S244751

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

KURT STOETZL, ET AL.

Plaintiffs and Appellants,

v.

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

Defendants and Respondents.

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 No. CJC11004661, The Honorable John E. Munter

RESPONDENTS' STATE OF CALIFORNIA, ET AL. ANSWER BRIEF ON THE MERITS

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I.

INTRODUCTION

The arguments raised by the Represented Employee subclass in this action threaten the integrity of the collective bargaining process between the State of California and its employees by seeking to rewrite labor agreements that have existed for two decades. Since 1998, plaintiffs in the Represented Employee subclass[1] have worked schedules established under section 207(k)

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[1] On January 28, 2011, the trial court certified the following class in this action:

> 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.

(Vol. 1, AA000039.)

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, whose labor relations with the State are governed by the Ralph C. Dills Act (Gov. Code § 3512, et seq.) (AA, Vol. 3, p. AA 000604) and Unrepresented (Excluded) Employees, whose labor relations with the state are governed by the Bill of Rights for State Excluded Employees (Gov. Code, § 3525, et seq.). (AA, Vol. 3, p. AA 000605.)

This brief addresses issues involving the Represented Employee subclass. For issues involving the Unrepresented Employee subclass, see the State's Opening Brief on the Merits.

of the federal Fair Labor Standards Act. ("FLSA," see 28 U.S.C. § 207(k).) This "7(k) schedule" to which the Represented Employee subclass has been subject since 1998 is the result of a series of Memoranda of Understanding (MOUs) negotiated between the State and the Represented Employees' exclusive representative, the California Correctional Peace Officers Association ("CCPOA"), pursuant to the Ralph C. Dills Act. (Gov. Code § 3512, et seq.) Each of these MOUs, all of which included a 7(k) schedule, were submitted to the Legislature for adoption, were signed by the Governor, and were chaptered into law, as required by the Dills Act. (See Gov. Code § 3517.5) Furthermore, each of these MOUs was "scored," (i.e., the full costs of the MOUs were calculated) and funds were appropriated, based on the assumption that the 7(k) schedule, including the FLSA standard for determining the compensability of hours worked, applied to employees covered by the MOUs, namely the Represented Employee subclass. (See AA, Vol. 18, pp. AA004937 to AA 005008, Defs' Trial Exhibits 209 and 210.) Accordingly, the 7(k) schedule included in the MOUs between the State and CCPOA controlled the determination of the Represented Employees' wages and hours of work. (See *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1040 ["[I]t is clear that an MOU, once approved by the Legislature (either directly – see § 3517.5 – or through the appropriation of sufficient funds to pay the

agreed-upon employee compensation), governs the wages and hours of the state employees covered by the MOU."].)

Based on the continuous application of a 7(k) schedule to Represented Employees since 1998, both the trial court and the Court of Appeal found that the FLSA constitutes the legal standard for determining the compensable hours of work for that subclass. As a result of this conclusion, both the trial court and Court of Appeal correctly ruled that the Represented Employees' claim for additional compensation for pre- and post-work activities ("PPWA") was precluded as a matter of law because PPWA is non-compensable under the FLSA.

Despite the fact that the 7(k) schedules in the MOUs have governed the terms and conditions of their employment since 1998, Appellants seek to repudiate the effect of their agreement to such a schedule by challenging the rulings of the courts below. Appellants' arguments to this Court are essentially the same arguments as those rejected at both the trial and appellate level. The foundation on which those arguments are built is the contention that the failure to compensate PPWA constitutes a violation of California's minimum wage law. To be clear, this case is not, and never has been, about a violation of the minimum wage. None of the members of the plaintiff class were paid less than the minimum wage for the *compensable* hours of work they performed. While it is rhetorically convenient for Appellants to couch their arguments in the language of the minimum wage, such arguments

overlook the reality that in any case involving claims for unpaid wages, including this one, the threshold issue is whether the time for which compensation is sought constitutes "compensable hours of work." If a particular activity, and the time spent doing it, is non-compensable, then no wage – minimum, premium, or otherwise – is owed. Thus, the critical issue in this case is whether the PPWA for which Appellants seek compensation is, as a matter of law, compensable. It is not. As both lower courts found, because the FLSA is the controlling legal standard for determining the compensability of Represented Employees' hours worked, their PPWA is non-compensable. The FLSA expressly provides that PPWA is non-compensable time.

Appellants attempt to escape the clear import of the MOU provisions establishing a 7(k) schedule for the Represented Employee subclass by raising two arguments that both lower courts characterized as "flawed." First, Appellants argue that the language of the MOUs themselves do not compel a finding that the FLSA controls the determination of compensable hours worked. In this, they are wrong. The 7(k) schedules approved by the Legislature through adoption of the MOUs inherently include the FLSA standard for compensability. The 7(k) schedule is unique to the FLSA; there is no state law analog. By approving 7(k) schedules, the Legislature necessarily approved all aspects of that schedule, including the FLSA

standard for determining the compensability of hours worked. This is evident in the plain language of the MOUs approved by the Legislature.

