*Mendiola*, 60 Cal.4th at p. 839.) The wage order defines "hours worked" as, "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (*Id.*)

As the plaintiffs pointed out in their opening brief, the test for compensability under the wage order (employer control) parallels the *Brinker* test for an off-duty meal period that complies with section 226.7 (relief of all duty and relinquishment of employer control). This makes sense. When employees engage in compensable work, they should be paid for it. And given section 226.7, employers may not require their employees to engage in compensable work during rest periods, which are supposed to be duty free.

ABM argues that there is a distinction between what constitutes "hours worked" in the compensable-time context and prohibited "work" under section 226.7, because the test for "hours worked" in the wage order has two components — time when the employee is under the employer's

control, *or,* time when the employee is suffered or permitted to work. (ABOM at 28.) ABM's observation is correct, but it is not clear how this helps ABM's position.

When an employee is "suffered or permitted" to work, it means that the employee is working, but not at the employer's request. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.) An example would be unauthorized overtime, which the employer has not requested or required. (*Id.*) Section 226.7 does not prohibit "work" during rest breaks; it prohibits employers from *requiring* their employees to work. By definition, employees who are suffered or permitted to work are not being required to do so.

The conclusion that employees cannot be made to perform compensable work during rest breaks is buttressed by *Murphy*, which held that the compensation that section 226.7 makes available to employees who have been required to work during breaks is properly treated as a wage, not a penalty. (*Murphy*, 40 Cal.4th at p. 1114.) In reasoning to that conclusion, the Court explained that if employers were allowed to require their employees to work during rest breaks, employees would essentially perform 20 minutes of "free" labor per 8-hour shift. (*Id.*, 40 Cal.4th at p. 1104.) This is because "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." (*Id.*)

Murphy therefore clearly connects the prohibition on work contained in section 226.7 with the concept of compensable work under the wage order, and therefore forbids the outcome that ABM argues for here —a construction of section 226.7 that allows employees to be required to perform compensable work during rest breaks.

ABM's response on this issue, as with its analysis of the relieved-of-all-duty standard, is oblique. Its answering brief contains three distinct arguments:

- That the compensable-time cases do not address an employer's obligations to provide rest breaks (ABOM at 28);
- That *Mendiola* and the other compensable-time cases show that on-call rest breaks cannot be *per se* invalid (ABOM at 29-34); and
- That the plaintiffs' reliance on *Mendiola* and *Morillion* is misplaced, because those cases are factually distinguishable (ABOM at 34-36).

Although ABM's observation that the compensable-time cases do not address an employer's obligations concerning rest breaks is accurate, it misses the point. *Mendiola*, for example, is relevant here for two reasons. It demonstrates that, even though ABM allowed its guards to browse the internet or make phone calls during their rest breaks, this did not mean that they were not working. And it shows that the guards who were on call at their employer's work site were under their employer's control and providing a service to their employer, and were therefore entitled to compensation for the on-call time. *Mendiola* accordingly demonstrates that ABM's guards, who were likewise providing services to their employer during their rest breaks, were therefore working, and not receiving off-duty rest breaks.

ABM devotes substantial space to its second argument, which seeks to establish that "simply being on-call does not constitute performing

work." (ABOM at 29.)[12] Depending on the particular situation, that could be true. Without knowing the exact arrangement, it would be difficult to craft any absolute rules regarding which "on-call" relationships constitute work and which do not. As plaintiffs noted in their opening brief, "[The term 'on call'] encompasses a disparate variety of arrangements between employer and employee. Some of these on-call arrangements qualify as work, while others do not." (ABOM at 39.) Plaintiffs cited *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403, 408, as an example. That case detailed two different types of on-call arrangements by the police officers, one that constituted "working" and one that did not. (*Id.*) Therefore, it is not surprising that an "on-call" physician who is out for dinner with her spouse is probably not working, while a security guard who remains "on-call" during a rest break, taken in the middle of her shift, is surely working.

Since there are many different kinds of on-call arrangements, the Courts have formulated a multi-factor test to sort out which arrangements qualify as compensable work. (*Mendiola*, 60 Cal.4th at p. 840.) The purpose of the test is to determine which arrangements involve a sufficient degree of employer control over the employee as to qualify as compensable "hours worked" under the wage order. (*See, e.g., Mendiola*, 60 Cal.4th at p. 840

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[12] As it did below, ABM cites the unpublished, pre-*Brinker* federal trial court decision in *Temple v. Guardsmark* (N.D. Cal. 2011, No. C. 09-02124 SI) 2011 WL 723611, for the proposition that on-call rest breaks are acceptable under California law. It even attaches a copy of *Temple* to its brief. In the trial court, Judge Wiley criticized ABM for citing *Temple* because it lacks any legal analysis justifying on-call breaks. Rather, and as Judge Wiley pointed out to ABM, the opinion clearly states that the parties simply stipulated that on call breaks were acceptable. (3RT 6324:22-6325:15.)

["California courts considering whether on-call time constitutes hours worked have primarily focused on the extent of the employer's control."].) In addition to the multi-factor test, "Courts have also taken into account whether the 'on-call waiting time is spent primarily for the benefit of the employer and its business." (*Id.*, internal brackets and ellipses omitted.)

