No. S244751

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KURT STOETZL, et al.

Plaintiffs, Appellants and Petitioners,

v.

STATE OF CALIFORNIA, et al.

Defendants and Respondents.

On Review From The Court of Appeal for the First Appellate District, Division Four, No. A142832

After an Appeal From the Superior Court for the State of California, County of San Francisco, Case No. CJC11004661, Hon. John E. Munter

Coordination Proceeding Special Title: CALIFORNIA CORRECTIONAL EMPLOYEES WAGE AND HOUR CASES

OPENING BRIEF ON THE MERITS OF PLAINTIFFS/PETITIONERS

MESSING ADAM & JASMINE LLP
Gary M. Messing, Bar No. 75363
gary@majlabor.com
*Gregg McLean Adam, Bar No. 203436
gregg@majlabor.com
Yonatan L. Moskowitz, Bar No. 306717
yonatan@majlabor.com
235 Montgomery St., Suite 828
San Francisco, California 94104
Telephone: 415.266.1800
Facsimile: 415.266.1128

SQUIRE PATTON BOGGS LLP
David M. Rice, Bar No. 131064
david.rice@squirepb.com
275 Battery St., Suite 2600
San Francisco, CA 94111
Telephone: (415) 954-0200
Facsimile: (415) 393-9887

Lead Class Counsel for Plaintiffs/Petitioners

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REGULATIONS

CONSTITUTIONAL PROVISIONS

I.

ISSUES PRESENTED FOR REVIEW

1. Can and did a state employee union waive the California minimum wage and compensability standards of employees it represents in favor of less protective federal equivalents?

2. If the answer to issue 1 is no, are those employees entitled not simply to minimum wage for all "hours worked" under California's "employer control" test but to their contractual or statutorily agreed upon hourly wages (plus overtime where applicable)?

II.

INTRODUCTION

The Wage Orders of the Industrial Welfare Commission (the "IWC") give California State employees the right to be compensated for any work performed under the control of their employer. This Court has repeatedly held that those Orders are entitled to "extraordinary deference," "have the same dignity as statutes," and courts must therefore "seek to harmonize them" with other law, including federal law, with the mandate "to promote employee protection." (See, e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027; *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840, 843.) The court of appeal nevertheless nullified their application, including even the right to

California minimum wage, to a large class of Petitioners in this case by concluding that Petitioners' Union waived their California wage and hour rights in favor of less protective federal law.

These Petitioners are California correctional peace officers who are represented by their union pursuant to the terms of the Ralph C. Dills Act (Gov. Code § 3512 et seq. ["Dills Act"]). Petitioners contend that the State did not compensate them for all time spent under its control, primarily so-called "pre and post-work activity" ("PPWA") when the officers are on prison grounds but before and after they assume their posts. Although the court of appeal agreed that a separate subclass of sergeants and lieutenants was entitled to seek additional compensation, it accepted the State's argument that the Union for the represented officers waived their right to any compensation required by the IWC's Wage Orders, and in particular Wage Order 4–2001 governing, among other things, California minimum wage. The court reached this radical conclusion solely on the basis that the Union entered into memoranda of understanding ("MOUs") with the State that referenced a single provision of federal law under the Federal Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA). This was error.

Neither the plain language of those MOUs, nor the bargaining history, supports the conclusion that the Union waived Petitioners' California wage and hour rights, primarily for the simple reason that it is undisputed neither the contracts nor the parties in their negotiations ever

discussed those rights. Moreover, even had the union tried to waive Petitioners' California minimum wage rights, it could not have done so because those rights are unwaivable. (Lab. Code, § 1194, subd. (a); *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 455.) Consequently, the court of appeal's conclusion that the waiver was permissible because the Legislature ratified the MOUs fails because, under the Dills Act, the Legislature could only ratify what the parties agreed to, and as a matter of law the parties could not have agreed to waive Petitioners' right to California minimum wage.

With respect to the sergeants and lieutenants, the court of appeal properly reversed the trial court. Having harmonized the Wage Orders with federal overtime law, as it was required to do, the court ruled that the subclass could seek either California minimum wage or premium overtime wages under a breach of contract theory for uncompensated time. The court of appeal should have also harmonized state and federal standards to permit the correctional officer class to also pursue recovery on the same bases, as well as under California's Labor Code sections 222 and 223.

Harmonization is no more difficult for the officers than it is for the sergeants and lieutenants. The parties agree that the relevant IWC definition of "hours worked" – the employer "control standard" – is broader than the federal standard and would potentially include work performed that is not compensable under federal law. Harmonization simply allows

both classes to pursue payment for "hours worked" under California law that the employer treats as non-compensable under federal law.

