

S244751

IN THE SUPREME COURT  
OF THE  
STATE OF CALIFORNIA

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SUPREME COURT  
**FILED**

MAR 5 2018

KURT STOETZL, ET AL.

Jorge Navarrete Clerk

*Plaintiffs and Appellants,*

Deputy

v.

STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES, ET  
AL.

*Defendants and Respondents.*

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On Review From The Court Of Appeal For the First Appellate District,  
Division One, 1st Civil No. A142832

After An Appeal From the Superior Court For The State of California,  
County of San Francisco, Case Number CJC11004661, The Honorable John E.  
Munter

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**OPENING BRIEF ON THE MERITS OF STATE OF CALIFORNIA, ET AL.**

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## I.

### **ISSUES PRESENTED FOR REVIEW**

Because this Court's November 29, 2017 Order granting review in this action did not specify the issues to be briefed, Respondents State of California, the California Department of Human Resources (CalHR, f/k/a the Department of Personnel Administration or DPA), the California Department of Corrections and Rehabilitation (CDCR), and the California Department of State Hospitals (DSH, f/k/a the California Department of Mental Health or DMH) (collectively, "Respondents" or "the State") set forth verbatim the issues presented in their Petition for Review to this Court as follows:

1. Whether the Court of Appeal erred in holding the definition of "hours worked" found in the Industrial Wage Commission's Wage Order No. 4, as opposed to the definition of that term found in the federal Fair Labor Standards Act, constitutes the controlling legal standard for determining the compensability of the Unrepresented Employee subclass' preliminary and postliminary "walk time."

2. Whether the Court of Appeal erred in holding that the Unrepresented Employee subclass can pursue a common law breach of contract claim for unpaid overtime, without adducing evidence at trial of an implied contract from which such contractual obligations may be derived.

## II.

### INTRODUCTION/SUMMARY OF ARGUMENT

The present action is what commonly is referred to as a “walk time” case. Appellants are a class of correctional employees who, by stipulation of the parties (Appellants’ Appendix [AA], Vol. 1, pp. AA 000230) are divided into two subclasses: Represented Employees, whose labor relations with the State are governed by the Ralph C. Dills Act, Government Code section 3512, *et seq.*, and Unrepresented Employees, whose labor relations with the State are governed by the Bill of Rights for State Excluded Employees, Government Code section 3525, *et seq.* The plaintiff class claims it has not been paid for all time worked, including the time it takes them to walk to their posts in the correctional institutions at which they work.

Throughout the course of this litigation, Appellants continually have characterized the central issue presented as whether their minimum wage rights have been violated. That is *not* the issue, however, on which this case turns. Rather, the critical issue before this Court is more fundamental. The question on which this case turns is whether the controlling legal standard for determining the compensable hours worked for employees in the plaintiff class is the federal Fair Labor Standards Act (FLSA), 29 U.S.C. section 201, *et seq.* or California’s “control” test as embodied in IWC Wage Order No. 4 and as articulated by this Court in *Morillion v. Royal Packing Co.* (*Morillion*) (2000) 22 Cal.4th 575.

Since the mid-1980's, the method for compensating employees in the Unrepresented Employees subclass<sup>1</sup> has been contained in rules and regulations adopted by CalHR pursuant to the Legislature's broad and express delegation of authority to it, which includes the authority "to establish and adjust salary ranges" for state excluded employees (Gov. Code § 19826, subd. (a)), to "adopt rules governing hours of work and overtime compensation" (Gov. Code § 19849), and, of particular relevance to the present discussion, to "provide for overtime payments as prescribed by the Federal Fair Labor Standards Act." (Gov. Code § 19845.)

