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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARIA LETICIA BANDA et al., Plaintiffs and Appellants, v. RICHARD BAGDASARIAN, INC., Defendant and Respondent.	E035739 (Super.Ct.No. INC029768) OPINION

APPEAL from the Superior Court of Riverside County. Christopher J. Sheldon, Judge. Affirmed in part, reversed in part and remanded with directions.

California Rural Legal Assistance, Inc., Arturo Rodriguez, Cristina Guerrero, Cynthia L. Rice; Talamantes/Villegas/Carrera and Mark Talamantes for Plaintiffs and Appellants.

Law Office of Joseph E. Herman, Joseph E. Herman, Bruce Carroll; Swajian & Swajian, Dawn Swajian and Gregory A. Swajian for Defendant and Respondent.

Law Offices of Steven Drapkin and Steven Drapkin for the Employers Group, the California Chamber of Commerce, the California Employment Law Council, the California Restaurant Association, and the Alliance of Motion Picture & Television Producers as Amicus Curiae on behalf of Defendant and Respondent.

Western Growers Law Group and Jason E. Resnick for Western Growers, California Grape and Tree Fruit League, California Citrus Mutual and Nisei Farmers League as Amicus Curiae on behalf of Defendant and Respondent.

Plaintiffs and appellants, Maria Banda, Cecilio Banda, and Mercedes Moreno, (hereafter plaintiffs) are farm workers. Defendant and respondent, Richard Bagdasarian, Inc. (hereafter defendant) is a table grape grower who has employed plaintiffs on a seasonal basis to harvest grapes. In June 2002, plaintiffs filed a complaint against defendant seeking injunctive relief and restitution for defendant's alleged unfair competition in violation of Business and Professions Code sections 17200, 17202, and 17203. In their complaint,[1] comprised of four purported causes of action or theories of recovery, plaintiffs alleged that defendant failed to authorize, permit, and provide rest and meal periods in accordance with Wage Order No. 14 promulgated by the Industrial Welfare Commission (IWC) and thereby violated Labor Code section 226.7.[2] Plaintiffs

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[1] All references to plaintiff's complaint are to the first amended complaint filed on July 17, 2002.

[2] Plaintiffs sought to recover wages for the four years prior to filing their action in 2002. Because that four-year period included time that preceded January 1, 2001, the date on which Labor Code section 226.7 became effective, plaintiffs alleged two different means for calculating their wage recovery.

further alleged that defendant required field workers such as plaintiffs to taste unwashed grapes to determine their ripeness and thereby violated various Labor Code provisions related to worker and workplace safety. Based on the statutory violations, plaintiffs alleged that defendant engaged in unfair and unlawful business practices in violation of Business and Professions Code section 17200 et seq., commonly referred to as the Unfair Competition Law (UCL). As a result of those unfair and unlawful business practices, plaintiffs alleged they were entitled to restitution under Business and Professions Code section 17203 in the amount of an hour's pay, as specified in Labor Code section 226.7, and were also entitled to injunctive relief under Business and Professions Code section 17203 to prohibit defendant from requiring plaintiffs to taste unwashed grapes.

Defendant demurred to plaintiffs' complaint on various grounds, and the trial court sustained the demurrer without leave to amend as to the second and fourth causes of action, both of which alleged claims for so-called waiting time penalties under Labor Code section 203. Those penalties apply when an employer fails to pay wages when payment is due. In particular, plaintiffs alleged that defendant was required under Labor Code section 226.7 to pay workers for the rest and meal periods that defendant failed to provide and that such pay constituted wages. Plaintiffs further alleged that defendant did not pay those wages when an employee terminated employment or defendant laid off an employee, and therefore defendant was required to pay the penalty specified in Labor Code section 203.

Defendant asserted in its demurrer that the pay specified in Labor Code section 226.7 is a penalty rather than wages or compensation for work performed, and that Labor

Code section 203, as alleged in the second and fourth causes of action, applies only when an employer fails to pay wages. The trial court agreed with defendant. Therefore, the trial court found that plaintiffs' second and fourth causes of action failed, as a matter of law, to allege facts sufficient to state a cause of action under Labor Code section 203.