The Court should therefore reverse the court of appeal's decision with respect to these officers and permit them to pursue payment for uncompensated hours they can show they worked under state law upon remand to the trial court. They should not be precluded from even attempting to make that showing by the erroneous rulings below.

III.

FACTS AND PROCEDURAL BACKGROUND

The Plaintiffs in this lawsuit are correctional peace officers employed by the State at 37 state-run correctional institutions. (3 AA at p. 603–604.) The Defendants are the State of California, the California Department of Corrections and Rehabilitation, the California Department of Mental Health, and the California Department of Human Resources ("CalHR") (formerly the Department of Personnel Administration). Plaintiffs, like the lower courts, will refer to them collectively as "the State."

The trial court certified two subclasses of Plaintiffs: a subclass of "Represented Employees" that is comprised primarily of correctional officers who collectively bargain over "wages, hours and other terms and conditions of employment" (Gov. Code § 3517), and a subclass of "Unrepresented Employees" that is comprised primarily of correctional

sergeants and lieutenants who do not collectively bargain. (1 AA at p. 231.) The California Correctional Peace Officers' Association is the union ("Union") that bargains with the State over the terms and conditions of employment for the Represented Employees under the Ralph C. Dills Act. (Gov. Code § 3512 *et seq.* ["Dills Act"].)

The Represented Employees filed the class action complaint in *Stoetzl et al. v. State of California et al.*, County of San Francisco Case No. CGC-08-474096 in April 2008. (1 AA at p. 1.) The Judicial Council later coordinated *Stoetzl* with two class actions filed by different members of the Unrepresented Employees (*Shaw et al. v. State of California et al.*, County of Kings Case No. 10C0081 ("*Shaw*") and (*Kuhn et al. v. State of California et al.*, County of Los Angeles Case No. BC450446 ("*Kuhn*"). (1 AA at pp. 67–68.)

The State prevailed in the trial court with respect to both subclasses, resulting in dismissal of all Plaintiffs' claims and entry of a final, appealable judgment in the action. (20 AA at pp. 5438–5444, 5447–5453, 5457–5461; Cal. Civ. Proc., § 904.1, subd. (a)(1).) On appeal, the First District reversed with respect to the Unrepresented Employees but affirmed in full with respect to the Represented Employees. Accordingly, this Opening Brief on the Merits is filed on behalf of the Represented Employees as Petitioners. The Unrepresented Employees are Respondents

to the State's contemporaneously-filed petition for review, which this Court also granted.

A. The Relevant Responsibilities Of A Represented Correctional Officer And Compensation Under The Terms Of The MOUs At Issue

The correctional facilities where petitioners work function 24 hours per day, seven days per week, year-round. Not all employee "posts" operate 24 hours per day, but most do. Those posts are typically staffed by employees on three eight-hour "watches." Employees staffing such positions cannot leave their post until relieved by the officer filling the post on the next shift. Consequently, a correctional officer scheduled to work first watch (typically 10 p.m. to 6 a.m.) in a watch-tower in a California correctional facility will spend significant time under her employer's control before she assumes her post and after she hands it off.

Petitioners seek to show at trial that from the moment she arrives at the facility until the moment she leaves, the officer may be required to respond to emergencies and is subject to search. (RT Vol. III 478:5–12.) She may not bring her phone, radio, reading material or other personal property through the facility's security gates. After waiting to pass through security, the officer must walk to a centralized location inside the correctional facility where she picks up, checks out, and performs safety checks to her tools and safety equipment. (See 1 AA at pp. 78–79; RT Vol. IV, 593:14–595:8.) This walk can be lengthy, and during it, the officer

may pass through additional security gates and undergo further searches. (1 AA at pp. 78–79.)

The employee must timely arrive at her post for her 10 p.m. shift to receive a briefing on the events of the day from the officer she is relieving (if late, she will delay the departure of that officer). At a time station placed along her route, she signs a shift log recording her *scheduled* start time (*not* the time she actually signs the log) in order to indicate that she has arrived on time. (1 AA at p. 78.)

After the shift, the officer must await her relief, brief the relief officer, sign out, and walk back through the prison and the security gates to drop off her tools and safety equipment. Then she must walk to the main facility exit on the same regulated route she entered on and wait for those security gates to release her to walk to her car. Only when an employee leaves prison grounds is she completely free from the employer's control.