Under the rules adopted by CalHR, the compensability of Unrepresented Employees' hours worked is, and always has been, governed by the FLSA. The Court of Appeal erred by holding that California's definition of "hours worked," rather than the FLSA, governs the determination of compensable hours worked for the Unrepresented Employee subclass. The Court of Appeal's holding vitiates the express

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<sup>1</sup> Following the trial of Phase I, which by stipulation of the parties involved various threshold legal issues described in full below, the trial court rendered a decision in favor of the State. (AA, Vol. 20, p. AA005409.) The trial court thereupon entered judgment for the State (AA, Vol. 20, p. AA 005438) and Appellants appealed. (AA, Vol. 20, p. AA 005466.) On appeal, the Court of Appeal affirmed the trial court's judgment for the State with respect to the Represented Employee subclass, but reversed the trial court as to the Unrepresented Employee subclass. Both sides filed Petitions for Review to this Court and on November 29, 2017, both Petitions for Review were granted. The present brief addresses the State's challenge to the Court of Appeal's decision reversing the trial court's judgment in its favor regarding the Unrepresented Employee subclass.

delegation of authority to CalHR by the Legislature to establish rules and regulations for compensating excluded employees. The Court of Appeal's holding also fails to give proper deference to the regulations adopted by CalHR pursuant to this express delegation of authority, which establish a methodology for compensating employees in the Unrepresented Employees subclass based on the FLSA.

Along with the Court of Appeal's error in holding that California law, rather than the FLSA, controls the determination of what constitutes compensable hours worked, the Court of Appeal further erred in holding that Appellants could maintain a common law breach of contract claim against the State for allegedly failing to pay overtime pay. At the trial court correctly concluded, Appellants failed to adduce any evidence at trial demonstrating the existence of a contractual obligation to pay them overtime. Furthermore, none of the rules or regulations on which they potentially could rely for such a proposition evince an unequivocal intent to create a contractual obligation to pay overtime, as opposed simply to creating overtime policies.

Based upon the arguments set forth below, as well as the record in this case, the State respectfully requests this Court reverse that portion of the Court of Appeal's decision regarding the Unrepresented Employee subclass and reinstate the trial court's judgment in its favor.

### III.

#### **STATEMENT OF THE CASE**

##### **A. Statement of Material Facts.**

###### **1. Description of Unrepresented Employee Subclass.**

There are nine job classifications contained in the class certified by the trial court in its January 28, 2011 order. (AA, Vol. 1, p. 000039.) Pursuant to the stipulated order dated January 6, 2012 (AA, Vol. I, pp. AA000230-000235), the plaintiff class was divided into two subclasses: Represented Employees (AA, Vol. 3, p. AA 000604 [Stip. No. 7]) and Unrepresented (Excluded) Employees. (Gov. Code, § 3525, et seq.) (AA, Vol. 3, p. AA 000605 [Stip. No. 10].) The Unrepresented Employee subclass, which is the focus of this brief, consists of the following job classifications: Correctional Sergeants, Correctional Lieutenants, and Senior Medical Technical Assistants. The California Correctional Peace Officers Association (CCPOA) and the California Correctional Supervisors Organization (CCSO) are the non-exclusive representatives for the members of the Unrepresented Employee subclass. (AA Vol 3, p. 000605 [Stip. No. 9].)

###### **2. Labor Relations Between the State and the Unrepresented Employee Subclass.**

Labor relations between the State and the Unrepresented Employee subclass are governed by the Bill of Rights for State Excluded Employees,

Government Code section 3525, et seq. (AA, Vol. 3, p. AA 000605 [Stip. No. 10].) Employees covered by the Bill of Rights for State Excluded Employees, such as those in the Unrepresented Employee subclass, are excluded from the collective bargaining process with respect to the wages, hours, or other terms and conditions of their employment. Instead, CalHR is authorized to “adopt rules and regulations for the administration of excluded employer-employee relations” (Gov. Code § 3535) and to “adopt or amend regulations to implement employee benefits for those state officers and employees excluded from, or not otherwise subject to, the Ralph C. Dills Act.” (Gov. Code § 3539.5.)

