Kralowec Law

The Kralowec Law Group

May 22, 2015

Hon. Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Curiae Letter in Support of Review:
Salazar v. Avis Budget Group, Inc., Case Nos. D065148, S225629

Dear Honorable Justices:

Pursuant to Rule of Court 8.500(g), I write on behalf of Consumer Attorneys of California ("CAOC") to urge the Court to grant the petition for review in *Salazar v. Avis Budget Group, Inc.* (Cal. Ct. App., Feb. 27, 2015, D065148) 2015 WL 877817, *petition for review filed* (Apr. 9, 2015, S225629).

The Fourth Appellate District's opinion, though unpublished, follows one side of a split in authority regarding Justice Werdegar's concurring opinion in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 ("*Brinker*"), and presents an opportunity for the Court to resolve an important and narrow issue affecting both employers and employees regarding the effect of failing to maintain records of employees' meal breaks, and their respective burdens of proof at the class certification stage.

Statement of Interest

Founded in 1962, CAOC is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC's members have taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the courts and in the Legislature. This has often occurred through submission of amicus curiae filings in cases involving the rights of injured California workers. CAOC submitted amicus curiae briefs on behalf of the employee-plaintiffs in both *Brinker*, *supra*, and in *Duran v. U.S. Bank Nat'l Assn.* (2014) 59 Cal.4th 1.

Reasons Why Review Should Be Granted

The Court should grant review to resolve a conflict among the Courts of Appeal, and to guide application of California law by federal district courts in California, regarding the results of employers' failure to maintain accurate records of employees' meal breaks, and whether the burdens of proof for class certification are shifted thereby.

The *Brinker* concurrence is clear:

> Employers covered by Industrial Welfare Commission (IWC) wage order No. 5–2001 (Cal.Code Regs., tit. 8, § 11050) have an obligation both to relieve their employees for at least one meal period for shifts over five hours (*id.*, subd. 11(A)) *and* to record having done so (*id.*, subd. 7(A)(3) ["Meal periods ... shall also be recorded."]). If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided.

(*Brinker, supra*, 53 Cal.4th at pp. 1052-53 (conc. opn. of Werdegar, J.).) This standard does not relieve employees of their burden to prove all of the elements of class certification, as employer-side interests have claimed. It does, however, reiterate that employers have the burden to prove affirmative defenses, such as a defense that employees waived their right to take a work-free meal break. (See *ibid*.)

Significantly, Justice Werdegar's statements in her *Brinker* concurrence did not break new legal ground. To guide lower courts, and fully consistent with the main *Brinker* opinion, the concurrence simply underscored existing law. For example, in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961, the Third District Court of Appeal recognized that "where the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages." (*Id*., quoting *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727 (internal quotation marks omitted).)

The Fourth District panel here, in addressing plaintiffs' argument that the trial court did not consider a predominately common question that the employer failed to maintain adequate records of meal breaks, stated that "Justice Werdegar's statement in a concurring opinion is not binding precedent […] and does not shift the burden to a defendant to refute a class-wide finding of meal break violations." (*Salazar v. Avis Budget Group, Inc.*, *supra*, 2015 WL 877817, at *5, citing *Seckler v. Kindred Healthcare Operating Group, Inc*. (C.D. Cal., Mar. 5, 2013) 2013 WL 812656, *8 [finding that the presumption applied only as to an individual employees' claims].)

The Courts of Appeal are split on whether to apply the presumption stated in the *Brinker* concurrence. (Compare *Sutter Health Wage and Hour Cases* (Cal. Ct. App., June 3, 2014, A137875) 2014 WL 2467018, *12 (First District) ["the rebuttable presumption referenced in the *Brinker* concurrence is not the 'law of the land.' Concurring opinions do not constitute binding precedent."]; *In re Walgreen Company Overtime Cases* (2014) 231 Cal.App.4th 437, *ordered not to be officially published* (Feb. 18, 2015) (Second District) ["This concurrence is not the law. Only two justices endorsed it."]; *Chavez v. Angelica Corporation* (Cal. Ct. App., Dec. 10, 2014, D063199) 2014 WL 6973497, *9 (Fourth District) ["we conclude this statement in a concurring opinion, which is *not* binding precedent (see *In re Marriage of Dade* (1991) 230 Cal.App.3d 621, 629), does *not* shift the burden to a defendant to refute a class-wide finding of meal break violations."] with *Faulkinbury v. Boyd & Associates, Inc*. (2013) 216 Cal.App.4th 220, 230-231

(Fourth District) ["if an employer's records show no meal period for a given shift, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided, shifting the burden to the employer to show the meal period was waived."]; *Bradley v. Networkers Internat., LLC* (2013) 211 Cal.App.4th 1129, 1144-1145 (Fourth District) [same]; and *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907 (Fourth District) ["an employer has an important obligation to keep accurate time"].)

Some California federal district court decisions have adopted opposing views of the *Brinker* concurrence, as well. (Compare *Ricaldai v. US Investigation Services LLC* (C.D. Cal. 2012) 878 F.Supp.2d 1038, 1043-1044 ["the court notes its agreement with Justices Werdegar and Liu that it is the employer's burden to rebut a presumption that meal periods were not adequately provided, where the employer fails to record any meal periods."]; *Ambriz v. Coca Cola Co.* (N.D. Cal. 2013) 2013 WL 5947010, *3 ["In light of Justice Werdegar's concurrence, and h[er] majority opinion, Plaintiff here is not required to allege anything more than what he has already alleged: that he was entitled to meal breaks, and that meal breaks were not provided."]; *Medlock v. Host Int'l, Inc.* (E.D. Cal. 2013) 2013 WL 2278095, *3 ["wage order No. 5–2001 requires the employer to maintain records detailing the meal breaks and its failure to do so, raises a rebuttable presumption that the breaks were not afforded."] with *Seckler v. Kindred Healthcare Operating Group, Inc., supra*, 2013 WL 812656, at *8 [finding that "Plaintiffs have the ultimate burden to prove that Defendants have a policy of inadequate meal provision" in order to certify a class.].)

As these differing opinions demonstrate, this case presents an opportunity for the Court to finally resolve the important question of whether an employer's failure to maintain adequate records of meal breaks creates a rebuttable presumption that meal breaks were not properly provided to employees, and the effect of such a presumption on the burdens of proof for class certification.

Conclusion

For the reasons stated above, the Court is respectfully asked to grant the petition for review in *Salazar*.

Sincerely,

Chad A. Saunders
State Bar No. 257810

cc: See attached proof of service

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 180 Montgomery Street, Suite 2000, San Francisco, California 94104, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. AMICUS CURIAE LETTER IN SUPPORT OF REVIEW; and
2. PROOF OF SERVICE.

☑ **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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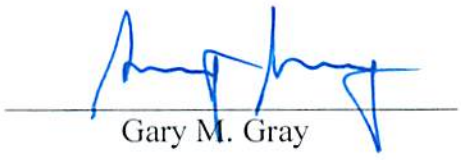
Executed May 22, 2015 at San Francisco, California.



Gary M. Gray