As described in more detail below, since 1998 a series of collective bargaining agreements or memoranda of understanding ("MOUs") have compensated correctional officers for 12 minutes per day, over and above eight hours of compensated time at post, for such pre and post work activity ("PPWA"). (RT Vol. II, 241:25–242:4; 264:19–265:3; 267:23–268:1.) During a period between September 2007 and May 2011, no MOU existed but the same compensability rules were maintained under State policies called the "Implemented Terms." (RT Vol. II, 337:13–16; RT Vol. III,

446:12–449:6.) The State does not track or compensate time spent by individual officers inside state grounds or even inside the correctional facility itself. (RT Vol. II, 256:6–257:8.) Instead, all employees uniformly receive 12 minutes per day of compensated time no matter how long they spend under their employer's control.

Under Petitioners' theory of the case, if instead of 8 hours and 12 minutes per day under the employer's control, an employee spends 8 hours and 36 minutes performing the duties and tasks above, the employee would be entitled to be paid for the additional 24 minutes of uncompensated time at either the minimum wage rate, her regular hourly rate, or the premium overtime rate.

B. Summary Of The Relevant Employment Relationship From 1998 To 2013[1]

In 1998, the State and the Union negotiated the terms of a one-year MOU. (See RT Vol. II, 221:14–18; 223:4–9.) Prior MOUs provided for a 40-hour workweek, after which employees were entitled to overtime for additional hours worked. The 1998 MOU introduced an expanded 168-hour work schedule based on a 28-day period, which was premised on the State's discretion, under section 207(k) of the FLSA (29 U.S.C. § 207(k)) – known as "the 7k exemption" – to change the threshold for incurring

[1] The Represented Employees have attached a Timeline of Events as Appendix 1 to assist the Court in understanding the history of the parties' agreements or lack thereof.

federal overtime liability. (RT Vol. II, 231:19–233:8.) The 7k exemption is one of only a handful of sections of the FLSA that an employer has discretion to adopt. (Indeed, the parties' current MOU provides for premium overtime wages when the employee works more than 41 hours in a seven-day period.) Most of the FLSA is mandatory federal law. The practical effect of this change was that instead of accruing overtime wages after 40 hours worked in 7 days, an employee now had to work more than 168 hours in 28 days before she would begin to receive overtime wages.

Specifically, the 1998 MOU states: "CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor and Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees under the provisions specified herein." (3 AA at pp. 631–632.) The 1998 MOU scheduled employees for 160 hours at their post plus 4 hours of training plus 4 hours of PPWA, for a total of 168 compensated hours of work each 28-day period. (Slip Op. at p. 5.) The MOU stated "that generally this is sufficient time for all pre and post work activities during each work period, and that the compensation allotted for these activities *under this provision* is full compensation for all of these activities." (*Id.* [emphasis added].)

The MOU also stated:

> The State and CCPOA agree that they have made a good faith attempt to comply with all requirements *of the FLSA* in negotiating this provision. If any court of competent jurisdiction declares that any provision or application of this Agreement is not in conformance *with the FLSA*, the parties agree to meet and confer immediately . . . .

(3 AA at p. 634 [emphasis added].) In addition, the Union agreed "that neither it nor any of its employees acting on their own behalf or in conjunction with other law firms shall bring suit in any court challenging the validity of this provision *under the FLSA*." (3 AA at p. 634 [emphasis added].)

As the trial court noted, however: "The parties agree that when the 1998–1999 MOU was executed there was only one compensability standard that could be applied – the FLSA's first principal activity test. In light of that, the parties' agreement in the 1998–1999 MOU to apply federal law is not surprising. Indeed, there was no other standard they could have referred to." (See 20 AA at p. 5427 [Statement of Decision].) As a result, as the court of appeal put it succinctly, "[d]uring the course of the negotiations, there was no discussion of whether the State would have to comply with California wage and hour laws." (Slip Op. at p. 6.)

The successor 1999–2001 MOU "rolled over" (i.e., continued) the same provisions; consequently, "the bargaining history was rolled over as well." (Slip Op. at p. 6.)

On January 1, 2001 a change critical to the outcome of this case occurred. The California Industrial Welfare Commission ("IWC") amended the General Minimum Wage Order and Wage Order 4–2001 (which *both* parties and the lower courts agreed apply to the Represented Employees) to make the California minimum wage applicable to public employees of the State and its political subdivisions for the first time. Previously, public employees were exempt from the IWC Wage Orders (*compare* 2 AA at p. 525 *with* 2 AA at p. 527), explaining why, in the 1998 negotiations, "there was no discussion of whether the State would have to comply with California wage and hour laws." (Slip Op. at p. 6.)