After prevailing on its demurrer to the second and fourth causes of action, defendant moved for summary judgment, or in the alternative, summary adjudication, on the first and third causes of action of plaintiffs' complaint. In its summary judgment motion defendant asserted, as it had in its demurrer, that the pay set out in Labor Code section 226.7 is a penalty and, therefore, plaintiffs did not have a property interest in that pay that would support restitution in a UCL action, as alleged in the first cause of action, nor did plaintiffs have a private right to recover that penalty under Labor Code section 226.7, as alleged in the third cause of action. Defendant further asserted that plaintiffs' grape-tasting claims, also alleged in the first cause of action, either were within the exclusive jurisdiction of workers' compensation or were within the purview of the California Occupational Safety and Health Act (Cal-OSHA) such that the trial court should abstain from adjudicating the workplace safety issue, or should invoke the doctrine of primary jurisdiction and refer the issue to the Division of Occupational Safety and Health.

In their opposition, plaintiffs contended that the pay defendant owed them under Labor Code section 226.7 is wages, and as such can be recovered as restitution in an action under the UCL. Plaintiffs also asserted that they were not seeking damages for personal injury resulting from defendant's practice of requiring employees to taste

unwashed grapes, and therefore the grape-tasting claim is not preempted by the workers' compensation law. Plaintiffs further contended that the safety issues are not covered by Cal-OSHA, but instead arise under the general duties of an employer to provide safe employment for its employees set out in Labor Code sections 6400, 6401, 6403, and 6401.7.

The trial court agreed with defendant and granted summary judgment in defendant's favor on plaintiffs' first and third causes of action.

Plaintiffs appeal from the subsequently entered judgment contending, as they did in the trial court, that the pay specified in Labor Code section 226.7 is wages, and therefore is properly the subject of a claim for restitution under Business and Professions Code section 17203. Likewise, plaintiffs contend that they have a private right of action to recover that pay under Labor Code section 226.7. Plaintiffs further contend that the trial court incorrectly granted summary judgment on the first cause of action because the grape-tasting allegations do not state a claim within the exclusive jurisdiction of workers' compensation or within the purview of Cal-OSHA but, rather, properly state a UCL claim under Business and Professions Code section 17200.

We conclude, for reasons we now explain, that the pay specified in Labor Code section 226.7 is a penalty, and as such cannot be recovered in a UCL action. We further conclude, however, that plaintiffs have a private right of action under Labor Code section 226.7 to recover that penalty. Therefore, the trial court erred in granting summary judgment on plaintiffs' third cause of action. We also agree with plaintiffs' contention

that the trial court's findings on the grape-tasting allegations are incorrect, and therefore the trial court improperly granted summary judgment on the first cause of action.

DISCUSSION

In their first cause of action, as previously noted, plaintiffs alleged that defendant engaged in unfair competition by failing to provide meal and rest breaks in accordance with IWC Wage Order No. 14, and also by requiring plaintiffs to taste grapes without providing plaintiffs a means to wash their hands and to wash the grapes. Based on those allegations, plaintiffs sought to enjoin the allegedly unfair and unlawful business practices and to obtain restitution of wages owed to them and members of the public under Labor Code section 226.7 as compensation for defendant's alleged failure to provide meal and rest breaks, all allegedly in accordance with Business and Professions Code section 17203.[3]

In its summary judgment motion, defendant asserted that the payment authorized in Labor Code section 226.7 is a penalty, not wages, and because it is a penalty, plaintiffs do not have any property or monetary interest in the payment. Defendant further asserted

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[3] Proposition 64, which took effect on November 3, 2004, amended Business and Professions Code sections 17200 and 17500 by eliminating the public standing provision and by limiting private enforcement of UCL actions to a plaintiff who "'has suffered injury in fact and has lost money or property.'" (*United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1303, italics omitted.) Whether the amendment applies retroactively is an issue presently pending before our state Supreme Court. (See, e.g., *Branick v. Downey Sav. and Loan Ass'n* (2005) 126 Cal.App.4th 828, review granted Apr. 27, 2005, S132433.) We will not address the retroactivity issue because, even if the amendments apply retroactively, plaintiffs meet the amended standing requirements based on their allegations, set out above, that they have suffered injury in fact and have lost money as a result of defendant's unfair competition.

that without a property or monetary interest, plaintiffs are not persons in interest and, therefore, are not entitled to restitution under Business and Professions Code section 17203. That assertion raises a question of law, not fact, and, therefore, does not depend on defendant's showing in support of its summary judgment motion. Defendant also claimed that under the pertinent IWC wage order, defendant was only required to authorize and permit meal and rest breaks, not to actually provide them. Therefore, defendant asserted in its summary judgment motion that plaintiffs were not entitled to payment under Labor Code section 226.7 for the missed meal and rest breaks allegedly denied, regardless of the nature of the statutory payment. Whether defendant was required under the pertinent wage order to provide rest and meal breaks to plaintiffs, and if so whether a private right of action exists to enforce that obligation, are also questions of law.[4]