This general legislative delegation of authority to CalHR to adopt regulations governing the terms and conditions of state employment for employees in the Unrepresented Employee subclass is specifically reinforced in a series of statutes in the Government Code pursuant to which the Legislature has delegated to CalHR the specific authority to adopt rules and regulations governing the terms and conditions for compensating those employees.

For instance, Government Code section 19826, subdivision (a) delegates to CalHR the authority to set salary ranges:

The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and

responsibilities. In establishing or changing these ranges, consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. The department shall make no adjustments that require expenditures in excess of existing appropriations that may be used for salary increase purposes. The department may make a change in salary range retroactive to the date of application of this change.

(AA, Vol. 13, AA003619 [Defendants' Exhibit 204].)

Government Code section 19843, subdivision (a) allows CalHR to create workweek groups:

For each class or position for which a monthly or annual salary range is established by the department, the department shall establish and adjust workweek groups and shall assign each class or position to a workweek group. The department, after considering the needs of the state service and prevailing overtime compensation practices, may establish workweek groups of different lengths or of the same length but requiring different methods of recognizing or providing compensation for overtime. The department may also provide for the payment of overtime in designated classes for work performed after the normal scheduled workday or normal scheduled workweek.

(AA, Vol. 13, p. AA003621 [Defendants' Exhibit 205].)

Government Code section 19844, subdivision (a) allows CalHR to set overtime rules:

The department shall provide the extent to which, and establish the method by which, ordered overtime or overtime in times of critical emergency is compensated. The department may provide for cash compensation at a rate not to exceed 1 1/2 times the regular rate of pay, and the rate may vary within a class depending upon the conditions of work, or the department may provide for compensating time off at a rate not to exceed 1 1/2 hours of time off for each hour of overtime worked. The provisions made under this section shall be based on the

practices of private industry and other public employment, the needs of state service, and internal relationships.

(AA, Vol. 13, p. AA003622 [Defendants' Exhibit 206].)

Government Code section 19845, subdivision (a) permits CalHR to apply FLSA overtime rules to state employees:

Notwithstanding any other provision of this chapter, the department is authorized to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act to state employees.

(AA, Vol. 13, p. AA 003623 [Defendants' Exhibit 207].)

Finally, Government Code section 19849, subdivision (a) directs CalHR to adopt rules governing working hours and overtime compensation:

The department shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records. Each appointing power shall administer and enforce such rules.

(AA, Vol. 13, p. AA003624 [Defendants' Exhibit 208].)

**3. CalHR's Exercise of its Legislatively Delegated Authority to Establish the Method for Compensating Unrepresented Employees.**

Pursuant to the authority granted it by the Legislature both in the Bill of Rights for State Excluded Employees and the series of Government Code sections cited above, CalHR has adopted a number of regulations governing the method by which employees in the Unrepresented Employee subclass are compensated.

For instance, title 2, California Code of Regulations, section 599.666.1 provides:

The pay plan for state civil service employees designated supervisory under Government Code section 3513(g) or excluded from the definition of state employee under Government Code section 3513(c) or managerial under Government Code section 3513(e) (Ralph C. Dills Act) consists of the salary ranges and rates established by the Department and the regulations contained in this article.

Title 2, California Code of Regulations, section 599.671 provides that that “[u]nless otherwise indicated in the pay plan, the rates of pay set forth represent the total compensation in every form except for overtime compensation.”

Pursuant to the express authority granted it in Government Code section 19843, CalHR has established workweek groups for state employees. (Cal. Code Regs., tit. 2, § 599.701.) Based on this code section, CalHR, in 1983, divided state employees into two Work Week Groups (WWGs): WWGs 1 and 4. (*Ibid.*)

At the same time, and pursuant to the express delegation of authority granted it to provide for overtime payment as prescribed by the FLSA (Gov. Code § 19845) CalHR adopted regulations providing for the circumstances under which overtime would be compensable. One such regulation provides that “[i]n order to be compensable by cash or compensating time off, overtime in [WWG] 1 and Subgroups 4A, 4B, and 4D must be authorized in advance . . . by the appointing authority or its designated representative. This authorization must also be confirmed in writing not later than 10 days after the end of the pay period during which the time was worked.” (Cal. Code

Regs., tit. 2, § 599.702.) Another regulation provides that overtime must be “ordered overtime” to be compensable. (Cal. Code Regs., tit. 2, § 599.704.)

