UNITED PARCEL SERVICE WAGE AND HOUR CASES; THOMAS McGANN, Plaintiff and Appellant, v. UNITED PARCEL SERVICE, INC., Defendant and Respondent.

B221709

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

192 Cal. App. 4th 1425; 2011 Cal. App. LEXIS 211

February 24, 2011, Filed

SUBSEQUENT HISTORY: Rehearing denied by McGann v. United Parcel Service, Inc., 2011 Cal. App. LEXIS 415 (Cal. App. 2d Dist., Mar. 16, 2011)

PRIOR HISTORY: [**1]

APPEAL from the judgment of the Superior Court of Los Angeles County, No. BC395547, JCCP No. 4606, William F. Fahey, Judge.

United Parcel Service Wage & Hour Cases, 190 Cal. App. 4th 1001, 118 Cal. Rptr. 3d 834, 2010 Cal. App. LEXIS 2073 (Cal. App. 2d Dist., 2010)

DISPOSITION: Affirmed in part, reversed in part.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

After an employer prevailed in an employee's action for unpaid overtime compensation and related claims, the trial court awarded attorney fees and costs to the employer as the prevailing party. The employee alleged that he had been misclassified as exempt. His overtime claim proceeded to a jury trial following pretrial rulings for the employer on his other claims. The jury found that he was an exempt employee under both state and federal law. (Superior Court of Los Angeles County, No. BC395547 and JCCP No. 4606, William F. Fahey, Judge.)

The Court of Appeal reversed the award of statutory attorney fees to the employer and affirmed the award of litigation costs to the employer. The court held that although fee awards are authorized only to prevailing employees (Lab. Code, § 1194, subd. (a)) on overtime compensation claims, the employer was not barred (Lab. Code, § 218.5) from seeking to recover the fees it incurred in defending the other claims. The court concluded, however, that the employer was not entitled to attorney fees on any of the claims. Section 1194 precluded recovery as to both the state and federal overtime claims. As to wage statement claims (Lab. Code, § 226, subd. (e)), fee awards are allowed only to employees. The unfair competition law (Bus. & Prof. Code, § 17200 et seq.) does not authorize attorney fees. A claim for remedial compensation (Lab. Code, § 226.7) does not trigger the reciprocal fee recovery provisions (§ 218.5). The employer could recover its litigation costs (Code Civ. Proc., § 1032, subd. (b)), because § 1194 does not expressly disallow a cost award to a prevailing employer. (Opinion by Grimes, J., with Bigelow, P. J., and Flier, J., concurring.) [*1426]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Wage and Hour Actions.--The language of Lab. Code, § 1194, subd. (a), evinces a nonreciprocal or unilateral attorney fee provision only in favor of prevailing employee-plaintiffs suing for unpaid minimum wages or overtime compensation. One-sided fee-shifting statutes are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy.

(2) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Wage and Hour Actions.--Lab. Code, § 1194, is a more specific provision than Lab. Code, § 218.5, and therefore it controls as to the availability of attorney fees with respect to claims concerning failure to pay minimum wages or overtime. The one-way fee-shifting rule in § 1194 was meant to encourage injured parties to seek redress--and thus simultaneously enforce the minimum wage and overtime laws--in situations where they otherwise would not find it economical to sue. To allow employers to invoke § 218.5 in an overtime case would defeat that legislative intent and create a chilling effect on workers who have had their statutory rights violated. Such a result would undermine statutorily established public policy. That policy can only be properly enforced by a recognition that § 1194 alone applies to overtime compensation claims.

(3) Statutes § 29--Construction--Language--Legislative Intent--Most Reliable Indicator.--The rules of statutory construction are well settled. A court must look first to the words of the statute, because they generally provide the most reliable indicator of legislative intent. If the statutory language is clear and unambiguous, the court's inquiry ends. If there is no ambiguity in the language, the court presumes the Legislature meant what it said and the plain meaning of the statute governs. In reading statutes, courts are mindful that words are to be given their plain and commonsense meaning. Statutes governing conditions of employment are to be construed broadly in favor of protecting employees. Only when a statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation.

(4) Actions and Special Proceedings § 2--Definitions and Distinctions--Cause of Action.--Code Civ. Proc., § 22, does not stand alone as the [*1427] sole basis upon which the term "action" is defined in the law. An action is simply the right or power to enforce an obligation. An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one. Further, the essence of a cause of action is the existence of a primary right and one violation of that right, i.e., it arises out of an antecedent primary right and corresponding duty, and a breach of such primary right and duty by the person upon whom the duty rests. The primary right and duty and the delict or wrong constitute the cause of action in the legal sense. The cause of action is simply the obligation to be enforced. It should also be noted that a cause of action must be distinguished from the remedy which is simply the means by which the obligation or corresponding duty is effectuated and also from the relief sought. A separate action may be filed for each independently actionable wrong or breach of duty; the term is therefore reasonably interpreted as referring to a single claim or cause of action.

