

S224853

SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS et al.,

Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant.

2d Civil Nos. B243788 & B247392

(Los Angeles County
Super. Ct. Nos. BC336416, BC345918,
CG5444421)

SUPREME COURT
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OPENING BRIEF ON THE MERITS

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)]

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ISSUES FOR REVIEW

(1) Do Labor Code § 226.7, and Industrial Welfare Commission (IWC) wage order No. 4-2001 require that employees be relieved of all duties during rest breaks?

(2) Are security guards who remain on call during rest breaks performing work during that time under the analysis of *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833?

INTRODUCTION

IWC Wage Order 4 requires employers to provide their employees with two 10-minute rest periods per eight-hour shift. Labor Code section 226.7, subd. (b), prohibits employers from requiring employees to work during those rest breaks. Plaintiff Jennifer Augustus, representing a class of security guards employed by defendant ABM Security Services, Inc., sued ABM for violating section 226.7 by making its guards work while on their rest breaks.

Based on undisputed evidence that ABM did not relieve its guards of all duty during their rest breaks, the trial court granted summary judgment for the plaintiffs. The Court of Appeal reversed, but it did not find that there were any disputed issues of fact. Rather, it held that section 226.7 does not require employers to relieve their employees of all duty during rest breaks, and that ABM's guards were not actually "working" during their breaks because they were "simply on call."

Both aspects of the Court of Appeal's construction of section 226.7 are untenable. The failure to apply the relieved-of-all-duty standard is contrary to the text and purpose of the statute, as well as the terms and structure of the Wage Order. By definition, a rest break is a respite from labor. Therefore, rest breaks and meal breaks must be duty free.

The IWC has allowed employers and employees to agree to on-duty meal breaks in limited circumstances. But no similar provision authorizes on-duty rest breaks. Instead, employers are required to apply to the DLSE for an exemption if providing off-duty rest breaks would be a hardship. ABM certainly knew of the exemption process, having itself utilized the exemption for one year during the class period.

Section 226.7 confirms that rest breaks must be duty free, by expressly forbidding employers from making employees work during those breaks. When employees are required to perform a job duty, they are working — not resting.

The Court of Appeal's construction of section 226.7 cannot be squared with this Court's earlier decisions construing that statute, *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 (“*Murphy*”) and *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (“*Brinker*”).

Murphy describes rest breaks as a time when the employee is “free from employer control.” (*Id.*, 40 Cal.4th at p. 1113.) Similarly, *Brinker* holds that section 226.7 requires that off-duty meal breaks be duty-free time when the employer relinquishes control over the employee. (*Brinker*, 53 Cal.4th at pp. 1038, 1040-1041.)

The Court of Appeal sought to distinguish *Brinker* as a case that dealt only with an employer's meal-break obligations. But section 226.7 forbids employees from working during either meal breaks or rest breaks. That prohibition must apply with equal force to both types of breaks unless the word “work” in the statute means different things depending on the type of break at issue. That would be an exceedingly odd way to construe the statute, but it is the central pillar of the Court of Appeal's holding.

The relieved-of-all-duty standard is not only integral to the work-free mandate for rest breaks established by the Wage Order and section 226.7, it is also a clear, easily administered rule that puts employees and employers alike on notice of their respective rights and responsibilities. This standard also protects employee welfare, which is a fundamental purpose of section 226.7. Any other standard would be less clear, harder to administer, and more easily subject to abuse.

The Court of Appeal’s conclusion that ABM guards were not working during their rest breaks is belied by the record. The following chart, which is taken verbatim from the opinion below, compares the guards’ duties while they are working and while they are on break.

Principal job duties of ABM security guard while on duty	ABM guard responsibilities during rest breaks
<p>“The primary responsibility of Security at a guarded facility is to provide an immediate and correct response to emergency/life safety situations (i.e. fire, medical emergency, bomb threat, elevator entrapments, earthquakes, etc.) In addition, the Security officers must provide physical security for the building, its tenants and their employees. The security officer can accomplish this task by observing and reporting all unusual activities. In essence, the officer is the eyes and ears of the Building Management.” <i>(Augustus v. ABM Security Services, Inc. (2014) 182 Cal.Rptr.3d 679-680.)</i></p>	<p>“ABM admitted it requires its security guards to keep their radios and pagers on during rest breaks, to remain vigilant, and to respond when needs arise, such as when a tenant wishes to be escorted to the parking lot, a building manager must be notified of a mechanical problem, or an emergency situation occurs.” <i>(Augustus v. ABM Security Services, Inc., 182 Cal.Rptr.3d at p. 680.)</i></p>

Despite the clear overlap between what the guards were required to do while on duty and while on break, the Court of Appeal held that the guards were not working during rest breaks. Instead, the court concluded

that the guards were merely “on-call.” It explained, “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.” (*Augustus*, 182 Cal.Rptr.3d at p. 685.)