Similarly, the dispositive issues with regard to plaintiffs' allegation that they were required to taste grapes to determine their ripeness are whether that claim is one within the exclusive jurisdiction of workers' compensation, and whether Cal-OSHA has primary jurisdiction over the claim such that the trial court properly abstained from addressing it. Those are issues of law, not fact. In short, although defendant styled its motion in the

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[4] The only factual issue defendant raised with respect to the meal and rest break allegation is whether plaintiffs had agreed to forego those breaks in return for an earlier end to their workday. The trial court did not rule on that issue in granting defendant's motion for summary judgment. Moreover, plaintiffs' filings in opposition to defendant's motion were sufficient to create a triable issue with respect to the question of whether plaintiffs had voluntarily waived their authorized breaks.

trial court as one for summary judgment, and included the required statement of undisputed material facts and supporting declarations, the issues defendant raised in that motion did not turn on the facts but rather are all issues of law. An order sustaining a demurrer also raises only questions of law, namely the sufficiency of the pleading to state a cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

1.

STANDARD OF REVIEW

The dispositive issues in this appeal, whether raised by demurrer or summary judgment motion, are ones of law and include the following:

(1) Does IWC Wage Order No. 14 require defendant to provide meal and rest breaks to its employees?

(2) If so, does the one hour of pay specified in Labor Code section 226.7 constitute wages such that plaintiffs have a property interest in that pay which they then may recover as restitution under Business and Professions Code section 17203, or is the pay a penalty?

(3) If the pay is a penalty, do plaintiffs have a private right of action to recover that penalty under Labor Code section 226.7?

(4) Do plaintiffs' allegations regarding mandatory grape tasting state a claim within the exclusive jurisdiction of workers' compensation?

(5) If not, does Cal-OSHA control resolution of the grape-tasting claim such that the trial court properly abstained from resolving the safety issue?

(6) If not, did the trial court abuse its discretion in invoking the doctrine of primary jurisdiction and dismissing the grape-tasting allegations set out in plaintiffs' complaint?

Because these issues all are ones of law, we review them de novo. (*Orange County Employees Assn. v. County of Orange* (1991) 234 Cal.App.3d 833, 840 ["The interpretation and application of a statutory scheme is a question of law which is subject to de novo review on appeal"].) In other words, defendant's motion was in effect a motion for judgment on the pleadings. (See 6 Witkin, Cal. Procedure (4th ed. 1996) Proceedings Without Trial, § 164, p. 577.) "An appellate court independently reviews a trial court's order on such a motion. . . . Independent review is called for when the underlying determination involves a purely legal question or a predominantly legal mixed question." (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.)

2.

ANALYSIS

As set out above, plaintiffs' first cause of action alleged a UCL claim and sought restitution of the pay owed under Labor Code section 226.7. Defendant asserted in its summary judgment motion that plaintiffs are not entitled to restitution for a variety of reasons. In order to resolve this issue we first must recount the general principles pertinent to a UCL claim for restitution.

A. RESTITUTION UNDER THE UCL FOR ALLEGED MEAL AND REST BREAK VIOLATIONS

Business and Professions Code section 17203 provides, "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

"A UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff or persons represented by the plaintiff through unfair or unlawful business practices. It is not an all-purpose substitute for a tort or contract action. '[D]amages are not available under [Business and Professions Code] section 17203. [Citations.]' [Citation.]" (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173.) To be entitled to restitutionary relief, as opposed to injunctive relief (the two forms of recovery authorized under Business and Professions Code section 17203) a plaintiff in a UCL action must have a vested or ownership interest in the money or property the plaintiff claims the defendant acquired by means of the alleged unfair business practice. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150 (*Korea Supply Co.*).) Stated otherwise, "Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent

monies given to the defendant or benefits in which the plaintiff has an ownership interest." (*Korea Supply Co.*, at p. 1148.)

Although plaintiffs alleged two unlawful and/or unfair business practices in their amended complaint, they sought restitution with respect to only one: defendant's failure to provide rest and meal breaks in accordance with IWC Wage Order No. 14, an omission plaintiffs alleged constituted a violation of Labor Code section 226.7.[5] Labor Code section 226.7[6] became effective in January 2001 and provides: "(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. [¶] (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided."