(5) Statutes § 22--Construction--Reasonableness--Avoiding Absurdity.--Where the statutory language is ambiguous and susceptible of differing constructions, a court may reasonably infer that the legislators intended an interpretation producing practical and workable results rather than one resulting in mischief or absurdity. The objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in the word's interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted and especially in order to avoid absurdity or to prevent injustice.

(6) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Wage and Hour Actions.--The phrase "any action" in the last sentence of Lab. Code, § 218.5, should be interpreted to mean any cause of action seeking overtime or minimum wage compensation for which Lab. Code, § 1194, fees are recoverable.

(7) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Wage and Hour Actions.--Notwithstanding Lab. Code, § 1194, Lab. Code, § 218.5, fees may be recovered by a defendant that prevails in claims seeking unpaid wages, fringe benefits, or health and welfare or pension fund contributions. [*1428]

(8) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Wage and Hour Actions.--Lab. Code, § 1194, absolutely precludes a prevailing employer's recovery of attorney fees in an overtime or minimum wage claim.

(9) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Wage and Hour Actions.--Lab. Code, § 226, subd. (e), contains a unilateral fee provision favorable to employee-plaintiffs. Therefore, an employer is not entitled to an award of statutory fees in successfully defending a cause of action thereunder.

(10) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Unfair Competition Actions.--The unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) does not authorize an award of attorney fees. No exception exists for UCL actions predicated on a statute that authorizes such an award.

(11) Labor § 10--Regulation of Working Conditions--Wages--Distinguished from Statutory Obligations.--Like the statutory protections against working in excess of an eight-hour day or for less than the minimum wage, the provisions mandating meal and rest breaks are part of the core remedial employee protections embodied in the Labor Code and the implementing wage orders promulgated by the Industrial Welfare Commission, such as wage order No. 9-2001 (Cal. Code Regs. tit. 8, § 11090). Like overtime compensation, the obligation to provide meal and rest periods is imposed by statute, and the statutory remedy for breach of that obligation is not akin to the types of compensation that have traditionally been encompassed within the definition of wages.

(12) Labor § 10--Regulation of Working Conditions--Wages--Distinguished from Statutory Obligations.--Wages include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay. These forms of compensation an employer voluntarily offers its employees, or agrees to provide pursuant to a collective bargaining agreement, are fundamentally different than a state-imposed mandate to pay overtime, a minimum wage or compensation for a missed meal or rest break.

(13) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Wage and Hour Actions.--A claim for remedial compensation under [*1429] Lab. Code, § 226.7, does not trigger the reciprocal fee recovery provisions of Lab. Code, § 218.5.

(14) Costs § 20--Attorney Fees--Other Particular Statutory Provisions--Wage and Hour Actions.--Since none of the claims on which an employer prevailed in an employee's action for unpaid overtime compensation and related claims permitted the recovery of attorney fees, an award of statutory fees to the employer was in error.

[Wilcox, Cal. Employment Law (2010) ch. 5, § 5.72; Cal. Forms of Pleading and Practice (2010) ch. 250, Employment Law: Wage and Hour Disputes, § 250.40.]

(15) Costs § 2--Right to Costs--Prevailing Parties--Express Exceptions.--In order to deem a prevailing party outside the scope of the general cost recovery provisions of Code Civ. Proc., § 1032, subd. (b), there must be an express statutory prohibition.

(16) Costs § 2--Right to Costs--Prevailing Parties--Wage and Hour Actions.--Since there is no language in Lab. Code, § 1194, expressly disallowing recovery of litigation costs to a prevailing employer-defendant, such an employer may recover an award of reasonable statutory costs under Code Civ. Proc., § 1032, subd. (b), including up through the time of trial.

(17) Courts § 45--Decisions and Orders--Doctrine of Stare Decisis--Obiter Dicta--Points Actually Involved and Decided.--An appellate decision is authority only for the points actually involved and actually decided.

COUNSEL: Furutani & Peters, John A. Furutani; Duckworth Peters Lebowitz & Olivier and Mark C. Peters for Plaintiff and Appellant.

Paul, Hastings, Janofsky & Walker, Katherine C. Huibonhoa, Elizabeth A. Brown and Haley M. Morrison for Defendant and Respondent.

JUDGES: Opinion by Grimes, J., with Bigelow, P. J., and Flier, J., concurring.

OPINION BY: Grimes [*1430]

OPINION

GRIMES, J.--Plaintiff and appellant Thomas McGann (McGann) brought an action against his

employer, defendant and respondent United Parcel Service, Inc. (UPS), seeking recovery of unpaid overtime compensation and related claims. [1] Five of McGann's six causes of action were disposed of favorably to UPS in pretrial motions. The action proceeded to a jury trial on McGann's first cause of action for overtime compensation pursuant to Labor Code section 1194. The jury returned a verdict for UPS. The trial court, in posttrial motions, awarded UPS attorney fees and costs as prevailing party.