The court’s analysis therefore holds that (a) the test for what constitutes compensable work under the Wage Order is broader than the prohibition on “work” in section 226.7, and (b) that ABM guards were not actually working while on rest breaks, they were simply remaining available to return to work.

Both aspects of the court’s holding are wrong. This Court held in *Brinker* that compliance with section 226.7 required employers to relieve their employees of all duty and to relinquish control over how they spent their time. (*Id.*, 53 Cal.4th at pp. 1038, 1040-1041.) This test is virtually identical to the test for whether time is compensable.

And in *Mendiola*, this Court held that on-call security guards were “engaged to wait” — that is, their job was to wait for something to happen and to respond to it. (*Id.*, 60 Cal.4th at p. 842, n. 10.) The undisputed facts show that ABM required its guards to continue to do that job while they were taking rest breaks. They were not simply on call; they were actively serving as the building management’s eyes and ears — which is why, in the trial court, ABM admitted that they were on duty.

In sum, the legislative mandate in section 226.7 is clear. It forbids employees from being required to work during their rest breaks. As this Court held in *Brinker*, unless employees have been relieved of all duty and their employer has relinquished control over how they spend their time, they are working. Since ABM admits that it never relieved its guards of all duty during rest breaks, it violated section 226.7.

STATEMENT OF THE CASE

A. Factual Summary

ABM Security Services, Inc. (“ABM”), formerly d/b/a American Commercial Security Services, Inc. (“ACSS”), employs thousands of security guards in California at residential, retail, office, and industrial sites. (10JA 2965-2966.) Some sites have only one guard on duty; others have multiple guards working at the same time. (ABM’s appellant’s opening brief in the Court of Appeal (“AOB”) at 6.)

Named plaintiffs Jennifer Augustus, Emmanuel Davis, and Delores Hall are all former ABM security guards. (AOB at 6, 7.)

In 2006, after this litigation had commenced, ABM first applied to the DLSE and obtained an exemption from California’s rest-break requirements. (10JA 2821-22.) The one-year exemption applied only to its single-guard sites, and it expired in late 2007. (*Id.*) Two years later, ABM received a second exemption, but declined to use it because it did not apply to guards working the day shift. (12JA 3367; AOB at 9.)

B. Procedural Summary

1. July 2005: Augustus files her class-action complaint against ABM, which becomes the lead case in a consolidated proceeding

Augustus filed her class-action complaint against ABM on July 12, 2005. (1JA 1.) It pleaded two causes of action— a violation of Labor Code section 226.7 for failing to provide rest periods, and a violation of the unfair competition law (“UCL”), Business & Professions Code section 17200, et seq., for the same conduct. (1JA 4, 5.) Augustus alleged that ABM required its security guards to work during rest periods and that ABM had not obtained an exemption from the mandatory rest-period requirement. (1JA 2-3 [paras. 9, 10], 4 [para. 17].)

In July 2006, the trial court granted Augustus's motion to consolidate her action with two other class actions filed against ABM. (1JA 63.) A "master complaint" was then filed, which included claims against ABM for failing to provide mandated rest and meal breaks and for failing to pay wages due immediately upon an employee's discharge. (1JA 70, 79 [paras. 30-33], 80-81 [paras. 39, 40].)

2. May 2008: ABM's designated "person most qualified" testifies that the company does not relieve its employees of all duties during rest breaks

Augustus took ABM's deposition in May 2008. ABM designated its Senior Branch Manager, Fred Setayesh, as the person most qualified to testify on its behalf about all subjects designated in the deposition notice, which included the subject of rest breaks. (2JA 476 [para. 6]; AOB at 42-45.) ABM gave the following testimony through Setayesh:

Q: So it's your understanding that the security guards are taking rest breaks on an irregular basis during their shift while still conscious of their job requirements? In other words, you said they're not entirely relieved of all their job duties but they are receiving their rest breaks, is that correct?