Second, Appellants continue to argue, as they did below, that the collective bargaining process that led to the MOUs cannot be interpreted as a waiver of their wage rights under California law. Such an argument ignores the fact that the MOUs constitute legislative enactments, and are not mere private agreements between the State and its employees. The Legislature approved the 7(k) schedules, including the FLSA concepts inherent in that schedule. The concept of waiver thus has no place in the determination of the issues raised in this action.

Aside from their claim that the California standard for determining the compensability of hours worked should apply to them, the Represented Employee subclass also challenges the Court of Appeal's holding that they may not state a claim for breach of common law contract for payment of overtime. As the Court of Appeal correctly found, the MOUs at issue here contained "merger" clauses reciting that the MOUs reflect the complete agreement between the parties regarding all terms and conditions of employment. The notion of a separate implied agreement addressing the payment of overtime wages is antithetical to the comprehensive nature of the parties' MOUs.

Finally, Appellants challenge the rulings that Labor Code section 222 and 223 are inapplicable to the facts of this action. As both the trial court

and Court of Appeal correctly ruled, however, these code sections are inapposite.

This Court should not countenance Appellants' effort to thwart the Legislature's will as expressed in its adoption of MOUs going back to 1998, and its appropriation of funds in accordance with those MOUs, through their attempts to repudiate the 7(k) schedules in those agreements. Appellants' arguments lack merit and, for the reasons expressed below, should be rejected by this Court. The Court of Appeal's holding affirming the trial court's judgment in favor of the State as against the Represented Employee subclass should be affirmed.

II.

STATEMENT OF THE CASE

A. Statement of Material Facts.

1. Description of Represented 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) and Unrepresented (Excluded) Employees. (Gov. Code, § 3525, *et seq.*) (AA, Vol. 3, p. AA000605.)

The Represented Employee subclass consists of the following job classifications: Correctional Officers, Youth Correctional Officers, Correctional Counselor I, Correctional Counselor II (Specialist), Youth Correctional Counselor, and Medical Technical Assistant. These job classifications are represented for collective bargaining purposes by the California Correctional Peace Officers Association ("CCPOA") (AA Vol. 3, p. AA000604.)

2. Labor Relations Between the State and the Represented Employee Subclass.

Labor relations between the State and Represented Employees are governed by the Dills Act. (AA, Vol. 3, p. AA000604.) Pursuant to Government Code section 3517, the Governor or his or her designee (*i.e.*, CalHR) and recognized state employee bargaining representatives (*e.g.*, CCPOA) are required to meet and confer in good faith to address wages, hours, and other terms and conditions of employment. When an agreement is reached between the parties, they are required to prepare a joint written MOU that is submitted to the Legislature for approval. (Gov. Code § 3517.5; see also (AA, Vol. 3, pp. AA000604-605.) The MOU, like any other law, is introduced in the Legislature as a proposed bill, adopted by both houses of the Legislature, and forwarded to the Governor for signature, before being chaptered into law by the Secretary of State.

3. Specific Labor Relations History Between The State And The Represented Employee Subclass Relevant To The Issues On This Appeal.[2]

(a) 1998-1999 MOU Between The State And CCPOA (Defendants' Trial Exhibit 199, AA, Vol. 8, pp. AA002037, *et seq.*).

Beginning in approximately March 1998, the State and CCPOA began negotiating a successor MOU for employees in State Bargaining Unit 6 ["BU6"], the bargaining unit represented by CCPOA. (RT, Vol. 3, 289:4-9, Testimony of David Lewis ["Lewis"].)[3] At the time these negotiations began, BU6 employees were subject to a standard 40-hour, seven-day workweek. (RT, Vol. 3, 296:16-24 (Lewis).)

Before negotiations for the 1998 MOU, David Gilb, the then Assistant Chief of Labor Relations at CalHR (then DPA) and the States' chief negotiator for the 1998 MOU (RT, Vol. 4, 450:2-12, Testimony of David Gilb ["Gilb"]), approached CCPOA representatives to discuss the prospect of utilizing a 7k schedule for BU 6 employees. (RT, Vol. 4, 494:2-16 (Gilb).) This would be the first MOU between the State and CCPOA to include a 7k schedule. (See e.g., RT, Vol. 3, 299:5-8 (Lewis).) The purpose for proposing

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[2] The facts discussed in this section were, for the most part, the subject of the parties' pre-trial stipulated facts found at AA, Vol. 3, AA000602. Nonetheless, they were the subject of considerable proof at trial as the citations to the record here demonstrate.