In the trial court, defendant asserted that plaintiffs do not have a vested or ownership interest in the "pay" specified in section 226.7, subdivision (b). Resolution of

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[5] Defendant contends that plaintiffs failed to address the restitution aspect of the first cause of action in their opposition to defendant's summary judgment motion. Plaintiffs did address the issue, but in a section of its opposition that incorrectly referred to the second cause of action, rather than the first, in the section heading. Plaintiffs sought restitution only in their first cause of action. Therefore, plaintiffs' error in misidentifying the pertinent cause of action was obvious, and defendant could not have been adversely affected by that mistake. More importantly, defendant does not claim otherwise.

[6] All further statutory references are to the Labor Code unless otherwise indicated.

that issue depends initially on defendant's related claim that it was not required under Wage Order No. 14 to provide rest and meal breaks to plaintiffs. If plaintiffs are not entitled to rest and meal breaks, and for that reason are not entitled to recover the "pay" specified in section 226.7, the nature of that pay as wages or a penalty is irrelevant. Accordingly, we first address defendant's assertion that section 226.7 does not apply to plaintiffs because the pertinent wage order does not mandate rest and meal breaks.

(1) Wage Order No. 14 Requires Defendant to Provide Meal and Rest Breaks to Its Employees

In its summary judgment motion, defendant asserted that Wage Order No. 14, the IWC[7] wage order pertinent to agricultural occupations, and thus the wage order applicable to plaintiffs, does not require defendant to provide meal or rest periods. The pertinent provision of Wage Order No. 14 states that employers "shall authorize and permit" meal and rest periods.[8] According to defendant, the phrase "authorize and

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[7] The IWC "is an administrative body within the Division of Labor Standards Enforcement, consisting of five members appointed by the Governor. The commission determines the wages, hours, and working conditions of all employees, except outside salesmen, in [17] industries." (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 205, fns. omitted; see also §§ 1171-1204.)

[8] Section 11 of IWC Wage Order No. 14 is entitled "Meal Periods" and states: "Every employer shall authorize and permit all employees after a work period of not more than five (5) hours to take a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work, the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from

[footnote continued on next page]

permit" does not create a mandatory duty to provide rest or meal breaks. Consequently, defendant argues, that section 226.7 has no application to agricultural employers such as defendant. We disagree for two reasons.

First, the term "mandated" is only used in subdivision (a) of section 226.7. Therefore, even if defendant is correct in its view that the phrase "authorize and permit" as used in Wage Order No. 14 is language that does not give rise to a mandatory obligation, that assertion is pertinent only to subdivision (a) of section 226.7, which makes it unlawful for an employer to require an employee to work through a rest or meal period "mandated by an applicable order of the [IWC]." (§ 226.7, subd. (a).) If a rest or meal period is not "mandated" by Wage Order No. 14, then defendant has not violated subdivision (a) of section 226.7 if defendant requires employees to work through such rest or meal breaks.

Subdivision (b) of section 226.7, however, creates the entitlement to one hour of "pay" for each day in which a rest or meal break is denied and applies when "an employer fails to *provide* an employee a meal period or rest period *in accordance with an*

[footnote continued from previous page]
being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to."

Section 12 of Wage Order No.14 is entitled "Rest Periods," and states, "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."

applicable order of the Industrial Welfare Commission." (§ 226.7, subd. (b), emphasis added.) According to the emphasized language, whether an employer has failed to provide a rest or meal break, and thereby violated subdivision (b) of section 226.7, depends on the language of the applicable IWC wage order.

Wage Order No. 14, which is the one pertinent to plaintiffs, requires an employer such as defendant to "authorize and permit" meal and rest breaks. (See fn. 8, *ante*.) Like Wage Order No. 14, all but one of the 16 other IWC wage orders defendant submitted in support of its demurrer[9] use the phrase "authorize and permit" in section 12, the provision that pertains to rest periods.[10] The rest period provision in each of those 16 wage orders states, in pertinent part, that, "Every employer shall authorize and permit all employees to take rest periods . . . ." If subdivision (b) of section 226.7 applies only to mandated rest breaks, as defendant contends, rather than to rest breaks an employer is required to "authorize and permit," then subdivision (b) does not apply to rest periods at all because rest periods are not mandated in any IWC wage order. In other words, under

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[9] Defendant submitted the wage orders, and other documents, in a request for judicial notice that accompanied defendant's demurrer. Plaintiffs objected to the judicial notice request but the record on appeal does not indicate that plaintiffs obtained a ruling on their objection.