A: I said they're not relieved from all duties, but they are — they can take their breaks.

Q: And that applies for rest breaks and meal breaks?

A: Correct. (2JA 504.)

* * *

Q: Previously you said that some of the duties of the security officers are performed continuously even while taking rest breaks; correct?

A: I said they will not be relieved from all duties.

(2JA 505.)

Setayesh made changes to his testimony on 14 different pages of the deposition transcript, but he left the testimony quoted above unchanged.

(2JA 522-523.)

3. February 2009: Plaintiffs successfully move for class certification

Plaintiffs filed a motion for class certification in June 2008, which sought certification of “rest break” and “meal break” subclasses. (1JA 101, 103.) The motion argued that all ABM security guards are subject to “a blanket policy of categorically denying them both off-duty meal breaks and duty-free rest periods.” (1JA 111.) It argued that—because ABM has a uniform, company-wide policy and practice requiring all security guards to remain on duty during rest breaks—common factual and legal questions predominated over individual questions, making class certification appropriate. (1JA 124.)

The trial court granted the motion in February 2009, certifying both a meal-break subclass and rest-break subclass. The latter excluded the one-year period when ABM had an exemption from the DLSE from the rest-break requirements. (7JA 1999.)

4. July 2010: Plaintiffs move for summary adjudication of the rest-break cause of action, while ABM cross-moves for summary judgment

a. ABM argues in its summary-judgment motion that the nature of security-guard work requires that it keep its guards on duty at all times

ABM filed its own motion for summary judgment or class decertification, which was heard at the same time as plaintiffs’ motion for summary adjudication. (7JA 2043.) In its motion, ABM sought to establish

that both the meal-break and rest-break violations alleged in the master complaint were without merit as a matter of law. The crux of its argument was: (a) the nature of ABM security-guard work required that ABM keep the guards on duty; (b) ABM accordingly had its guards sign on-duty meal agreements when they were hired; and (c) ABM authorized and permitted its employees to take rest breaks. (7JA 2045, 2049-2050.)

ABM's motion asserted that "[t]he nature of a security officer's job duties requires constant monitoring. The public will rightly presume they are on duty and ready to help when they are on the premises. They also must be available for unexpected emergencies" (7JA 2049.) ABM emphasized what had become its essential theme in this case: that "the nature of security work prevents guards from being relieved of all duty." (7JA 2050.)

It elaborated on that theme in the Statement of Facts, which explained: "All guards are expected to ensure the security of their properties as well as the tenants at their worksite. This includes being available should an emergency arise, such as a medical crisis or fire, *or an unexpected escort be needed.*" (7JA 2053, emphasis added.)

ABM argued that its policy of requiring guards to take on-duty meal breaks was lawful because the nature of security work prevented guards from being relieved of all duties during meal breaks. (7JA 2056-2057.) It insisted that this is true, not only for guards who worked alone, but also at sites with multiple guards: "While security officers at multi-guard locations may not work alone, *they too cannot always be relieved of all duties.* For example, should an emergency arise, which is not uncommon in security work, the officer must immediately be available via radio or cell phone to tend to the crisis." (7JA 2057, emphasis added.)

“Issue 2” within ABM’s separate statement supporting its motion contended that ABM was entitled to judgment as a matter of law on plaintiffs’ meal-break claim “because the nature of security officer work *prevents guards from being relieved of all duty* during meal periods.” (8JA 2115, emphasis added.) In support of this issue, ABM listed the following undisputed facts:

20. When a facility is manned by just one security guard, he or she cannot desert his or her post for an extended period.

21. In the multi-guard situation, even though guards may often take scheduled, 30-minute off-duty breaks, *they must be available, via radio or cell phone*, should an emergency arise, like a tenant getting stuck in the elevator, a fight breaking out, a medical crisis, or someone slipping and falling in the hallway. (8JA 2116-2117, emphasis added.)

