U.S. Court of Appeals Docket Number 16-16903

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERROD FINDER, on behalf of himself and all others similarly situated,

Plaintiff and Appellee,

vs.

LEPRINO FOODS COMPANY and
LEPRINO FOODS DAIRY PRODUCTS COMPANY,

Defendants and Appellants.

From a Decision of the United States District Court,
for the Eastern District of California,
Case No. 1:13-cv-02059-AWI-BAM, Hon. Anthony W. Ishii

BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF AND APPELLEE JERROD FINDER

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CORPORATE DISCLOSURE STATEMENT

The California Employments Lawyers Association (CELA) does not have a parent company or issue stock, and no publicly held company owns 10 percent or more of its stock.

Respectfully submitted,

LAW OFFICES OF LOUIS BENOWITZ

Dated: October 25, 2017

BY /s/ Louis Benowitz
Counsel for *Amicus Curiae*
California Employment Lawyers Association

INTEREST OF *AMICUS CURAIE*

The California Employment Lawyers Association (CELA) is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour cases concerning meal and rest periods such as *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), *Brinker Restaurant Corporation v. Superior Court*, 53 Cal.4th 1004 (2012), and *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257 (2016), CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in the California Labor Code and applicable orders of the California Industrial Welfare Commission. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting briefs as *amicus curiae* and letters before the California Courts of Appeal, the California Supreme Court, and U.S. Court of Appeals for the Ninth Circuit.

Counsel for Plaintiff Jerrod Finder (Morris Nazarian of the Law Offices of Morris Nazarian) and Counsel for Defendants Leprino Foods Company and Leprino Foods Dairy Products Company (Sandra L. Rappaport and Adam W. Hoffman of Hanson Bridgett LLP) have consented to the filing of this brief.

STATEMENT OF COMPLIANCE WITH FRAP RULE 29(c)(5)

No party or its counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person – other than the amicus curiae, its members or its counsel – contributed money that was intended to fund preparing or submitting the brief.

Respectfully submitted,

LAW OFFICES OF LOUIS BENOWITZ

Dated: October 25, 2017

BY /s/ Louis Benowitz
Counsel for *Amicus Curiae*
California Employment Lawyers Association

INTRODUCTION

The District Court in this case properly found that Plaintiff Jerrod Finder ("Plaintiff") is entitled to pursue claims for waiting time penalties and wage statement penalties based on the alleged failures of Defendants Leprino Foods Company and Leprino Foods Dairy Products Company (collectively, "Defendants") to pay him and similarly situated employees premium wages when they were not provided with legally required meal and rest periods. Through this brief, *amicus curiae* California Employment Lawyers Association (CELA) seeks to offer additional insight into why the California Labor Code allows employees to recover statutory penalties under sections 203[1] and 226 for an employer's nonprovision of meal and rest periods in violation of section 226.7.

As explained below, unless section 226.7 premiums are treated as wages for purposes of the statutes governing the timing of wage payments, including section 203, they would be transformed into penalties in direct contravention of the California Supreme Court's reasoning in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), which would severely undermine California's strong public policy in favor of the prompt payment of wages. Similarly, unless section 226.7 premiums are treated as wages for purposes of section 226, California's

[1] All section citations are to the California Labor Code unless otherwise indicated.

policy of ensuring that employees receive complete pay stubs that enable them to verify whether they have been properly paid would be thoroughly frustrated.

In view of these considerations, CELA respectfully requests for this Court to affirm the District Court's order in its entirety and allow Plaintiff to continue pursuing his putative class action claims against Defendants for statutory penalties under sections 203 and 226.

ARGUMENT

I. AN EMPLOYER'S FAILURE TO PROMPTLY PAY EARNED PREMIUMS UNDER CALIFORNIA LABOR CODE SECTION 226.7 ENTITLES A SEPARATED EMPLOYEE TO WAITING TIME PENALTIES UNDER SECTION 203.

The California Supreme Court has recognized on four separate occasions that premium payments for an employer's failure to provide a required meal, rest, or recovery period are wages. *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 266 (2016) (recognizing that premium pay for a rest period violation is compensation for what would otherwise be free labor from an employee); *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244, 1256 (2012) (recognizing that the remedy for the nonprovision of a meal or rest period is a wage); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1018 (2012) ("employers who violate these [meal and rest period] requirements must pay premium wages."); *Murphy*, *supra*, 40 Cal.4th at 1099 ("We conclude that the remedy provided in Labor Code section 226.7 constitutes a wage or premium pay").