[10] The exception is Wage Order No. 17 which does not include a provision on rest periods.

defendant's interpretation, the Legislature's inclusion of rest periods in section 226.7, subdivision (b) is meaningless.[11]

Defendant's interpretation of the phrase "authorize and permit" would render section 226.7, subdivision (b) inapplicable to rest periods, which in turn would render meaningless the Legislature's act of including rest period violations in the statute. That result would run afoul of the well-settled principle of statutory construction that, "Wherever reasonable, interpretations which produce internal harmony, avoid redundancy, and accord significance to each word and phrase are preferred." (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 114.) For this reason, we must reject defendant's assertion that section 226.7, subdivision (b) only applies to rest and meal periods mandated under an IWC order and not to rest and meal periods that an employer must authorize and permit.

The second basis for our disagreement with defendant is that we do not share its interpretation of the phrase "authorize and permit." According to defendant, that phrase does not require defendant to provide rest and meal breaks. As previously discussed, under every wage order except one, employers must "authorize and permit" rest breaks, and therefore must at a minimum provide employees with the opportunity to take those

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[11] In contrast with the provisions pertaining to rest periods, the wage order provisions regarding meal periods state, with one exception, that, "No employer shall employ any person for a work period of more than five (5) hours [six hours in the case of Motion Picture employees] without a meal period of not less than 30 minutes . . . ." The exception is Wage Order No. 14 which applies to plaintiffs and which states, in pertinent part, "Every employer shall authorize and permit all employees after a work period of not more than five (5) hours to take a meal period of not less than 30 minutes . . . ."

breaks. The employer, however, does not have an affirmative duty to force an employee to take a rest break that the employer is only required to authorize and permit. Therefore, if an employee voluntarily works through a rest break, the employer has met its obligation to provide that break, as long as the break was authorized and permitted.

In contrast to rest breaks, meal breaks are mandatory for all employees, with limited exceptions.[12] Consistent with section 512, subdivision (a), the wage order provisions pertinent to meal breaks state, "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes . . . ." Employers have an affirmative duty not only to provide a meal break, but also to ensure that employees actually take that break.[13]

Defendant was required to "authorize and permit" both rest and meal breaks for its employees under the provisions of Wage Order No. 14, and therefore was required to provide its employees with those breaks, even though it was not required to ensure that its employees actually took those breaks. In other words, defendant could not directly or

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[12] The limited exceptions include persons, such as plaintiffs, who are employed in an agricultural occupation as defined in IWC Wage Order No. 14. Such persons are expressly excluded from various provisions of the Labor Code including the provisions regarding meal breaks and overtime pay. (See § 554.)

[13] This distinction is noted in an opinion letter of the Department of Labor Standards Enforcement (DLSE) which states in pertinent part that an employer need only authorize and permit rest periods and "[i]n this regard rest periods differ from meal periods, during which an employer has an affirmative obligation to ensure that workers are actually relieved of all duty, not performing any work, and (with the exception of health care workers under Orders 4 and 5) free to leave the employer's premises." (Dept. of Industrial Relations, DLSE Opinion Letter 2002.01.28.)

indirectly require its employees to work through rest and meal breaks, but it was not required to prevent employees from doing so voluntarily. For these reasons we conclude that section 226.7, subdivision (b) applies to defendant and its employees. Because we reject defendant's contrary assertion, we next must decide whether plaintiffs may recover the additional hour of pay specified in section 226.7, subdivision (b) as restitution in a UCL action. As previously discussed, in order to recover restitution in a UCL action, plaintiffs must have a vested or ownership interest in the "pay" specified in section 226.7, subdivision (b). Plaintiffs have that interest if the pay is wages but not if the pay is a penalty. Accordingly, we next address that issue.

(2) The Pay Specified in Section 226.7, Subdivision (b) is a Penalty

Whether plaintiffs have a vested or ownership interest in the additional hour of pay specified in subdivision (b) of section 226.7 depends on the nature of that "pay." Plaintiffs contend the pay specified in section 226.7 is wages, and an employee has a vested interest in unpaid wages. (See, e.g., *Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at p. 173 [unpaid overtime compensation constitutes unpaid wages in which an employee has a vested or ownership interest and therefore those wages may be the subject of an order for restitution under Business and Professions Code section 17203].) Because unpaid wages are recoverable in a UCL action, plaintiffs contend as they did in the trial court that "pay" in section 226.7 means "wages." If, on the other hand, the additional hour of pay is a penalty, as defendant contends, then plaintiffs do not have the requisite interest and may not obtain restitution under Business and Professions Code section 17203.