The successor July 1, 2001 – July 2, 2006 MOU adjusted the work schedule to eliminate the four hours of compensated training but otherwise maintained all of the FLSA and PPWA provisions quoted above. (Slip Op. at pp. 6–7.) Once again, the 1998 bargaining history with respect to these provisions still controlled because, as the trial court noted: "There were no discussions during negotiations between the parties that PPWA or the definition underlying PPWA should be changed from prior agreements. Similarly, there were also no discussions regarding the applicability of the State minimum wage or what constituted compensable work." (20 AA p. 5419.)

On September 18, 2007, after the State and the Union reached impasse in their negotiations, the State imposed its "last, best, and final

offer." (Slip Op. at p. 7.) The terms relevant to this case were essentially unchanged from the 2001 MOU. (*Ibid.*) Nothing in these "Implemented Terms" purported to exempt the Represented Employees from IWC Wage Order 4–2001 or any other wage order. Importantly, as the court of appeal expressly acknowledged, "[t]he Legislature did not approve or ratify these terms." (*Ibid.*)

On April 9, 2008, while these Implemented Terms were in effect, the Represented Employees filed the *Stoetzl* class action lawsuit, alleging they had not been adequately compensated under California law for all hours worked. (1 AA at pp. 1–14.) The Unrepresented Employees later filed the *Shaw* and *Kuhn* complaints, containing similar allegations, which were eventually coordinated with *Stoetzl*. (1 AA at p. 91–108; 1 AA at pp. 109–128; 1 AA at pp. 67–68.)

The State and the Union signed a new MOU on May 16, 2011, which extended to July 2, 2013. The MOU continued most of the FLSA language discussed above; however, it dropped the language stating that four hours was generally sufficient time for all PPWA. (Slip Op. at p.7.) The parties added a side-letter agreeing that no changes to the MOU language would have prejudicial effect on either side's arguments in this action. (*Ibid.*)

C. The Trial Court Proceedings

Once the three separately filed class action lawsuits were coordinated, the trial court certified two subclasses – the Represented Employees and the Unrepresented Employees. (Slip Op. at pp. 2–3.) No party challenged the class certification rulings on appeal; indeed, they stipulated to the subclasses. (*Id.* at p. 3.)

The causes of action alleged in the consolidated action were:

1. failure to pay contractual overtime under Labor Code sections 222 and 223;

2. failure to pay California minimum wage under Labor Code sections 1182.11, 1182.12, 1194, and 8 Cal. Code Regs. section 11000 et seq.;

3. failure to keep accurate records of hours worked under Labor Code section 1174; and

4. failure to pay overtime in breach of common law contract.

(Slip Op. at p. 2.)

Plaintiffs premised each of these claims on their contention that the "hours worked" for which additional compensation was due – whether at the California minimum wage, the regular hourly rate or the contractual overtime rate – was determined according to the definition of that term in IWC Wage Order 4–2001, which defines "hours worked" as "the time during which an employee is subject to the control of an employer, and

includes all the time the employee is suffered or permitted to work, whether or not required to do so." (5 AA at p. 1158 [Wage Order 4–2001, subd. 2(K)].) This is commonly known as the "control standard." (See Slip Op. at p. 3.)

The State, on the other hand, insisted that the compensability standard for both subclasses was governed exclusively by the FLSA's "first principal activity of the day" test. (29 U.S.C. § 201 *et seq.*; 29 U.S.C. § 254; Slip Op. at p. 3.) Plaintiffs do not dispute that federal compensability standards determine employees' entitlement to premium overtime wages under the FLSA. But they maintain that the state must still comply with California's more stringent control test. The State does not dispute that application of the control standard would potentially expand the number of compensable hours for the Represented Employees beyond what those employees were actually paid for during the time periods in question.