A. Premium Payments Under Section 226.7 Are Subject to the Timing Requirements of Sections 201 and 202 Because They Are a Form of Wages.

Protecting employees requires treating the premium payment under California Labor Code section 226.7 as a wage for purposes of the statutory provisions that govern the timing of wage payments. The California Supreme Court recognized that section 226.7 payments are wages "in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.'" *E.g.*, *Brinker Restaurant Corp.*, *supra*, 53 Cal.4th at 1026–27 (quoting *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 702 (1980)).

Section 226.7(c) requires a payment to an employee "for each workday that the meal or rest or recovery period is not provided." In *Murphy*, the Court explained, "The right to a penalty, unlike section 226.7 pay, does not vest until someone has taken action to enforce it." *Murphy*, *supra*, 40 Cal.4th at 1108. As the Court also explained, "[A]n employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime." *Id*.

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When the Court in *Murphy* used the term "immediately" to describe when an employee becomes entitled to a section 226.7 payment, it did so by analogizing an employee's immediate entitlement to section 226.7 payments to an employee's immediate entitlement overtime wages. In doing so, the Court also reasoned that the section 226.7 payment "is in keeping with the Labor Code definition of 'wages.'" *Id.* at 1104 & fn. 6; *see also* Cal. Lab. Code § 200 (defining "wages"). Thus, just as overtime wages are "wages" within the meaning of section 200, so too are section 226.7 premiums. *Murphy*, 40 Cal.4th at 1103–04, 1110 (noting that the California Industrial Welfare Commission used the same authority it used in providing for overtime pay to provide for the remedy codified in section 226.7); *see also Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 178 (2000) (recognizing that "earned wages that are due and payable pursuant to section 200 *et seq.* of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice.").

From this, it reasonably follows that the provisions of the California Labor Code that generally govern the timing of wage payments (e.g., sections 201 and 202 for employees who are discharged or who quit, and section 204 for current employees) apply with equal force to section 226.7 payments. Any contrary conclusion would mean that employers are not subject to any requirements

regarding the timing of section 226.7 payments. That would, as a practical matter, transform premium payments under section 226.7 into a penalty because an employer would only become obliged to pay them if an employee were to bring an enforcement action. *See Murphy*, 40 Cal.4th at 1108 ("The right to a penalty, unlike section 226.7 pay, does not vest until someone has taken action to enforce it."). Accordingly, the California Supreme Court's reasoning in *Murphy* requires that section 226.7 premiums be paid in accordance with the same timing requirements as all other wages.

B. Exempting Premium Payments Under Section 226.7 from Waiting Time Penalties Under Section 203 Would Discourage Employers from Promptly Paying Them Because It Would Significantly Lessen the Consequences of Nonpayment.

"'The public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established' and the failure to timely pay wages injures not only the employee, but the public at large as well." *Pineda v. Bank of America, N.A.*, 50 Cal.4th 1389, 1400 (2010) (*quoting Smith v. Superior Court*, 39 Cal.4th 77, 82 (2006)). In view of this policy, "the Legislature adopted the penalty provision [of section 203] as a disincentive for employers to pay final wages late." *Pineda*, 50 Cal.4th at 1400.

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There is no sound reason for treating section 226.7 payments differently than other wages in view of this public policy. If merely having a dual-purpose aspect were enough to exempt certain wage payments from section 203, then the non-payment (or late payment) of overtime wages would not trigger waiting time penalties by that same reasoning. *See Murphy*, *supra*, 40 Cal.4th at 1111 (discussing the dual-purpose nature of overtime, reporting time pay, split shift premiums). That is incorrect. *See, e.g.*, *Ghory v. Al-Lahham*, 209 Cal.App.3d 1487, 1482 (1989) (acknowledging that waiting time penalties under section 203 would flow from a failure to pay overtime wages).

Rather, just as employees are entitled to overtime wages once certain conditions are met, so too are they entitled to section 226.7 premiums. *See Murphy*, 40 Cal.4th at 1108. As such, once an employer owes earned section 226.7 premiums to an employee, the same considerations for encouraging their prompt payment apply with equal force. An employer can avoid liability under section 203 where it has a good faith defense as to liability for the underlying wages. *See* Cal. Code Regs., tit. 8, § 13520 (defining a "willful" failure to pay wages for purposes of section 203 and what constitutes a "good faith dispute"). In sum, there is no reason to encourage an employer to make an employee wait for section 226.7 premiums if the employer does not have a good faith basis for doing so.