1 McGann is a former class member of the federal class action entitled *Marlo v. United Parcel Service, Inc*., case No. CV 03-04336-DDP [**2] (RZx) which was decertified. (See *Marlo v. United Parcel Service, Inc*. (C.D.Cal. 2008) 251 F.R.D. 476.) This individual action was then filed in Los Angeles Superior Court. By order dated November 25, 2009, the action was deemed an ?included action" in the coordinated proceeding entitled *United Parcel Service Wage and Hour Cases*, Judicial Council Coordination No. 4606. The Second District was designated the court having jurisdiction for intermediate appellate review of the coordinated proceeding. Coordinated appeals pending before this court are B225089, B225090, B225092, B220250 and B221709.

McGann appeals, raising three issues: (1) the trial court erred in awarding statutory fees to UPS because Labor Code section 1194 contains a unilateral fee-shifting provision allowing fees only to a prevailing plaintiff; (2) even assuming some fees were properly awarded to UPS, the court erred in apportioning and fixing the amount of the award; and (3) the court erred in awarding litigation costs to UPS, including costs incurred through trial. We conclude UPS is not entitled to recover statutory attorney fees as a prevailing party in this action and therefore reverse the fee award. We affirm the [**3] order awarding litigation costs to UPS.

BACKGROUND

McGann worked for UPS for a number of years, including as an on-road supervisor from 2000 to 2005. He routinely worked in excess of eight hours per day and often skipped meal and rest periods due to the press of his work duties. Because his supervisory position was classified as exempt, McGann did not receive overtime compensation or the other benefits accorded nonexempt employees under California law. McGann filed a complaint against UPS stating six causes of action arising from his contention he was misclassified as exempt: the first cause of action for failure to pay overtime compensation pursuant to Labor Code sections 510 and 1194; the second cause of action for failure to provide meal and rest periods pursuant to Labor Code section 226.7; the third cause of action for failure to maintain and provide itemized wage statements pursuant to Labor Code sections 226 and 226.3; the fourth [*1431] cause of action for common law conversion; the fifth cause of action seeking injunctive and other equitable relief; and the sixth cause of action for unfair competition pursuant to Business and Professions Code section 17200 et seq.

Causes of action two [**4] through six were disposed of favorably to UPS by way of pretrial motions. UPS obtained a dismissal of McGann's fourth cause of action for conversion following the court's granting, in part, of its motion for judgment on the pleadings. Thereafter, the court granted UPS's motion for summary adjudication of McGann's second, third, fifth and sixth causes of action. The court denied summary adjudication of McGann's first cause of action for overtime compensation, and that claim proceeded to a jury trial.

UPS raised multiple defenses to the overtime claim, including that McGann was properly classified as exempt under both state and federal law. UPS asserted McGann was an exempt employee as described in the executive and administrative exemptions set forth in wage order No. 9-2001, codified at California Code of Regulations, title 8, section 11090 (Wage Order 9), governing workers employed in the transportation industry like McGann. UPS further contended McGann was exempt from receiving premium pay for overtime hours under the federal Motor Carrier Act of 1980 (MCA) (Pub.L. No. 96-296 (July 1, 1980) 94 Stat. 793). UPS prevailed at trial, the jury finding McGann was exempt from receiving overtime compensation under both Wage Order 9 and the MCA. [**5] Judgment was entered in favor of UPS on October 2, 2009.

UPS filed a motion for attorney fees as the prevailing party pursuant to Labor Code section 218.5. UPS conceded it was not entitled to recover fees for the successful defense of McGann's overtime claim, but sought recovery of $106,799 in attorney fees incurred in the defense of the other causes of action. UPS also sought statutory costs, including trial costs, in the amount of $20,703.70. McGann opposed UPS's request for attorney

fees and costs, contending primarily that the unilateral fee-shifting language in Labor Code section 1194 precluded UPS, as a successful *defendant*, from recovering any statutory fees or costs.

After entertaining argument on UPS's motion for fees and McGann's motion to strike or tax costs, the trial court determined UPS was entitled to recover statutory attorney fees and costs as a prevailing party under Labor Code section 218.5 and Code of Civil Procedure section 1032, subdivision (b), respectively. The trial court awarded UPS $100,000 in statutory attorney fees plus $16,693.70 [2] in costs. This appeal followed.

2 Before the court ruled on McGann's motion to strike or tax costs, UPS withdrew its request for $3,635 for [**6] trial transcripts and $375 in expert fees.

[*1432]

DISCUSSION

1. *The Award of Statutory Attorney Fees to UPS*

a. *Standard of review*

Our review of an award of attorney fees is ordinarily performed under the abuse of discretion standard. However, de novo review is warranted where, as here, determination of the propriety of such an award is dependent on statutory interpretation. (*Carver v. Chevron U.S.A., Inc*. (2002) 97 Cal.App.4th 132, 142 [118 Cal. Rptr. 2d 569] (*Carver I*); accord, *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1426 [95 Cal. Rptr. 2d 57] (*Earley*).) We therefore exercise our independent review.

b. *Labor Code sections 218.5 and 1194*

Both UPS and McGann pled a request for attorney fees in their respective operative pleadings. UPS successfully obtained an award of attorney fees as the prevailing party pursuant to Labor Code section 218.5. McGann, relying on *Earley*, contends the award was erroneous because the gravamen of his action was for unpaid overtime compensation, and Labor Code section 1194 precludes an award of attorney fees to the prevailing employer-defendant. UPS contends it is nonetheless entitled to statutory fees on the non-overtime-related claims pursuant to section 218.5. We therefore examine the interplay between sections 218.5 [**7] and 1194.