David Gilb, the former CalHR Director, testified at trial that in order to implement the above regulations, and based upon the authority delegated it by the Legislature, CalHR developed the California Pay Scales Manual. (Reporter’s Transcript [RT], Vol. 4, 467:9-468:5 (Gilb); AA, Vols. 11-13, AA p. 002794, *et seq.* [Defendants’ Exhibit 79].) This manual documents, among other things, the salary ranges for each employee class in the state civil service. (*Ibid.*) At trial, Mr. Gilb testified that all of the job classifications in the Unrepresented Employees subclass are listed in the appendix to the Pay Scale Manual and that each of those job classifications is designated as Work Week Group 2.<sup>2</sup> (See generally, RT, Vol. 4, 474:22-485:25 (Gilb).)

Section 10 of the Pay Scale Manual is entitled, “Work Week Groups Established Under The Fair Labor Standards Act.” (AA, Vol. 11, pp. AA002996-2999.) Subsection (f) of Section 10 of the Pay Scale Manual provides that “[t]he provisions of Work Week Group 2 are made applicable to all classes *which are determined by the Director of the Department of Personnel Administration to include positions subject to the FLSA.*” (*Id.* at

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<sup>2</sup> After the initial adoption of the Pay Scales Manual, CalHR restructured the WWGs by reassigning WWG 1, 4A, 4B, and 4D to WWG 2 for those positions CalHR determined to be subject to the calculation of overtime rates under FLSA criteria. (RT, 402:10-405:3.)

AA002997, emphasis added.) Mr. Gilb testified that he, and each of his predecessors holding the position of CalHR Director since the adoption of the Pay Scales Manual, have determined that the positions in the Unrepresented Employee subclass, all of which are included in Work Week Group 2, are subject to the FLSA. (RT, Vol. 4, 472:17-473:15.)

**B. Procedural History.**

**1. Operative Pleadings.**

The action entitled *Stoetzl, et al. v. State of California, et al.*, San Francisco County Superior Court, Case No. CGC-08-474096 (hereinafter “*Stoetzl*”) was commenced on April 9, 2008. (AA, Vol. 1, pp. AA000001, *et seq.*) On February 3, 2009, the trial court granted plaintiffs’ request for a complex designation. (AA, Vol. 1, pp. AA000015, *et seq.*) At the time of the trial of this action, the operative pleading in *Stoetzl* was the Fourth Amended Complaint. (AA, Vol 1, p. AA 000073, *et seq.*)

On May 12, 2011, the *Stoetzl* action was coordinated with two other actions: *Shaw, et al. v. State of California, et al.*, Kings County Superior Court, Case No. 10C0081 (“*Shaw*”) and in *Kuhn, et al. v. State of California, et al.*, Los Angeles County Superior Court, Case No. BC450446 (“*Kuhn*”). (AA, Vol. 1, p. AA000069.) By the time of trial, the operative complaint in *Shaw* was the Second Amended Complaint (AA, Vol. 1, AA000091, *et seq.*) and the operative complain in *Kuhn* was the First Amended Complaint. (AA, Vol. 1, AA000109, *et seq.*)

The complaints in the coordinated actions alleged causes of action for (1) failure to pay contractual overtime in violation of Labor Code sections 222 and 223; (2) failure to pay statutory minimum wage in violation of Labor Code sections 1182.11, 1182.12, 1194, and 8 California Code of Regulations section 11000, *et seq.*; (3) failure to keep accurate records of employee hours in violation of Labor Code section 1174; and (4) failure to pay contractual overtime in breach of common law contractual obligations. (AA, Vol. 1, p. AA000073, *et seq.*)