ABM also sought summary adjudication of the plaintiffs’ rest-break claim. “Issue 5” of its separate statement said: “The undisputed material facts demonstrate that Defendant is entitled to judgment as a matter of law on Plaintiffs’ first cause of action for failure to provide rest breaks according to Labor Code § 226.7 because ACSS authorized and permitted rest periods.” (8JA 2126.) ABM supported its argument with a host of declarations from security guards who stated that they were allowed to take rest breaks. (7JA 2061, 2062.) But none of those guards said that they were relieved of all duties during those breaks. (*Id.*)

ABM’s motion also addressed the exemptions it received from the DLSE for rest breaks. It explained that in late 2006 it obtained a one-year exemption for its single-guard sites. ABM claimed that after the exemption

expired, the replacement exemption that the DLSE offered “could not be administered” so ABM “decided to continue to provide rest breaks rather than attempt to administer the inconsistent exemption.” (8JA 2128 [UMF 49].)

b. Plaintiffs move for summary adjudication of their rest-break claim, asserting that ABM does not relieve its guards of all duties during rest breaks

In July 2010, the plaintiffs moved for summary adjudication of their rest-break cause of action. (10JA 2679, 2705.) They argued that California law requires employers to relieve their workers of all duties during rest breaks, unless they obtain an exemption from the DLSE. (10JA 2692, 2693.)

Fact number 1 in the plaintiffs’ separate statement in support of the motion was that “Defendant’s security guard employees are not relieved of all duties at any time.” (10JA 2708.) The evidentiary support for this fact came from ABM’s own testimony, through Setayesh, that it had a company-wide policy and practice of not relieving its security guards of all duties during their rest breaks. (10JA 2693.)

Plaintiffs also relied on testimony from ABM’s Regional Human Resources Manager, Sarah Knight. (10JA 2813, 2814, 2847.) She testified that ABM’s guards are continuously on duty and are expected to interrupt their breaks in order to respond to emergencies. (10JA 2847.)

c. In its opposition, ABM concedes that it does not give its guards off-duty rest breaks

In its opposition to the plaintiffs’ motion, ABM did not argue that it relieved its guards of all duties during rest breaks. Instead, it insisted that the guards were not really working during their rest breaks because it allowed them to do things they were forbidden to do while on duty. It asserted:

Such leisure activities, like reading a book and smoking, are clearly prohibited during work hours. (Additional Fact 32, Declaration of Fred Setayesh, ¶¶ 3-4). Therefore, there is no question that when an officer engages in these non-work activities, he or she is taking a break, even if his or her cell phone or pager may (in some instances) still be on.

(Additional Fact 33). (10JA 2914.)

ABM explained that it required its guards to keep their radios or pagers on during breaks so that they could respond to work-related needs that might arise:

. . . Plaintiffs try to argue that class members' rest periods are not duty free based on Fred Setayesh's single comment that security officers are not "relieved from all duties" during rest breaks. Importantly, Plaintiffs did not set forth Mr. Setayesh's subsequent explanatory testimony *stating that guards simply must keep their radios or pagers on* in case an emergency should arise to ensure the safety of the facility and its tenants. (Additional Fact 33, Setayesh Deposition, 77:3-78:15). (10JA 2914, 2915, emphasis added.)

ABM also denied that California law required it to relieve its guards of all duties during their rest breaks, claiming that would make it impossible to provide rest periods to guards who were working alone. (10JA 2916.) Those were the guards whom the DLSE had previously agreed to exempt from the Wage Order's rest break requirements. (10JA 2822.) ABM insisted that, even after that exemption expired, it was still permitted to

require employees at single-guard sites to interrupt their rest breaks and attend to “business demands.” (10JA 2916.)

ABM also argued that because companies can require on-duty meal breaks, they must logically also be allowed to require on-duty rest breaks. (10JA 2916.) It noted that some employees who work alone—like gas-station attendants or baristas in coffee kiosks—take on-duty meal breaks because it is not practical to relieve them of all duties. (*Id.*) According to ABM, “*It would naturally follow* that these workers may take rest breaks that comply with the law even if it means they may occasionally be interrupted by a customer or other business demand.” (*Id.*, emphasis added.)

In response to Plaintiffs’ Undisputed Fact 1—that ABM guards were not relieved of all duty during rest breaks—ABM stated: “Disputed. ACSS’ security officers do not work and are entitled to engage in leisure activities during meal and rest breaks.” (10JA 2885). In support of this response ABM cited a new declaration from Setayesh and 20 declarations from ABM security guards. (10JA 2885-2886.)

ABM included certain “additional facts” in its response to the plaintiffs’ separate statement, which included:

31. Plaintiffs Augustus and Davis were smokers and, like other guards, they took several smoke or rest breaks throughout their employment with ACSS.