C. The California Supreme Court's Decision in *Kirby v. Immoos Fire Protection, Inc.* Does Not Compel a Contrary Result Because an Action for Waiting Time Penalties Is Separate and Distinct from an Action for Wages.

The California Supreme Court's decision in *Kirby*, *supra*, does not require a contrary result here. There, the Court liberally construed section 226.7 in a manner that protected employees from the risk of massive attorneys' fee awards against them when it concluded that an action under section 226.7 is for the nonprovision of meal and rest periods rather than for the nonpayment of wages. *Kirby*, Indeed, as the Court explained:

> In giving no indication that section 218.5 applies to meal or rest break claims when it enacted section 226.7, the Legislature could reasonably have concluded that meritorious section 226.7 claims may be deterred if workers, especially low-wage workers, had to weigh the value of an "additional hour of pay" remedy if their claims succeed against the risk of liability for a significant fee award if their claims fail.

Kirby, 53 Cal.4th at 1260. Importantly, the Court in *Kirby* recognized that the remedy for a violation of section 226.7 is a wage even though the action is not brought for the nonpayment of wages. *Kirby*, 53 Cal.4th at 1255–56.

Consistent with the *Kirby* decision, the California Supreme Court's earlier decision in *Pineda*, *supra*, recognizes that an employee may bring an action for section 203 penalties separate from an action for wages subject to the same limitations period that applies to wage claims. *See Pineda*, 50 Cal.4th at 1398 ("section 203(b) contains a single, three-year limitations period governing all

actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages."). As the Court recognized in *Murphy*, this is the same statute of limitations that applies to plaintiffs seeking the wage remedy for the nonprovision of meal and rest periods. *See Murphy*, *supra*, 40 Cal.4th at 1099–1100.

Given that the remedy under section 226.7 is a wage, and that payments under section 226.7 are necessarily payable in accordance with sections 201 and 202 (as, if they were not, an employer would be under no obligation to pay them without an employee having to bring suit), there is no reason to discourage their prompt payment by exempting them from section 203.

II. AN EMPLOYER'S FAILURE TO PAY EARNED PREMIUMS UNDER CALIFORNIA LABOR CODE SECTION 226.7 ALSO ENTITLES AN EMPLOYEE TO RECOVER STATUTORY PENALTIES UNDER SECTION 226.

Section 226 requires an employer to provide an employee with an accurate written wage statement that accurately states, among other things, the employee's gross and net wages earned. Cal. Lab. Code § 226(a)(1), (5). The purpose of this requirement is so the employee can verify whether he or she has been properly paid. *See, e.g.*, *Morgan v. United Retail, Inc.*, 186 Cal.App.4th 1136, 1149 (2010). Because an employee has the right to be paid a section 226.7 premium when the conditions for its payment are met, it follows that an employee should be able to verify that the premium was properly paid based on his or pay stub—just like an

employee is entitled to do with any other form of wages. To the extent that Defendants point to a scenario where an employee can get a replacement break instead of premium pay (AOB at 21–22), that scenario does not implicate section 226 because the provision of a replacement break does not result in a workday where a required break was not provided. *See Augustus*, *supra*, 2 Cal.5th at 272. In sum, there is no basis for arbitrarily excluding section 226.7 payments from the requirements of section 226.

CONCLUSION

For the reasons set forth herein, CELA respectfully requests for this Court to affirm the District Court's decision in its entirety.

Respectfully submitted,

LAW OFFICES OF LOUIS BENOWITZ

Dated: October 25, 2017

BY /s/ Louis Benowitz
Counsel for *Amicus Curiae*
California Employment Lawyers Association

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 29-2

The attached brief is 12 pages long. It is proportionately spaced, has a typeface of 14 points and contains 2,301 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Respectfully submitted,

LAW OFFICES OF LOUIS BENOWITZ

Dated: October 25, 2017

BY /s/ Louis Benowitz
Counsel for *Amicus Curiae*
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *amicus curiae* California Employment Lawyers Association, by and through its counsel of record, hereby certifies that it is not aware of any related cases pending in this Court.

Respectfully submitted,

LAW OFFICES OF LOUIS BENOWITZ

Dated: October 25, 2017

BY /s/ Louis Benowitz
Counsel for *Amicus Curiae*
California Employment Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

LAW OFFICES OF LOUIS BENOWITZ

Dated: October 25, 2017

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