Labor Code section 218.5 contains a reciprocal fee recovery provision in favor of the "prevailing party" in certain wage disputes. Section 218.5 states, in relevant part: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action. ... [¶] *This section does not apply to any action for which attorney's fees are recoverable under Section 1194*." (Italics added.)

(1) Labor Code section 1194, subdivision (a) provides that "[n]otwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." The language of section 1194 evinces a nonreciprocal or unilateral attorney fee provision only in favor of prevailing employee-plaintiffs suing for unpaid [**8] minimum wages or overtime compensation. One-sided fee-shifting statutes [*1433] "are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy." (*Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 324 [225 Cal. Rptr. 861].)

(2) Labor Code section 1194 is the more specific provision of the two statutes and therefore it controls as to the availability of attorney fees with respect to claims concerning failure to pay minimum wages or overtime. (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 270 [15 Cal. Rptr. 3d 244]; see also Civ. Code, § 3534 ["[p]articular expressions qualify those which are general"].) This district has specifically so held. "There can be no doubt that the one-way fee-shifting rule in [Labor Code] section 1194 was meant to 'encourage injured parties to seek redress--and thus simultaneously enforce [the minimum wage and overtime laws]--in situations where they otherwise would not find it economical to sue.' [Citation.] To allow employers to invoke [Labor Code] section 218.5 in an overtime case would defeat that legislative intent and create a chilling effect on workers who have had [**9] their statutory

rights violated. Such a result would undermine statutorily-established public policy. That policy can only be properly enforced by a recognition that [Labor Code] section 1194 alone applies to overtime compensation claims." (*Earley*, *supra*, 79 Cal.App.4th at pp. 1430-1431, italics omitted.)

Unlike McGann, the plaintiffs in *Earley* only sued for unpaid overtime compensation. (*Earley*, *supra*, 79 Cal.App.4th at p. 1424.) Here, McGann sued to recover statutory remedies for numerous alleged violations of employee protection statutes set forth in the Labor Code, including those requiring payment of overtime, payment of compensation for missed meal and rest breaks, and failure to maintain time records. He also sought recovery for conversion and the statutory remedy for violation of the unfair competition law (UCL). (Bus. & Prof. Code, § 17200 et seq.) We must therefore consider whether UPS may recover attorney fees for the successful defense of other claims that have been joined with the overtime compensation claim.

(3) The rules of statutory construction are well settled. "[W]e must look first to the words of the statute, 'because they generally provide the most reliable indicator [**10] of legislative intent.' [Citation.] If the statutory language is clear and unambiguous our inquiry ends. 'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' [Citations.] In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. [Citation.] We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. [Citations.] Only when the statute's language is ambiguous or susceptible of [*1434] more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (*Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, 1103 [56 Cal. Rptr. 3d 880, 155 P.3d 284] (*Murphy*).)

The parties do not contend the language of Labor Code section 1194 is ambiguous. And, on its face, the plain language of section 1194 is unequivocal: it permits only a prevailing employee-plaintiff to recover attorney fees in an action for unpaid minimum wages or overtime compensation. Here, the dispute over entitlement to fees arises from the language of Labor Code section 218.5, which provides for reciprocal recovery of attorney fees to the [**11] prevailing party in an action to recover unpaid wages or benefits, with the following exception: "This section does not apply to *any action* for which attorney's fees are recoverable under Section 1194." (§ 218.5, italics added.) [3]

3 Additional express exceptions set forth in the statute are not pertinent to our discussion.

The phrase "any action" can plausibly be given two different meanings. It can reasonably be interpreted to mean a successful employer-defendant cannot recover Labor Code section 218.5 fees in *any civil action* in which an overtime or minimum wage cause of action is pled, irrespective of whether or not any other wage claims are joined. It can also reasonably be read to mean the prevailing employer-defendant cannot recover section 218.5 fees as to *any claim or cause of action* seeking overtime or minimum wage compensation, but may recover fees incurred in the successful defense of other joined claims seeking non-overtime-related wages and benefits, if such claims independently support entitlement to section 218.5 fees.

(4) McGann argues the phrase "any action" can only be read as meaning a "civil action." He cites Code of Civil Procedure section 22 in support which defines "an [**12] action" as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." However, section 22 does not stand alone as the sole basis upon which the term "action" is defined in the law. As the Supreme Court has explained, "an action is simply the right or power to enforce an obligation. '*An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one*,' ... ." (*Frost v. Witter* (1901) 132 Cal. 421, 426 [64 P. 705], some italics added.)