**2. Class Certifications.**

On January 28, 2011, the trial court granted class certification in *Stoetzl*. (Vol. 1, AA000039.) The Order defined the initial class as follows:

All persons who are or who have been employed as Correctional Officers, Correctional Sergeants, Correctional Lieutenants, Medical Technical Assistants, Senior Medical Technical Assistants, Correctional Counselors I, Correctional Counselors II, Youth Correctional Officers, and/or Youth Correctional Counselors to [sic] work at adult and/or youth correctional institutions within the California Department of Corrections and Rehabilitation in the period commencing April 9, 2005 until the notice of pendency of this class action is given.

On October 4, 2011, after coordination of the *Shaw* and *Kuhn* matters, the trial court granted class certification in those actions. (Vol. 1, AA000156-157.) On January 6, 2012, the trial court approved the parties' stipulation dividing the plaintiff class into two subclasses: Represented Employees and Unrepresented Employees. (AA, Vol. 1, p. AA 000230.)

### **3. Motion for Judgment on the Pleadings**

On March 16, 2012, the State moved for judgment on the pleadings in all three coordinated suits. (Vol. 1, AA000242-427.) On June 19, 2012, the trial court granted the motion in part. (Vol. 2, AA000573-578.) Specifically, the trial court granted judgment on the pleadings with respect to Appellants' causes of action for violation of Labor Code sections 222 and 223 and failure to keep records in violation of Labor Code section 1174, but denied judgment on the pleadings with respect to the two remaining causes of action for failure to pay the minimum wage and breach of common law contract. (AA, Vol. 3, p. AA000573.)

### **4. Pre-Trial Stipulations.**

On January 30, 2013, the parties stipulated to, and the trial court approved, the following issues to be tried to the court during Phase 1 of this action (AA, Vol. 2, p. AA000579):

#### Compensability

(a) Whether the California state law standard of compensability (the "control" standard) or the FLSA standard of compensability ("first principal activity of the day") establishes the standard for determining plaintiffs' compensable hours worked; as to Represented Employees: During the relevant time period, did the parties agree the FLSA would constitute the controlling legal standard for determining represented employees' compensable hours worked?

#### Minimum Wage

(b) Whether Labor Code sections 1182.11, 1182.12, 1194 and 8 CCR section 11000 et seq. and/or the Wage Orders apply to the state employer for purposes of establishing the minimum

wage applicable to plaintiffs.

(c) Represented Employees: During the relevant time period, did the parties contractually agree to apply the federal minimum wage instead of the California minimum wage and, if so, is such an agreement enforceable?

Breach of Contract Claims

(d) Is there any legal prohibition, including but not limited to, the Ralph C. Dills Act (Govt. Code § 3512, *et seq.*) for represented employees and the Bill of Rights for State Excluded Employees (Govt. Code §3525, *et seq.*) for unrepresented employees, against stating a claim for breach of common law contract regarding the terms and conditions of employment against the state, or against an employee for receiving overtime for hours worked beyond their regular work schedule?

(e) For represented employees, what contractually enforceable overtime policies existed when (1) the 2001-2006 MOU was in effect, including by operation of effect of Government Code § 3517.18 until September 18, 2007, (2) the state's Implemented Terms were in effect, and (3) once the 2011-2013 MOU took effect?

(f) Assuming represented employees can state a common law contract claim, were represented employees required to exhaust contractual grievance procedures and/or other administrative remedies prior to bringing a civil breach of contract action?

(g) Assuming unrepresented employees can state a common law contract claim, what contractually enforceable overtime policies existed during the class period?

Along with the issues to be tried during phase 1, the parties agreed to certain stipulated facts for that trial. (AA, Vol. 2, p. AA000602.)