32. Leisure activities, like reading a book and smoking, are clearly prohibited during work hours.

33. Guards simply *must keep their radios or pagers on in case an emergency - fire, flood, criminal activity, medical crisis or bomb threat - should arise to ensure the safety of the facility and its tenants.* (10JA 2901-2902, emphasis added.)

d. ABM concedes during oral argument that it keeps its guards on duty during breaks

During oral argument of the cross-motions, ABM's counsel admitted that California's rest-break rules required employees to be relieved of all duty. (3RT 4526:24-26.) He argued that ABM complied with that requirement because "[b]eing relieved of duty doesn't mean that you are relieved of the mere possibility that you can be called back." (3RT 4526:26-28.) ABM's counsel also argued that because employees can be required to perform job duties during on-duty meal breaks, they can be required to do the same thing during rest breaks. (3RT 4529:1-18.) "It's just a question of whether it has to be paid," he said. "Every rest period was paid for. There's no off the clock rest period." (*Id.*)

He urged the court to remember that "the guards get paid for the on-duty lunch . . . Just like for a rest period." (3RT 4531:10-12.) ABM paid them to handle "the real life stuff that security guards do. From time to time they will be called to address issues that arise." (3RT 4531:14-18.) "It is the very nature of security guard services that when they will be needed is unknown. And that's why they need to remain on duty, and *that's why they keep them on duty.*" (3RT 4538:26-28, emphasis added.)

5. December 2010: The trial court denies ABM's summary judgment motion and grants the plaintiffs' cross-motion for summary adjudication

On December 23, 2010, the trial court (the Hon. Carolyn Kuhl) issued a written order granting the plaintiffs' motion for summary adjudication and denying ABM's motion. (13JA 3754-3755.) That order described the essence of this case: "Here, Defendant argues that it provides rest breaks, *but acknowledges that a guard's rest break is always an on-duty rest break.*" (13JA 3757, emphasis added.)

Judge Kuhl supported that statement by cataloguing ABM's legal arguments and factual showings on the motion:

Defendant's policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed (for example, when a tenant needs an escort to the parking lot, which could not be called a life threatening emergency but nonetheless is an important job duty for a security guard.) Because a guard must be available for these situations, guards must keep their cell phones or pagers on. Defendant's position is that interruptions are so rare that the guards are effectively getting their breaks; that plaintiffs have presented no evidence that a guard who was interrupted could not restart their break; and that, because a guard is free to engage in non-work related activities during the rest period (provided the rest break is not interrupted) such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc., that the breaks are in compliance with the wage order and should not be considered on-duty time.

(13JA 3757-3758.)

Judge Kuhl ruled that ABM security guards remained under ABM's control while they took their breaks, even though they were allowed to engage in some personal activities, and ABM therefore violated the requirement that employers provide duty-free rest breaks. (13JA 3758-3760.)

6. February 2012: Plaintiffs bring their summary-judgment motion on behalf of the rest-break subclass

After Judge Kuhl’s ruling, ABM cooperated with the plaintiffs in providing the data necessary for the plaintiffs’ expert to calculate the appropriate damages, interest, and waiting-time penalties. ABM agreed that it would not object to the underlying data on the grounds of authenticity, foundation, or admissibility. (14JA 3943.)

On February 8, 2012, the plaintiffs filed a motion for summary judgment, which was heard by Judge Wiley. (14JA 3934, 3959; 27JA 7833.) Plaintiffs sought unpaid wages under Labor Code section 226.7 — an hour for each shift worked in excess of 3.5 hours, prejudgment interest on the unpaid wages, waiting time penalties under Labor Code section 203, an injunction, and an award of attorney’s fees. (14JA 3943, 3944.)

In opposition, ABM argued that Judge Kuhl’s ruling was invalid and that Judge Wiley could (and should) reconsider Judge Kuhl’s ruling.¹ (22JA 6292, 6301-6304, 6315.) It also argued that there were disputed factual issues about damages — in particular whether all ABM guards had actually received rest breaks. ABM suggested that there was no evidence of a company “practice” to deny off-duty rest breaks—only a company “policy” not to provide them. (22JA 6308.)

It also argued that the eleven depositions it had taken of its guards after the 2010 summary-adjudication ruling showed that “the majority of the time” the guards received rest breaks and were seldom interrupted. (22JA 6306.) It noted that one guard, David Swagerty, testified that he did

¹ ABM argued that Judge Kuhl’s ruling represented a procedurally improper “partial” summary judgment. ABM has not advanced this argument on appeal.