Further, " '[t]he essence of a cause of action is the existence of a primary right and one violation of that right, i.e., it arises out of an antecedent primary right and corresponding duty, and a breach of such primary right and duty by the person upon whom the duty rests. [Citations.] The primary right and duty and the delict or wrong constitute the cause of action in the legal sense. [*1435] [Citations.] "The cause of action is simply the obligation to be enforced." [Citations.]' It should also be noted that a cause of action must be distinguished from the remedy which is simply [**13] the means by which the obligation or corresponding duty is effectuated and

also from the relief sought." (*Elliott v. City of Pacific Grove* (1975) 54 Cal.App.3d 53, 57 [126 Cal. Rptr. 371].) A separate "action" may be filed for each independently actionable wrong or breach of duty; the term is therefore reasonably interpreted as referring to a single claim or cause of action.

(5) We are mindful of the rule that where, as here, "the statutory language is ambiguous and susceptible of differing constructions, we may reasonably infer that the legislators intended an interpretation producing practical and workable results rather than one resulting in mischief or absurdity." (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919 [76 Cal. Rptr. 3d 483, 182 P.3d 1027].) " ' "[T]he objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in [the word's] interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted and especially in order to avoid absurdity or to prevent injustice." [Citation.]' [Citation.]" (*Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 232 [110 Cal.Rptr. 144, 514 P.2d 1224].)

(6) We [**14] conclude the phrase "any action" in the last sentence of Labor Code section 218.5 should be interpreted to mean any "cause of action" seeking overtime or minimum wage compensation for which Labor Code section 1194 fees are recoverable. That construction best reflects our duty to harmonize seemingly conflicting statutory provisions and avoid a construction that ignores or nullifies one statutory provision in favor of another. (*Stone Street Capital, LLC v. California State Lottery Com*. (2008) 165 Cal.App.4th 109, 118 [80 Cal. Rptr. 3d 326]; cf. *Carver I, supra*, 97 Cal.App.4th 132 [unilateral fee-shifting provision in Cartwright Act did not preclude recovery of contract-based fees arising from other claims].) To interpret the phrase to mean "civil action," as McGann urges, would lead to absurd results.

For example, an employee-plaintiff with a claim for unpaid overtime and other claims for unpaid health benefits and pension fund contributions could file two separate civil actions, one seeking recovery of unpaid overtime, and the other seeking recovery of unpaid benefits and contributions. The plaintiff would be subject to an award of fees under Labor Code section 218.5 if the employer-defendant prevailed in the action [**15] for unpaid benefits and contributions. However, if that same plaintiff made the procedural choice of joining all claims in one lawsuit, the plaintiff would be protected from any award of fees in favor of the employer-defendant, even if the defendant prevailed on [*1436] all claims, simply because the plaintiff joined a claim for unpaid overtime compensation with claims for unpaid benefits and contributions. Under the rules of permissive joinder, a plaintiff-employee could join any number of causes of action against an employer-defendant and thereby defeat the prevailing defendant's statutory and/or contractual right to recover fees simply by including one cause of action for overtime compensation. [4] This is not a reasonable interpretation that harmonizes the overall statutory scheme and we therefore reject it.

> 4 Code of Civil Procedure section 427.10 allows for unrestricted permissive joinder of causes of action against a defendant, even those unrelated by subject matter.

(7) The legislative history supports our interpretation. The Legislative Counsel's Digest of Assembly Bill No. 2509 (1999-2000 Reg. Sess.)--the bill which added the Labor Code section 1194 language to Labor Code section 218.5--states the amended language creates [**16] "an express exception" to the general rule of section 218.5 by precluding a prevailing employer's recovery of fees in actions for unpaid overtime or minimum wage compensation. (Legis. Counsel's Dig., Assem. Bill No. 2509 (1999-2000 Reg. Sess.) 6 Stats. 2000, Summary Dig., p. 399.) There is no language indicating any intent by the Legislature to completely nullify section 218.5 in any civil action simply because of the joinder of one cause of action for overtime compensation with other wage and benefit claims. And, despite McGann's argument to the contrary, *Earley* does not compel a different result. *Earley* clearly states that, notwithstanding section 1194, section 218.5 fees may be recovered by a defendant that prevails on claims seeking unpaid "wages, fringe benefits, or health and welfare or pension fund contributions." (§ 218.5; see *Earley, supra*, 79 Cal.App.4th at p. 1430.)

c. *UPS is not entitled to statutory fees*

Given the foregoing analysis, we conclude UPS was not barred from seeking statutory attorney fees solely because McGann's lawsuit included a claim for overtime compensation. However, we conclude none of the other

causes of action entitled UPS as the prevailing party to recover [**17] attorney fees.

(8) UPS concedes there is no basis for recovery of fees related to the successful defense of the first cause of action, the statutory overtime claim. Labor Code section 1194 absolutely precludes a prevailing employer's recovery of attorney fees in an overtime or minimum wage claim. (*Earley, supra*, 79 Cal.App.4th 1420.) As such, there is no basis for an award of any fees incurred after the summary judgment ruling which disposed of all claims except the first cause of action for unpaid overtime compensation.