[3] David Lewis was a member of CCPOA's negotiating team for the 1998 MOU and was one of the principal drafters of CCPOA's proposals regarding the 7k schedule to be included in that MOU. (RT, Vol. 3, 287:14-18, 337:3-8 (Lewis).)

a 7k schedule to CCPOA was to provide a mechanism for compensating PPWA. (*Id.*, at 494:17-495:16.) CCPOA generally was receptive to the concept of a 7k schedule. (*Id.*, at 497:16-24; see also, RT, Vol. 3, 299:22-24, 338:12-17 (Lewis); RT, Vol. 3, 383:8-11, Testimony of Steve Weiss ["Weiss"].)[4]

From the outset, and throughout negotiations for the 1998 MOU, the State made it clear it was defining compensable PPWA to be included in the 7k schedule as the time from an employee picking up his or her tools (e.g., keys, pepper spray, etc.) to the time when the employee arrived at his or her assigned post in the correctional institution. (RT, Vol. 4, 498:20-499:11 (Gilb).) The State based this definition of compensable PPWA on its position that the FLSA only requires compensation from the employee's first principal activity, *i.e.,* picking up tools. (RT, Vol. 4, 501:8-23 (Gilb).) CCPOA understood this was how PPWA was being defined. (See RT, Vol. 3, 308:5-18, 321:11-17, 353:16-20 (Lewis).) As Mr. Weiss, CCPOA's chief negotiator, testified on direct examination:

> Q. And do you recall there being a definition of what PPWA meant anywhere in the MOU?
>
> A. Yes.
>
> Q. You recall an actual definition?
>
> A. Yes. Pre- and post-work activities.

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[4] Steve Weiss was the chief negotiator for CCPOA during bargaining for the 1998 MOU. (RT, Vol. 3, 381:1-4 (Weiss).)

> Q. Okay. Beyond knowing what the acronym stood for, is there anyplace [*sic*] in the MOU that you're aware of where that phrase, pre- and post-work activities, is more specifically defined so one would know specifically what was meant by that phrase?
>
> A. All throughout the 7k contract sections, it talks about 4 hours of pre- and post-work activities per work period.
>
> Q. Okay. And was there ever any definition that talked about what activities – what work activities would be included in that definition?
>
> A. Not so much drawn out in the MOU. But in the conversations at the table, it was picking up your keys, picking up your tools, Mace, whatever was appropriate for the particular post that they were working.

(RT, Vol. 3, 386:20-387:14 (Weiss).)

Not only did the parties to the 1998 negotiations understand PPWA was intended to provide compensation from tool pickup to post, they also understood federal, not California, law applied to the 7k schedule. At no time during the 1998 negotiations was there any discussion about applying California state law to the 7k schedule. (RT, Vol. 3, 310:13-18 (Lewis).) As Mr. Lewis testified:

> Q. During the course of the 1998 negotiations did you believe California state law to apply to the FLSA 7k schedule you were negotiating?
>
> A. I did not believe state law applied.
>
> Q. Okay. And that was the reason you personally never raised the subject at the bargaining table, correct?
>
> A. I did not raise the subject at the bargaining table because we were negotiating under the federal law. And that's the only thing we were talking about at the time was federal law.

(RT, Vol. 3, 359:14-24 (Lewis).) Mr. Weiss similarly testified there was no discussion of California state law in connection with the proposed 7k schedule. (RT, Vol. 3, 428:9-17 (Weiss).) Mr. Gilb testified he informed CCPOA's representatives the State would not compensate PPWA prior to the time employees picked up tools because the FLSA, and specifically the Portal-to-Portal Act, did not require compensation before that point in time. (RT, Vol. 4, 501:19-502:9 (Gilb).)

The 1998 negotiations resulted in an agreement between the State and CCPOA regarding the 7k schedule, which was embodied in section 11.12 of the 1998 MOU. Pursuant to the 7k schedule in the 1998 MOU, employees in posted positions were assigned to 168 hours in a 28-day work period. (AA, Vol. 8, pp. 2037, 2087 [Defendants' Trial Exhibit 199].) Section 11.12 of the MOU begins with the prefatory statement:

> CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees under the provisions specified herein.

(*Ibid.*)

Section 11.12 of the 1998 MOU specifically addressed PPWA at subsection (A)(1)(b) and provided as follows:

> All institutional-based staff shall be scheduled to [f]our (4) hours per work period to allow for pre and post work activities. *CCPOA agrees 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.*

(*Ibid.*, emphasis added.)

Finally, section 11.12 of the 1998 MOU stated at subsection (C)(1):

> 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. ... CCPOA agrees that neither it nor any of its employees acting on their own behalf or in conjunction with other law firms shall bring any suit in court challenging the validity of this provision under the FLSA.

