JENNIFER AUGUSTUS, et al., Plaintiffs and Respondents, v. ABM SECURITY SERVICES, INC., Defendant and Appellant.

S224853

SUPREME COURT OF CALIFORNIA

2015 CA S. Ct. Briefs 24853; 2015 CA S. Ct. Briefs LEXIS 279

April 2, 2015

2d Civil Nos. B243788 & B247392. (Los Angeles County Super. Ct. Nos. BC336416, BC345918, CG5444421). 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)].

Petition for Appeal

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TITLE: Reply to Answer to Petition for Review

TEXT: INTRODUCTION

ABM's answer to the Plaintiffs' petition contains no cogent reason to deny review. It argues that the outcome in this

case was correct and that the Court of Appeal's legal analysis was sound. Even if that [*2] were true, review would still be necessary to resolve the conflict between the opinion and earlier cases, and to define the contours of a legally compliant rest break under California law.

Labor Code section 226.7, subdivision (b), forbids employers from making employees "work" during meal breaks and rest breaks. In *Brinker*, n1 this Court held that in order to comply with this requirement for meal breaks, employers were required to relinquish control over their employees and relieve them of all duty during the break. As ABM is eager to emphasize in its answer, *Brinker* did not directly address an employer's obligation with respect to rest breaks. (ABM Answer at 15, 16.)

n1 *Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1040.*

But several appellate courts have directly held that the "relieved of all duty" standard applies to rest breaks. Since the Court of Appeal's decision in this case holds otherwise, it has created a split of authority.

If the relieved-of-all-duty [*3] standard does not apply to rest breaks, what *is* the proper standard for compliance with section 226.7? The Court of Appeal's opinion provides scant guidance, beyond saying that on-duty breaks can be permissible. This Court should grant review to answer this vital question, which directly affects the majority of employees and employers throughout the state.

ARGUMENT

A. The Court of Appeal's opinion expressly authorizes "on duty" rest breaks, creating a split of authority and weakening the protection of Labor Code section 226.7

ABM's answer attempts to minimize the significance of the Court of Appeal's decision and accuses the Plaintiffs and their amici of "attack[ing] a decision that the Court of Appeal did not render." (Ans. at 3, 9.) For example, when the Plaintiffs point out that the opinion authorizes on-duty rest breaks, ABM says "nonsense." Yet, at the outset of the *Augustus* opinion the court rejects "the premise that California law requires employers to relieve their workers of all duty during rest breaks." (*Augustus v. ABM Security Services, Inc. (2014) 233 Cal.App.4th 1065, 1070.)* "We conclude the premise is false, and therefore [*4] reverse," the court explains. (*Id*.)

The *Augustus* court flatly rejects the contention "that rest periods must be duty free." (*Augustus* at p. 1079.) It holds that the *Brinker* relieved-of-all-duty standard applies only to meal breaks, not rest breaks. (*Id*.) It justifies this distinction by explaining that meal breaks and rest breaks are "qualitatively different" and notes that the IWC's wage orders only require that meal breaks be duty free. (*Id. at pp. 1081-1082.)*

This conclusion is problematic. Even if meal breaks and rest breaks are "different," that would not mean that what constitutes "work" during a meal break is somehow different than what constitutes "work" during a rest break. Section 226.7, subdivision (b), forbids employers from requiring employees "to work" during either meal breaks or rest breaks. *Brinker* makes clear that an employee is considered to be working during a meal break unless the employer has relinquished control of the employee's activities and relieved the employee of all duties. (*Brinker, 53 Cal.4th at p. 1040.)*

Given the structure of section 226.7, which forbids an employee "to work" during either [*5] meal breaks or rest breaks, the logic of *Brinker* would appear to apply with equal force to both meal and rest breaks. The *Augustus* court's conclusion to the contrary plainly weakens the protection that section 226.7 provides to workers.

ABM tries to soft-pedal what the *Augustus* opinion really says by reading it to authorize only "on-call" rest breaks,

rather than on-duty ones.

Not so. The Court of Appeal does not draw that distinction; it accepts that guards are "on duty" when "on call" - and then holds that on-duty breaks are legal. (*Augustus* at pp. 1076-1078.)

The court justifies this novel approach by reinterpreting Wage Order No. 4 to authorize on-duty rest breaks, stating:

> If the IWC had wanted to relieve an employee of all duty during a rest period, including the duty to remain on call, it knew how to do so. That it did not indicates no such requirement was intended. On the contrary, the IWC's order that an on-duty meal period must be paid implies an on-duty rest period, which is also paid, is permissible. (*Id. at pp. 1077-1078.)*

This reading of the Wage Order directly contravenes cases that say on-duty rest breaks are illegal. [*6] (*See, e.g., Bufil v. Dollar Financial Group Inc. (2008) 162 Cal.App.4th 1193, 1199* [employers must "relieve the employees of all duty... in order to accommodate lawful rest breaks"]; *Faulkinbury v. Boyd & Associates Inc. (2013) 216 Cal.App.4th 220, 236* ["There does not appear to be an on-duty rest break exception"]; *Godfrey v. Oakland Port Services Corp. (2014) 230 Cal.App.4th 1267, 1286* [affirming judgment against employer for, *inter alia*, failing to provide off-duty rest breaks; *Dailey v. Sears, Roebuck & Co. (2013) 214 Cal.App.4th 974, 1000* [applying relieved-of-all-duty standard to rest breaks].) Review is necessary so that this Court can resolve the conflict and restore predictability to this area of California law.