The trial court granted judgment on the pleadings in favor of the State on the first and third causes of action above. (Slip Op. at p. 3.) The parties stipulated that the trial of the remaining two causes of action would be phased, with Phase I deciding, among other things, whether either subclass had a right to seek California minimum wage, regular wage and/or overtime wage for allegedly uncompensated time. (See Slip Op. at pp. 3–4 [setting out in more detail the parties' stipulation].) Later phases would

determine compensability and the amount of any unpaid wages. (3 AA at p. 721)

The trial court ruled in favor of the State and against both subclasses on all Phase I issues. (Slip Op. at p. 9.) With respect to the Represented Employees (Petitioners here), the trial court concluded that the employees were not entitled to California minimum wage because the Union bargained away that right in the MOUs and legislative approval of those MOUs "chaptered them into law." (*Ibid.*) With respect to the Unrepresented Employees, the trial court concluded that the Legislature delegated to CalHR authority to override the Wage Orders by "applying the FLSA as the standard for measuring compensable hours." (*Ibid.*) The trial court also concluded none of the plaintiffs had common breach of contract claims because "the terms and conditions of public employment are controlled by statute and ordinance, rather than contract," and because "in any case, plaintiffs had not established the existence of an agreement between the State and plaintiffs to pay overtime." (*Ibid.*)

Concluding that its Phase I ruling precluded either subclass from any recovery of unpaid compensation owed, the trial court entered final judgments dismissing all three coordinated actions. (20 AA at pp. 5438–5444, 5447–5453, 5457–5461.)

D. The Court Of Appeal Proceedings

The First District Court of Appeal affirmed the trial court's rulings in full with respect to the Represented Employees but reversed and remanded with respect to the Unrepresented Employees on the second and fourth causes of action. (Slip Op. at p. 28.)

As explained in more detail *infra*, the court of appeal essentially agreed with the trial court's analysis of the California minimum wage claims of the Represented Employees, finding that the Union had effectively waived those claims when bargaining for the MOUs at issue, and that the Legislature could and did ratify that waiver. (Slip Op. at pp. 12–17.) Although the court of appeal disagreed with the trial court conclusion that Plaintiffs could not pursue common law breach of contract claims because they were public employees, it nonetheless affirmed on the basis that "[n]either the parties [n]or the Legislature intended to create an implied right to compensation in addition to that agreed to in the MOU's." (Slip Op. at p. 24.)

On the other hand, the court of appeal reversed with respect to the Unrepresented Employees' California minimum wage and contractual overtime claims. The court rejected the trial court's conclusion that the California Pay Scale Manual, which sets forth compensation standards for Unrepresented Employees, displaced the IWC's wage orders. (Slip. Op. at p. 19.) The court proceeded to harmonize Wage Order 4–2001 with the

FLSA, concluding the Unrepresented Employees were entitled to California minimum wage for all hours worked under the control standard set forth in the Wage Order. (Slip Op. at p. 21.) By the same token, the court found the Unrepresented Employees could maintain their common law breach of contract action for all "hours worked" under the control standard "based on the overtime policies in effect at the time they performed that work[.]" (*Id.* at p. 24.)

The court of appeal affirmed the trial court's ruling dismissing the Labor Code section 222 and 223 claims. (*Id.* at pp. 25–27.)

Plaintiffs filed a petition for rehearing arguing that, under the court of appeal's own reasoning, the Represented Employees were at least entitled to seek payment for uncompensated time under the Wage Order during the three-year period when no legislatively-approved MOU existed. (Pet. for Rehearing (Sept. 15, 2017).) The court summarily denied that petition. (Order Denying Pet. for Rehearing (Sept. 21, 2017).)

E. The Proceedings In This Court

The Represented Employees and the State both filed petitions for review. This Court granted both petitions, with merits briefing to proceed on parallel tracks.

IV.

THE IWC'S WAGE ORDERS MUST BE GIVEN "EXTRAORDINARY DEFERENCE" AND HARMONIZED WITH FEDERAL LAW WHENEVER POSSIBLE

The California Constitution gives the Legislature the power to confer "legislative, executive, and judicial powers" on a "commission" for the purpose of "provid[ing] for minimum wages and for the general welfare of employees." (Cal. Const., art XIV, § 1.)

The California Legislature first delegated this "broad statutory authority" to the IWC over a century ago. (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 701.) Since then, the Legislature and people of California have expanded the IWC's power. (See, e.g., *Martinez v. Combs* (2010) 49 Cal.4th 35, 54 & fn.20 [describing the 1976 Constitutional amendment proposed by the Legislature and approved by voters that expanded the IWC's jurisdiction, which originally included only women and minors].) Labor Code section 1173 charged the IWC with "ascertain[ing] the wages paid to all employees in th[e] state."

The IWC pursued its mandate by drafting and issuing "industry- and occupation-wide wage orders specifying minimum requirements with respect to wages, hours, and working conditions." (*Brinker*, *supra*, 53 Cal.4th at p. 1026 [citation omitted].) These wage orders are "to be accorded the same dignity as statutes." (*Id.* at p. 1027.) They are