Following agreement on all terms of the 1998 MOU, Mr. Gilb prepared a summary of the parties' agreements along with a costing analysis that was submitted to the Legislature. (RT, Vol. 4, 504:3-18, 505:8-506:1 (Gilb).) The costing analysis submitted to the Legislature included not only the overall costs of the 7k schedule but the cost of the PPWA component as well. (*Ibid.*, see also, RT, Vol. 4, 595:12-17 (Gilb). The California Legislative Analyst's Office included the costing information associated with the new 7k schedule in its report regarding the overall cost impact of the 1998 MOU. (AA, Vol. 18, pp. AA005001, 5003 [Defendants' Trial Exhibit 211].)

Consistent with the requirements of the Dills Act and its constitutional authority over the terms and conditions of state employment, the Legislature approved the 1998 MOU as AB 2472. The bill was then signed by the Governor and chaptered into law by the Secretary of State. (Stats. 1998, ch. 820, § 2, p. 93.)

(b) 1999-2001 MOU Between The State And CCPOA (Defendants' Trial Exhibit 200, AA, Vol. 8, pp. AA002197, *et seq.*).

In 1999, the State and CCPOA negotiated a successor agreement to the 1998 MOU. In the 1999 MOU, the 7k schedule was renumbered as section 11.11. (AA, Vol. 8, pp. AA002197, 2258.) Other than this renumbering, the 7k schedule was "rolled over" from the 1998 MOU into the 1999 MOU. (RT, Vol. 3, 330:19-331:3 (Lewis).) Rolling over the 7k schedule from the 1998 MOU to the 1999 MOU included not only a rollover of the actual MOU language but also a rollover of the parties' bargaining history underlying the 7k schedule. (RT, Vol. 3, 362:19-363:5 (Lewis); RT, Vol. 3, 430:14-19 (Weiss).)

The 1999 MOU was approved by the Legislature as SB 615. It was then signed by the Governor and chaptered into law. (Stats. 1999, ch. 778, § 6(b), p. 96.)

(c) 2001-2006 MOU Between The State And CCPOA (Defendants' Trial Exhibit 201, AA, Vol. 9, pp. AA002371, *et seq.*).

In 2001, the State and CCPOA once again rolled over the 7k schedule, into a successor MOU. (RT, Vol. 3, 430:20-23.) On this occasion, however, the 7k schedule was reduced from 168 hours in a 28-day work period to 164 hours effective July 1, 2004. (AA, Vol. 9, pp. AA002371, 2446.) In all other respects, however, section 11.11 in the 2001 MOU was identical to the language contained in both the 1998 and 1999 MOUs. (*Ibid.*)

The 2001 MOU was passed by the Legislature as SB 65. It was then signed by the Governor and chaptered into law. (Stats. 2002, ch. 1, § 2, p. 94.)

(d) The State's Implemented Last, Best, And Final Offer, 2007-2011 (Defendants' Trial Exhibit 7, AA, Vol. 6, p. AA001380, *et seq.*)

Before the 2001 MOU expired, the State and CCPOA began negotiating for a successor MOU. Those negotiations took place throughout 2006 and 2007 but were unsuccessful in achieving a successor MOU. (RT, Vol. 4, 491:18-20 (Gilb).) As a result, the State declared an impasse and implemented the terms of its last, best, and final offer. (*Id.*, at 492:9-493:16 (Gilb).) The 7k schedule which had been part of the 2001 MOU was continued, without change, as part of the State's implementation of its last, best, and final offer. (RT, Vol. 4, 513:20-516:6 (Gilb); AA, Vol. 6, p. AA001380 [Defendants' Trial Exhibit 7].)

(e) 2011-2013 MOU Between The State And CCPOA (Defendants' Trial Exhibit 202, AA, Vol. 10, p. AA002583, *et seq.*

The State and CCPOA negotiated a new MOU in 2011. By that time, the present action had been filed. The 2011-13 MOU maintained the same 7k work schedule from prior MOUs. (AA, Vol. 10, pp. AA002583, 2659.)

The parties continued to agree in the 2011 MOU that employees subject to the 7k schedule "are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the

employer is declaring a specific exemption for these employees under the provisions specified herein." (*Ibid.*) However, the 2011 MOU eliminated the longstanding language in which CCPOA agreed that four hours constituted sufficient time and compensation for PPWA. (*Ibid.*) Instead, the parties agreed to Sideletter No. 7 to the MOU, which provided that no change in the language of the 2011 MOU "shall have prejudicial effect to either side's argument in *Stoetzl v. State of California.*" (AA, Vol. 8, p. AA002036.)

The 2011 MOU was adopted by the Legislature as SB 151. It was thereupon signed by the Governor and chaptered into law. (Stats. 2011, ch. 25, § 2(b), p. 95.)

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