CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL - SECOND DIST.
FILED
JAN 29 2015
JOSEPH A. LANE Clerk
Deputy Clerk

JENNIFER AUGUSTUS, et al., Plaintiffs and Respondents, v. ABM SECURITY SERVICES, INC., Defendant and Appellant.	B243788 & B247392 (Los Angeles County Super. Ct. Nos. BC336416, BC345918, CG5444421) ORDER MODIFYING OPINION AND DENYING REHEARING; CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on December 31, 2014, be modified as follows:

1. On page 11, the following two paragraphs are added at the top of the page:

"The word "work" is used as both a noun and verb in Wage Order No. 4, which 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." (Cal. Code Regs., tit. 8, § 11040, subd. 2(K).) In this definition, "work" as a noun means "employment"—time during which an employee is subject to an employer's control. "Work" as a verb means "exertion"—activities an employer may suffer or permit an employee to perform. (See *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [work is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and

pursued necessarily and primarily for the benefit of the employer and his business"].) Section 226.7, which as noted provides that "[a]n employer shall not require an employee to work during a meal or rest or recovery period," uses "work" as an infinitive verb contraposed with "rest." It is evident, therefore, that "work" in that section means exertion on an employer's behalf.

"Not all employees at work actually perform work. "'[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. . . . [I]dleness plays a part in all employments in a stand-by capacity.'" (*Mendiola v. CPS Security Solutions, Inc.* (2015) 2015 Cal. LEXIS 3, 9-10 (*Mendiola*), quoting *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133.) Remaining on call is an example. On-call status is a state of being, not an action. But section 226.7 prohibits only the action, not the status. In other words, it prohibits only working during a rest break, not remaining available to work.

2. On page 11 continuing to page 12, the now-second paragraph, which begins with "Because ABM guards," along with the next two paragraphs, are stricken and replaced with the following:

"This conclusion is bolstered by contrasting subdivision 12(A) of Wage Order No. 4, which pertains to rest periods, and subdivision 11(A), pertaining to meal periods. Subdivision 11(A) requires that an employee be "relieved of all duty" during a meal period.[7] Subdivision 12(A) contains no similar requirement. If the IWC had wanted to relieve an employee of all duty during a rest period, including the duty to remain on call,

[7] Subdivision 11(A) of Work Order No. 4 provides: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time."

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: It would make no sense to permit a 30-minute paid, on duty meal break but not a 10-minute paid rest break.

"Plaintiffs argue a security guard's on-call rest time constitutes work for purposes of section 226.7 because it is indistinguishable from any other part of the guard's workday, as a guard is always on call. The argument is without merit. First, section 226.7 does not require that a rest period be distinguishable from the remainder of the workday, it requires only that an employee not be required "to work" during breaks. Even if an employee did nothing but remain on call all day, being equally idle on a rest break does not constitute working. At any rate, although the idea that a security guard never rests has a certain appeal, according to ABM's Post Orders a security guard who is on call performs few if any of the activities performed by one who is actively on duty. As described briefly above, a guard on duty must observe the guarded campus and perform many tasks, for example, greeting visitors, raising or lowering the campus's flags, or monitoring traffic or parking. No evidence in the record suggests an ABM guard taking a rest break is required to do any of these things. Admittedly, an on-call guard must return to duty if requested, but as discussed above and implicitly acknowledged in *Mendiola*, *supra*, remaining available to work is not the same as performing work."

3. On page 13, the first full sentence, beginning with "The issue was whether . . . ," is stricken and replaced with the following:

"The issue was whether the scope of the employer's rest break policy could be determined on a classwide basis."

4. On page 16, the third paragraph is stricken and replaced with the following:

"Plaintiffs rely on *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 and *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21 for the proposition that on-call rest periods are legally invalid. Neither case supports the proposition. In *Morillion*, the Supreme Court held that the time during which employees

were required to travel to the employer's work site on the employer's buses was compensable work time. (22 Cal.4th at p. 578.) In *Aguilar*, the court held that time employees were required to remain at group homes during an overnight shift, during which they could sleep but had to remain on call, was compensable work time. (234 Cal.App.3d at pp. 24, 30.) What constitutes compensable work time is not the issue here, as it is undisputed rest breaks are compensable. The question is whether section 226.7 prohibits on-call rest periods. On that issue, *Morillion* and *Aguilar* provide no guidance."

5. The last paragraph on page 16, running over to page 17, is stricken and replaced with the following:

"In sum, although on-call hours constitute "hours worked," remaining available to work is not the same as performing work. (See *Mendiola*, *supra*, 2015 Cal. LEXIS at p. 9 [distinguishing readiness to serve from service itself]; see also Cal. Code Regs., tit. 8, § 11040, subd. 2(K) [distinguishing "hours worked" from work actually performed].) Section 226.7 proscribes only work on a rest break."

There is no change in the judgment.

Respondents' petition for rehearing is denied.

The opinion in the above-entitled matter was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports, and it is so ordered.

ROTHSCHILD, P. J. CHANEY, J. JOHNSON, J.