UPS's attempt to argue entitlement to postsummary judgment fees based on the jury's finding of no liability under the MCA is without merit. UPS [*1437] asserted the MCA defense to defeat McGann's claim for overtime pay. At trial, McGann argued that if the MCA was found to apply to him, then he would still be entitled to straight-time pay for any overtime hours worked, even if he was not entitled to premium pay (time and a half) as provided by California law. The MCA dispute concerned unpaid overtime compensation allegedly due McGann on account of his claim he was misclassified as exempt. McGann's "straight-time" argument was simply an alternative theory of, and means of computing, [**18] allegedly unpaid overtime compensation due him for days he worked in excess of eight hours. Since Labor Code section 1194 precludes recovery of attorney fees by an employer that prevails in an action for unpaid overtime, we find UPS is precluded from recovering fees for successfully persuading the jury that McGann was not entitled to overtime compensation under either the MCA or Wage Order 9.

(9) The third cause of action sought statutory penalties for failure to properly itemize wage statements pursuant to Labor Code section 226. Section 226, subdivision (e) contains a unilateral fee provision favorable to employee-plaintiffs, similar to Labor Code section 1194. Therefore, UPS was not entitled to an award of statutory fees in successfully defending this cause of action.

(10) The fourth cause of action for common law conversion was primarily based on the allegedly wrongful withholding of overtime compensation. UPS has not articulated any legal basis for the recovery of fees in connection with this common law tort. Similarly, the fifth and sixth causes of action sought various forms of relief under the UCL. We are not persuaded that incorporation of the Labor Code violations into these causes of action [**19] triggers Labor Code section 218.5 fees. "The UCL does not authorize an award of attorney fees. No exception exists for UCL actions predicated on a statute that authorizes such an award." (*People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 891 [112 Cal. Rptr. 3d 574].) UPS was not entitled to recover fees for its successful defense of the fourth, fifth and sixth causes of action.

That leaves only the second cause of action, alleging violations of Labor Code section 226.7, the statute mandating meal and rest breaks for nonexempt employees, as a possible basis for the fee award. However, considering the overall statutory scheme, we conclude UPS is not entitled to recover fees for its successful defense of this cause of action seeking remedies for missed meal and rest breaks.

UPS's argument that Labor Code section 218.5 fees may be recovered for the successful defense of a Labor Code section 226.7 claim alleging missed meal and rest breaks rests entirely upon *Murphy, supra*, 40 Cal.4th 1094. But, [*1438] *Murphy* did not address the Labor Code statutes permitting recovery of attorney fees. Instead, *Murphy* decided an entirely different question: which statute of limitations in the Code of Civil Procedure [**20] applies to an action seeking compensation for missed meal and rest breaks. The *Murphy* court had to decide whether an action for compensation for missed breaks under Labor Code section 226.7 is subject to the one-year statute of limitations governing claims for penalties (Code Civ. Proc., § 340, subd. (a)) or the three-year statute governing claims for liabilities created by statute, other than a penalty or forfeiture (Code Civ. Proc., § 338, subd. (a)). (*Murphy, supra*, at pp. 1099-1100.) *Murphy* concluded the statutory remedy for missed breaks is more akin to a "wage" than a penalty, thereby giving aggrieved employees the benefit of the three-year statute of limitations. (*Murphy, supra*, at pp. 1103-1111.)

UPS contends *Murphy* establishes that an action for recovery of the statutory remedies for missed meal and rest breaks is a claim for "nonpayment of wages" within the meaning of Labor Code section 218.5. UPS offers no analysis to support its contention that *Murphy*, which decided a statute of limitations question under the Code of Civil Procedure, should control or guide our analysis

of the Labor Code attorney fees provisions. We are not persuaded that extending the holding in *Murphy* [**21] to the discreet fee issue presented here is appropriate or in keeping with our duty to construe statutes regulating the conditions of employment liberally, "with an eye to protecting employees." (*Murphy, supra*, 40 Cal.4th at p. 1111; accord, *Ramirez v. Yosemite Water Co*. (1999) 20 Cal.4th 785, 794 [85 Cal. Rptr. 2d 844, 978 P.2d 2].)

Recognizing that the statutory remedy for denial of breaks--payment of one additional hour of regular pay for each day a break is denied--was susceptible of an interpretation as a wage and also as a penalty, the Supreme Court in *Murphy* found the remedy provided in Labor Code section 226.7 was primarily intended "to compensate employees for their injuries" occasioned by missed breaks and was, therefore, akin to a wage for purposes of assigning the appropriate statute of limitations. (*Murphy, supra*, 40 Cal.4th at p. 1111.) The court therefore gave employees the benefit of the three-year statute of limitations. However, nothing in the *Murphy* opinion suggests the court intended its decision to permit a prevailing employer-defendant in a section 226.7 action to recover attorney fees from the unsuccessful employee. To so find would undermine the Supreme Court's heavy reliance in its analysis [**22] on the principle that statutes governing working conditions must be liberally construed in favor of employees. [*1439]

We find the analysis in *Earley* more instructive. As noted above, *Earley* held Labor Code section 1194 bars recovery of statutory fees by prevailing employer-defendants in an action for overtime compensation. *Earley* explained, however, that Labor Code section 218.5 fees may be recovered by a prevailing defendant in any action brought "to recover nonpayment of *contractually agreed-upon or bargained-for 'wages, fringe benefits, or health and welfare or pension fund contributions*.' " (*Earley, supra*, 79 Cal.App.4th at p. 1430, italics added.) In rejecting the employer-defendant's claim for fees, the *Earley* court distinguished actions for unpaid wages from actions for unpaid overtime compensation. "An employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy. ... 'The duty to pay overtime wages is a duty imposed by the state; it is not [**23] a matter left to the private discretion of the employer. [Citations.]' " (*Ibid*., citation omitted.)