B. The Court of Appeal's opinion permits employers to mandate compensable "work" during rest breaks

ABM also ridicules the idea that the *Augustus* opinion means "that employers may require their employees to engage in compensable work during breaks." (Ans. at 9, internal punctuation omitted.) According to ABM, that too is "nonsense." (*Id*.)

In reality, it is a basic component [*7] of the Court of Appeal's rationale for distinguishing this Court's decision in *Mendiola*. n2 That case establishes that security guards are performing compensable work when they are on call. Because even ABM would agree that California law provides that employers cannot mandate compensable work during rest breaks, then *Mendiola* establishes that employers cannot force guards to remain on call during rest breaks.

n2 *Mendiola v. CPS Sec. Solutions, Inc. (2015) 60 Cal.4th 833, 838.*

Nevertheless, the *Augustus* court was unwilling to accept that conclusion, so its opinion rejects the premise that compensable work is prohibited during rest breaks. Yet, because section 226.7 expressly prohibits "work" during rest breaks, the court had to find some way to get around that language. This required it to hold that the term "work" in section 226.7 has a different meaning than compensable "work." (*Augustus* at p. 1077.)

As the Court of Appeal explained it, the word "work" is used as a noun [*8] ("a state of being") when the issue is compensability, but is used as a verb ("exertion") in section 226.7. (*Augustus* at p. 1077.) Hence, an employee may be "working" in the sense of being under their employer's control, and therefore entitled to compensation, even when they are not "working" in the sense of exerting themselves. (*Id*.)

But even this novel distinction cannot provide a rationale for finding that a single word in a single sentence in a statute - *work* - means different things depending on whether the work occurs during a meal break or a rest break. And the *Brinker* standard clearly forbids all "work" during meal breaks, regardless of whether that word is used as a noun or a verb.

ABM assures this Court that the opinion below is uncontroversial because it repeatedly acknowledges that section 226.7 "prohibits ... working during a rest break." (ABM answer at 2, citing *Augustus* at pp. 1071, 1077, 1078.) This is, of course, the statutory command. But the *Augustus* opinion dilutes that protection by parsing "work" in ways that no court previously has, and without any indication that the Legislature intended to use the word "work" in different ways in the [*9] same sentence in section 226.7.

Perhaps sensing that its deconstruction of "work" is tenuous, the Court of Appeal buttresses its conclusion by noting that the ABM guards are not "working" during their breaks because they perform "few" of their normal job activities, if any. (*Augustus* at p. 1078.) This is, perhaps, the most troubling aspect of the decision, because it plainly implies that employers can lawfully mandate *some* work during rest breaks. But the opinion leaves employers to guess where the line is between permissible and prohibited work.

Finally, although ABM would have this Court believe that the Court of Appeal's opinion is somehow limited to keeping security guards on call solely to respond to some sort of emergency, neither the evidence in the case nor the court's opinion is limited to what might occur in an emergency. Rather, the opinion holds that rest breaks are legal even when ABM's guards continue to engage in at least some of their routine and mundane on-duty activities.

CONCLUSION

The *Augustus* opinion is not limited to security guards, or to on-call rest breaks, or to what an employer may require of its employees in an emergency. It plainly [*10] holds that employers can require employees to remain on duty during rest breaks and to perform *some* compensable work. It expressly rejects the workable relieved-of-all-duty standard that other appellate courts have applied to rest breaks, yet provides no workable standard.

Neither employees nor employers should be required to guess about what section 226.7 means or what constitutes a legally compliant rest break in California. This case provides a perfect vehicle for this Court to address these issues and to provide a clear legal standard that will allow workers to confidently assert their rights and employers to avoid inadvertent liability. The petition for review should be granted.

Dated: April 2, 2015.

Respectfully submitted,

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Certificate of Word Count

(Cal. Rules of Court, Rule 8.504(d)(1))

The text of this petition consists of 1,613 words, according to the word count generated by the Microsoft Word word-processing program used to prepare the brief

Dated: [*11] April 2, 2015.

/s/ Jeffrey I. Ehrlich
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PROOF OF SERVICE

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.

On **April 2, 2015**, I served the foregoing documents described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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Executed on **April** 2, 2015, at Claremont, California.

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