Case number **S224611**

IN THE SUPREME COURT
STATE OF CALIFORNIA

CHRISTOPHER MENDOZA, etc., Plaintiff-Appellant-Petitioner;

MEAGAN GORDON, Plaintiff-Intervenor-Appellant-Petitioner

v.

NORDSTROM, INC., etc., Defendant-Appellee-Respndent

After a Request by the ninth circuit Court of Appeals
Case Numbers 12-57130, consolidated with 12-57144

APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

[PROPOSED] BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS AND APPELLANTS CHRISTOPHER MENDOZA AND MEAGAN GORDON

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APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

The California Employment Lawyers Association (CELA) requests permission to file a brief as amicus curiae in support of Plaintiffs and Appellants Christopher Mendoza and Meagan Gordon. CELA is a statewide organization of over 1,000 attorneys primarily representing employees in employment termination and discrimination cases.

CELA has appeared as *amicus curiae* in many cases before this Court, including *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, *Little v. Auto Stiegler, Inc.,* (2003) 29 Cal.4th 1064, *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, *Runyon v. Board of Trustees of the California State University* (2010) 48 Cal.4th 760, and *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

STATEMENT OF INTEREST

CELA, through its undersigned attorney, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

> The public policies of the State of California, as expressed by the Legislature and courts, establish that Labor Code sections 551, 552 and 556 should be interpreted to further the goals of expanding the workforce and avoid the problems arising from overwork; and that such policies overcome the administrative

burden on the employer.

If this request is granted, the following brief is support of plaintiff and appellant is respectfully submitted.

DISCLOSURE OF AUTHORSHIP OR MONETARY CONTRIBUTION

No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

Date: December 17, 2015

Respectfully submitted,

For Amicus Curiae CELA
Duchrow & Piano, LLP

_____

By: David J. Duchrow

PROPOSED BRIEF OF *AMICUS CURIAE*
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

I. INTRODUCTION

The California Employment Lawyers Association (CELA) supports the Plaintiff/Appellant's analysis of the statutes in question. CELA supports the interpretation of Labor Code §§ 551 and 552 as explained in Mendoza's and Gordon's briefs, for the reasons stated therein, as well as its interpretation of section 556.

In this brief, CELA expands on the arguments relating to the public policies which underlie those statutes and which require interpreting those statutes as the Appellant's request.

II. ARGUMENT

A. The Public Policies in California Which Favor Expansion of the Workforce and Avoiding the Evils of Overwork Require Adoption of the Interpretation of the Labor Code as Explained by Appellants.

Nordstrom's Answering Brief at 32 claims that "Public policy and the protective purpose of the Labor Code also mandate a workweek interpretation [as urged by Nordstrom]. By contrast, adopting a rolling rest day standard would (1) create a rigid rest day scheduling requirement for employees; and (2) impose unmanageable policing requirements on employees and managers - ***even when employees, like Mendoza and Gordon and their coworkers, prefer and consistently ask***

for flexibility in the workplace scheduling. (Bold and Italics in original). Nothing could be further from the truth.

The public policies advanced by Nordstrom against the rolling rest day standard - i.e., "rigid rest day scheduling requirements for employers" and "unmanageable policing requirements - are the same public policies which unsuccessfully challenged other employee protections, including overtime. In *Walling v. Youngerman-Reynolds Hardwood Co., Inc.* (1945) 325 U.S. 419, the employer sought to enjoin the overtime and record keeping requirements of Fair Labor Standards Act, 29 U.S.C. §§ 207(a) and 215(a). The employer unsuccessfully argued that the requirements placed an undue burden on employers, increasing labor costs by 50%. The Court noted that by placing the costs on the employer actually served more important goals which overcame the burden of the record keeping requirements and the increased labor cost:

> Under Section 7(a) [29 U.S.C. §207(a)] an employer is required to compensate his employees for all hours in excess of 40 at not less than one and one-half times the regular rate at which they are employed. Thus by increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, Section 7(a) **achieves its dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek.** [citations omitted]

325 U.S. at 423-424. Thus the United States Supreme Court found that the economic burden on the employer did not weigh in favor of eliminating the requirement; instead the Court found that those burdens actually promoted the policies of reducing hours of work and employing more men (and presumably women). Nordstrom here argues implicitly that the "scheduling" and "policing" requirements which would result from the interpretation advanced by the employees outweigh the policies in favor of reducing hours of work and an expanding workforce. CELA requests this Court find that the policies favoring fuller employment and lessening the burden of a long workweek outweigh the scheduling and policing issues raised by Nordstrom.

California, likewise, has an expressed statutory expression of the same policy favoring full employment. California Unemployment Insurance Code § 2070 states in relevant part, "It is the public policy of the State of California that manpower should be used to its fullest extent." Such a clear expression of public policy cannot be overcome by the burden of scheduling and record keeping, as Nordstrom suggests. To the extent that Plaintiffs/Appellants' interpretations result in the need to hire mor people to fill all of an employer's needs, those interpretations are supported by the public policy which encourages the employment of more people.

The policy of expanding the workforce has been used to support California's overtime laws. In *Sullivan v. Oracle Corporation* (2011) 51 Cal.4th 1191, the Supreme Court of California explained:

Furthermore, the overtime laws serve important public policy

> goals, such as protecting the health and safety of workers and the general public, protecting employees in a relatively weak bargaining position from the evils associated with overwork, and expanding the job market by giving employers an economic incentive to spread employment throughout the workforce.

51 Cal.4th at 1198.

Moreover, Nordstrom's analysis is faulty because it is based on the assumption that employees are free to schedule themselves to work as they choose, and that given that freedom, employees would sacrifice workplace health protections for a few more hours of work, and that the employer is helpless to keep track of employee work hours to see who is working more than 6 days in 7, or more than 8 hours a day or 40 hours in a week.

The truth is that in nearly all employment situations, the employer schedules the hours of work. The essence of employment is the power to control the activities of another person. *Martinez v. Combs* (2010) 49 Cal.4th 35, 58-59.

Nordstrom is a large and sophisticated employer, as evidenced by its adoption of policies which allow it to adhere to its own interpretation of Labor Code §§ 551 and 552. If Nordstrom is able to work out a schedule for a "rolling" 7 day period, it should just as easily adapt and work out scheduling for a "one day rest in seven" period.

In most workplaces, employees are not in control of their own schedules or numbers of hours. An employer can require employees to

work overtime under threat of termination if they do not or cannot comply (as long as the employer pays the proper overtime pay rate).

And an employer can prevent employees such as Mendoza and Gordon from working more than 6 days in 7. If nothing else, Nordstrom owes its other employees the ability to work the shifts taken by those two, or if there are not enough employees to spread the shifts around, the public policies of California would favor the hiring of additional employees.

III. CONCLUSION

CELA respectfully requests this Court to adopt the interpretation of Labor Code §§ 551, 552 and 556 as requested by the Appellants. That interpretation is consistent with the public polices as expressed by the Legislature and this very Court to expand the workforce, and to avoid the effects of overwork.

Dated: December 17, 2015

Respectfully submitted,
Duchrow & Piano, LLP

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By David J. Duchrow, for Amicus Curiae California Employment Lawyers Association

PROOF OF SERVICE

I am employed in the County of Los Angeles at 2510 Main Street, Suite 205, Santa Monica, California 90405-3583. On the date of mailing, I am over the age of eighteen, and not a party to the above-described action.

On December 17, 2015, I served the within:

BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

by placing the true copies thereof enclosed in sealed envelopes as stated on the attached mailing list;

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 Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on December 17, 2015, at Santa Monica, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____

David J. Duchrow

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