(11) Like the statutory protections against working in excess of an eight-hour day or for less than the minimum wage, the provisions mandating meal and rest breaks are part of the core remedial employee protections embodied in the Labor Code and the implementing wage orders promulgated by the Industrial Welfare Commission, such as Wage Order 9. Like overtime compensation, the obligation to provide meal and rest periods is imposed by statute, and the statutory remedy for breach of that obligation is not akin to the types of compensation that have traditionally been encompassed within the definition of "wages."

(12) The Labor Code defines "wages" as inclusive of "all amounts for labor performed." (Lab. Code, § 200.) Moreover, "[c]ourts have recognized that 'wages' also include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay." (*Murphy, supra*, 40 Cal.4th at p. 1103; see also *Prachasaisoradej v. Ralphs Grocery Co., Inc*. (2007) 42 Cal.4th 217, 228 [64 Cal. Rptr. 3d 407, 165 P.3d 133] [" 'wages' or 'earnings' are the amount the employer has [**24] offered or promised to pay, or has paid pursuant to such an offer or promise, as compensation for that employee's labor" (italics omitted)].) These forms of compensation an employer voluntarily offers its employees, or agrees to provide pursuant to a collective bargaining agreement, are fundamentally different than a state-imposed mandate to pay overtime, a minimum wage or compensation for a missed meal or rest break.

Nothing in the legislative history suggests the Legislature meant the reciprocal fee recovery provisions of Labor Code section 218.5 to apply in an action for violation of the Labor Code section 226.7 mandate that employers [*1440] provide meal and rest breaks for certain nonexempt employees. The statutory remedy of section 226.7, providing compensation for missed breaks, was first enacted in 2000 in response to poor employer compliance with the meal and rest break requirements. (*Murphy, supra*, 40 Cal.4th at pp. 1105-1106; Stats. 2000, ch. 876, § 7, p. 6509.) Before 2000, the only remedy available to an aggrieved employee was injunctive relief to prevent future abuse. (*Murphy*, at p. 1105.)

The 2000 amendment providing a pay remedy bears sufficient hallmarks of a penalty designed to shape [**25] employer behavior, and is sufficiently distinct from the customary types of bargained-for wages recognized under the law, that we cannot conclude the Legislature intended a claim under Labor Code section 226.7 to be interpreted as a claim for "nonpayment of wages" within the meaning of Labor Code section 218.5. The section 226.7 pay remedy for missed meal and rest breaks was enacted 14 years *after* the Legislature enacted the reciprocal fee recovery provisions of section 218.5. It is therefore not reasonable to assume that when the Legislature enacted section 218.5 in 1986 to provide for recovery of prevailing party fees in claims for nonpayment of wages and benefits, it intended that provision to permit a prevailing employer-defendant to recover fees from an employee raising a claim for denial of breaks--a claim which at that time only supported injunctive relief.

(13) Construing the entire statutory scheme with a view toward protecting employees, as we must, we find that a claim for remedial compensation under Labor Code section 226.7 does not trigger the reciprocal fee recovery provisions of Labor Code section 218.5. **(14)** Since none of the claims on which UPS prevailed permit the recovery of attorney fees, the [**26] award of statutory fees to UPS was in error.

2. *The Award of Statutory Costs to UPS*

a. *Standard of review*

Because the resolution of whether it was proper to award litigation costs to UPS requires interpretation of statutory language, we exercise our independent review. (*Carver I, supra*, 97 Cal.App.4th at p. 142.)

b. *Analysis*

The trial court awarded UPS costs in the amount of $16,693.70, which included several thousand dollars in costs incurred by UPS up through the time of trial. Citing Labor Code section 1194 and *Earley*, McGann contends this was error and that UPS was not entitled to prevailing party costs in any amount because of the fee-shifting provision of section 1194 or, if at all, only [*1441] to certain costs incurred up to the time of the summary judgment ruling which disposed of all claims except the overtime claim. We disagree.