ABM, at page 31 of its brief, chides the plaintiffs for not "grappling" with the multi-factor test. But at page 33, it acknowledges that many of the factors in the test "are clearly irrelevant to rest breaks," and explains that, "to the extent a multifactor analysis is even appropriate here, only three *Mendiola* factors could even be potentially relevant . . ." (*Id.*) ABM therefore does not seem convinced that the multi-factor test even applies[13].

Regardless, no weighing of factors is necessary here, because *Mendiola* holds that security guards who are kept on call at their employer's jobsite, and who, despite being allowed to engage in certain leisure activities, are nevertheless expected to respond to security-related calls, are working and hence entitled to compensation.

Even without relying on *Mendiola*, the same conclusion would follow from the responsibilities that ABM required of its guards while they were on rest breaks. By requiring its guards to (a) remain in some kind of communication contact with a pager or radio, (b) to remain "vigilant" during the breaks, and to (c) respond when needs arise, whether the need is a legitimate emergency or something more routine such as a client request

[13] This is likely because the cases that apply this test have discussed on-call arrangements that take place outside an employee's normal shift and away from the actual work premises. This multi-factor test was not formulated to analyze whether an "on-call" ten minute rest break that takes place typically in the middle of the employee's shift constitutes work. This is likely why ABM acknowledges that this test is ill-suited to the rest break situation.

for an escort to the parking lot (*Augustus*, 182 Cal.Rptr.3d at p. 680), ABM requires its guards to work during their rest breaks. No multi-factor test is needed to establish this reality.

ABM's third argument, focusing on what it perceives as factual dissimilarities between this case and *Mendiola* and *Morillion*, also fails to provide any reason why this Court should hold that employees can be allowed to perform compensable work during their rest breaks. ABM argues that the employers in those cases placed "stringent additional restrictions on their employees' ability to engage in non-work activities." (ABOM at 34.) ABM's efforts to distinguish these cases are unavailing.

For example, ABM observes that in *Mendiola*, the guards were required to reside in trailers at the work site; restrictions were placed on visitors, pets, and alcohol use; and guards could not easily trade on-call responsibilities. But the very nature of a rest break, which is a 10 minute respite during the guard's normal shift, necessarily means that ABM guards likewise cannot have visitors or pets, or use alcohol. ABM certainly does not suggest otherwise. So the restrictions in *Mendiola* that ABM points to would also seem to apply to ABM's guards, given the nature of rest breaks.

As for *Morillion*, ABM notes that the Court focused on the practical consequences of the employer's requirement that its employees assemble at designated locations to be transported to the jobsite in buses supplied by the employer. The Court noted that since employees could not use their own cars to get to and from the fields where they worked, they could not drop off their children at school or stop for breakfast before work, or run other errands that required the use of a car. ABM notes that there was no finding by the trial court that ABM placed similar restrictions on its guards during rest breaks.

But ABM is merely comparing different kinds of restrictions, while missing the larger point. ABM concedes that it did not relieve its guards of all duties during their rest breaks, and the record clearly shows that the guards remained under its control during those breaks. The fact that ABM's guards could drive to work but the field workers in *Morillion* could not simply shows that the manner in which ABM exercised control was different than the way that the employer exercised control in *Morillion.* This difference does not negate the existence of ABM's control.

CONCLUSION

Section 226.7 applies with equal force to meal breaks and rest breaks. Accordingly, the considerations that led this Court in *Brinker* to adopt the relieved-of-all-duty standard for meal breaks dictate that the same standard should apply to rest breaks. ABM fails to articulate any viable reason why what constitutes "work" if performed during a meal break would not also constitute "work" if done during a rest break.

The application of the relieved-of-all duty test is dispositive here, because the record plainly established that ABM did not relieve its guards of all duties during rest breaks. Contrary to ABM's protests, the plaintiffs do not seek to hold ABM liable because its guards were merely subject to the "potential" for interruption during their rest breaks; ABM is liable because it required its employees to *work* during their breaks.

Nor does ABM offer any reason why this Court should find that the term "work" in section 226.7 should be construed more narrowly than the concept of "hours worked" in the wage order — time when the employee is under the employer's control. This result is consistent with *Brinker*, and avoids the odd result that, despite the prohibition in section 226.7 on employees being required to work on their breaks, employers could still

require their employees to perform compensable work under the wage order during those breaks.

The summary judgment in favor of the plaintiffs should be affirmed.

Dated: October 21, 2015. Respectfully submitted,

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Dated: October 21, 2015.

Jeffrey I. Ehrlich

Lead Case: *Augustus, et al. v. ABM Security Services, Inc., etc.*
Supreme Court No. S224853
Court of Appeal No. B243788 (consolidated No. B247392)
Superior Court Case Nos.: Lead Case No. BC336416
[consolidated Case Nos. BC345918 and CGC5444421]

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 237 West Fourth Street, Second Floor, Claremont, California 91711.

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[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

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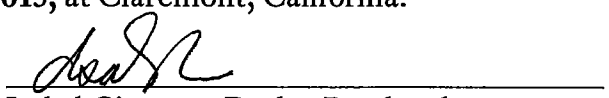

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