**5. Trial.**

Trial began on August 13, 2013 and continued through August 19, 2013. Closing arguments occurred on September 30, 2013. After trial, the

trial court issued a tentative statement of decision to which Appellants submitted objections. (AA, Vol. 19, p. AA005390.) The trial court issued its Final Statement of Decision on January 21, 2014 finding in favor of the State on the critical issues of the applicable legal standard for determining the compensability of hours worked and on whether the plaintiff class could establish a breach of common law contract claim against the State. (AA, Vol. 20, p. AA005409.)

With respect to the Unrepresented Employees subclass, the trial court found that “[t]he persuasive evidence adduced during trial established that the current WWG 2 definitions consistently reference the FLSA as the controlling legal standard for measuring Unrepresented Employees’ compensable hours worked.” (AA, Vol. 20, p. AA 005430.) In reaching this conclusion, the trial court noted that section 10(a) of the Pay Scales Manual defines “hours worked” in part, as follows: “For the purposes of identifying hours worked under the provisions of the FLSA, only the time spent which is required or controlled by the State and pursued for the benefit of the State need be counted.” The trial court rejected Appellants’ argument that the reference to “control” in this definition rendered the Pay Scales Manual’s definition of “hours worked” more consistent with California state law than the FLSA. (AA, Vol. 20, pp. AA 005430-31.) On this basis, the trial court concluded that “[a]t all relevant times and consistent with its legislatively delegated authority, CalHR has applied the FLSA as the standard for

measuring plaintiff's compensable hours worked. It follows that, as applied here, the FLSA standard of compensability constitutes state law." (*Id.* at p. AA 005431.)

With respect to the Unrepresented Employees subclass' claim for breach of common law contract, the trial court found that "CalHR has established specific rules addressing the subject of overtime pay, thereby foreclosing plaintiffs' common law claims. [¶] Moreover, plaintiffs failed to persuasively establish at trial the existence of any agreement to pay overtime to the Unrepresented Employees. *See Retired Employees Ass'n of Orange County, Inc. v. County of Orange*, 52 Cal.4th 1171, 1187-89 (2011). The Court finds and concludes that there was no such agreement." (AA, Vol. 20, p. AA 005434.)

Because the trial court's decision was determinative of all of Appellants' remaining claims, judgment was entered in favor of the State on June 23, 2014. (AA, Vol. 20, p. 5438.)

#### **6. Court of Appeal Decision.**

Following entry of the trial court's judgment, Appellants timely appealed to the First District Court of Appeal. (AA, Vol. 20, p. AA005466.) After the case was briefed fully, the Court of Appeal heard oral argument on August 8, 2017.

On August 31, 2017, the Court of Appeal issued its decision. With respect to the Unrepresented Employee subclass, the appellate court reversed

the judgment of the trial court. On the issue of the legal standard for determining the compensability of hours worked, the Court of Appeal held that the California “control” test for determining compensability, as set forth in IWC Wage Order No. 4, controlled because “our Supreme Court has explained that wage orders are entitled to ‘extraordinary deference’ and have ‘the same dignity as statutes,’” citing, *Brinker Restaurant Corp v. Superior Court (Hohnbaum) (Brinker)* (2012) 53 Cal.4th 1012, 1027. (Slip Opn., p. 19.) The Court of Appeal further found,

[I]t is possible to harmonize the California Pay Scale Manual and Wage Order No. 4, as we must seek to do under *Brinker*. [Citation.] The manual does not expressly state that law enforcement employees are not subject to the provisions of the wage orders applicable to their job classifications, nor does it contain any provisions concerning compensation for pre- and post-work activities. Wage Order No. 4, on the other hand, explicitly provides that its ‘Definitions’ (section 2) and ‘Minimum Wages’ (section 4) provisions apply to employees of the State.

(Slip Opn., p. 21.)

Thus, the Court of Appeal concluded, “[w]e may reasonably construe the regulatory schemes to mean that entitlement to overtime compensation is controlled by the FLSA but that the meaning of ‘hours worked’ is governed by Wage Order 4. Such a construction does violence to neither regulatory scheme.”

With respect to the Unrepresented Employees subclass’ claim for breach of common law contract, the Court of Appeal also reversed the trial