Our Supreme Court rejected a similar argument in *Murillo v. Fleetwood Enterprises, Inc*. (1998) 17 Cal.4th 985 [73 Cal. Rptr. 2d 682, 953 P.2d 858] (*Murillo*). *Murillo* involved reconciliation of the one-way fee-shifting provision in the Song-Beverly Consumer Warranty Act (Civ. Code, § 1794, subd. (d)), and the general cost recovery statute codified at Code of Civil Procedure section 1032, subdivision (b). [**27] The consumer plaintiff in *Murillo* was unsuccessful at trial and the court awarded the successful defendant litigation costs as a prevailing party. (*Murillo, supra*, at pp. 988-989.) On appeal, the plaintiff contended the Song-Beverly Consumer Warranty Act, commonly known as the "lemon law," contained a one-way fee and cost provision favorable to prevailing consumer plaintiffs only and therefore, the trial court had erred in awarding costs to the prevailing defendant. While acknowledging the Song-Beverly Consumer Warranty Act is " 'manifestly a remedial measure' " designed to protect the consumer, the Supreme Court nonetheless determined that nothing in the language of the statute, including the one-way fee and cost provision, disabled the general cost recovery provisions of Code of Civil Procedure section 1032, subdivision (b). (*Murillo, supra*, at p. 990.)

Noting that the right to costs derives solely from statute (*Murillo, supra*, 17 Cal.4th at p. 989), the court explained: "Because [Code of Civil Procedure] section 1032(b) grants a prevailing party the right to recover costs '[e]xcept *as otherwise expressly provided by statute*' (italics added), we must first determine whether Civil Code section 1794(d) [**28] provides an 'express' exception. Although Civil Code section 1794(d) gives a prevailing buyer the right to recover 'costs and expenses, including attorney's fees,' the statute makes no mention of prevailing sellers. In other words, it does not *expressly* disallow recovery of costs by prevailing sellers; any suggestion that prevailing sellers are prohibited from recovering their costs is at most *implied*. Accordingly, based on the plain meaning of the words of the statutes in question, we conclude Civil Code section 1794(d) does not provide an 'express' exception to the general rule permitting a seller, as a prevailing party, to recover its costs under [Code of Civil Procedure] section 1032(b)." (*Murrillo, supra*, at p. 991.) [5]

5 The Supreme Court distinguished the Public Records Act and its fee and cost provision, noting the difference when the Legislature expressly provides the circumstances under which a

prevailing plaintiff and a prevailing defendant are entitled to fees and/or costs, thus taking it outside of Code of Civil Procedure section 1032, subdivision (b). (*Murillo, supra*, 17 Cal.4th at p. 997, citing *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469 [23 Cal. Rptr. 2d 412].)
[*1442]

(15) Like the one-way fee-shifting [**29] provision in the Song-Beverly Consumer Warranty Act at issue in *Murillo*, the one-way fee-shifting provision in Labor Code section 1194 only contains express language as to prevailing plaintiffs. Therefore, any prohibition against a prevailing defendant recovering litigation costs is at best implied by the statutory language. But, in order to deem a prevailing party outside the scope of the general cost recovery provisions of Code of Civil Procedure section 1032, subdivision (b), there must be an express statutory prohibition. (*Murillo, supra*, 17 Cal.4th at p. 991.) **(16)** Since there is no language in Labor Code section 1194 expressly disallowing recovery of litigation costs to a prevailing employer-defendant, we conclude that UPS was entitled to an award of reasonable statutory costs under Code of Civil Procedure section 1032, subdivision (b), including up through the time of trial, and affirm the trial court's order. [6]

6 McGann raises no argument that any specific item of costs was unauthorized and therefore we affirm the cost award of $16,693.70 in its entirety.

The Supreme Court in *Murillo* reasoned that the public policy the Legislature sought to encourage by enacting the Song-Beverly Consumer [**30] Warranty Act, including the fee-shifting provision, was properly effectuated by the statutory construction allowing prevailing consumer plaintiffs to recover attorney fees and costs, while limiting a prevailing defendant to recovery of costs only. (*Murillo, supra*, 17 Cal.4th at pp. 993-994.) Likewise here, we do not believe that an interpretation of the statutory language which limits prevailing employer-defendants to recovery of litigation costs but allows prevailing employee-plaintiffs to recover both attorney fees and costs, undermines the public policy embodied in the wage and hour laws, specifically the policy of encouraging enforcement of overtime and minimum wage compensation claims embodied in Labor Code section 1194.

(17) Finally, McGann's argument notwithstanding, we find the court in *Earley* was not confronted with the question of the interplay of Labor Code section 1194 and Code of Civil Procedure section 1032, subdivision (b) and therefore had no occasion to decide the issue of costs. McGann's reliance on one sentence in *Earley* referring to "fees and costs," despite the fact the court's analysis is limited to a discussion of fees, is therefore misplaced. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [71 Cal. Rptr. 2d 830, 951 P.2d 399] [**31] [appellate decision is authority only " 'for the points actually involved and actually decided' "].) We find no basis in *Earley* or elsewhere for disregarding the rationale of *Murillo* which squarely addresses the issue of reconciling the general cost recovery provisions of Code of Civil Procedure section 1032, subdivision (b) with a specific one-way fee- and cost-shifting statute. [*1443]

DISPOSITION

The order awarding UPS statutory attorney fees is reversed. The order awarding UPS litigation costs as prevailing party is affirmed. Each side shall bear its own respective costs on appeal.

Bigelow, P. J., and Flier, J., concurred.