Whether the additional hour of pay specified in section 226.7, subdivision (b) is compensation in the form of wages for missed meal and rest breaks, or is a penalty imposed on the employer for failing to provide those rest and meal breaks is an issue currently pending before our state supreme court. (See *Murphy v. Kenneth Cole Productions, Inc.* (2005) 134 Cal.App.4th 728, review granted Feb. 22, 2006, S140308 [pay authorized in § 226.7, subd. (b) is a penalty therefore an action to recover it is subject to the one-year limitations period set out in Code Civ. Proc., § 340]; *Mills v. Superior Court* (2006) 135 Cal.App.4th 1547, review granted Apr. 12, 2006, S141711 [pay is penalty, and therefore does not support UCL cause of action or causes of action seeking waiting time penalties for failure to pay wages]; and *National Steel & Shipbuilding Co. v. Superior Court* (2006) 135 Cal.App.4th 1072, review granted Apr. 12, 2006, S141278 [pay is wages, and therefore action to recover is subject to three-year limitations period set out in Code Civ. Proc., § 338].) The only other case to address the question is *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365 (*Caliber*), which holds that the pay is a statutory penalty but not a civil penalty, and therefore not subject to section 2699.3 prefiling requirements. (*Caliber*, at p. 380, fn. 12.) We join with the majority of cases and justices that have addressed the issue and hold that the pay specified in section 226.7, subdivision (b) is a penalty. These cases set out the better reasoned analysis, which depends initially on the Legislature's intent in enacting section 226.7, subdivision (b). We determine that intent, first, by looking to the words of the statute. If the language "is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. [Citation.] 'If there

is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' [Citation.]" (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047.)

The statute, as previously noted, states in pertinent part that the employer "shall pay the employee *one additional hour of pay at the employee's regular rate of compensation*" if the employer fails to provide a rest or meal break. (§ 226.7, subd. (b), italics added.) The language of section 226.7 is unclear with respect to the critical point, namely, the nature of the specified "pay" – is the pay a penalty or is it compensation in the form of wages? The italicized phrase is not a definitive characterization of the payment. The term "pay" is ambiguous. "Pay" could mean "wages," a term that is defined in section 200 to mean payment for labor performed,[14] or it could mean compensation for the employer's failure to provide rest and meal breaks, in which case "pay" would mean compensation in the form of a penalty. "'The term "penalty" has a very comprehensive meaning. While often used as synonymous with the word "punishment," or as including a sum payable upon the breach of a private contract, it has also the more restricted meaning of a sum of money made payable by way of punishment for the nonperformance of an act or for the performance of an unlawful act, and which, in

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[14] Section 200 provides, "As used in this article [which includes section 226.7]: (a) 'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. [¶] (b) 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

the former case, stands in lieu of the act to be performed.' [Citations.]" (*San Diego County v. Milotz* (1956) 46 Cal.2d 761, 766.) Because section 226.7 does not plainly identify the nature of the pay as either wages or a penalty, we must look to the legislative history to determine what the Legislature intended when it enacted the statute.[15]

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[15] Defendant requests that we take judicial notice of legislative materials obtained through the Legislative Intent Service purportedly pertinent to the history of Assembly Bill No. 2509 pursuant to which section 226.7 was enacted. The materials include 22 separate documents, the majority of which are not relevant to show the Legislature's intent (e.g., letters to state legislators from various organizations, such as the California AFL-CIO, urging support or opposition to Assem. Bill No. 2509; a press release from the Governor's Office identifying section 226.7 as legislation recently signed into law). Defendant does not discuss the remaining materials (e.g., legislative materials regarding Assem. Bill No. 1652, and legislative materials regarding Assem. Bill No. 633), and therefore does not demonstrate their relevance to the legislative intent issue. For these reasons, defendant's supplemental request for judicial notice is denied.

Defendant also filed a supplemental judicial notice request on June 28, 2005, requesting us to take judicial notice of the Labor Commissioner's decision in *Hartwig v. Orchard Commercial, Inc.* (Cal. Dept. Industrial Relations, DLSE, May 11, 2005, No. 12-56901RB), and of a DSLE memorandum, dated June 17, 2005, designating *Hartwig* as a precedent decision. Defendant's request for judicial notice is granted.

Plaintiffs filed a supplemental request for judicial notice on June 17, 2005, in which they asked this court to take judicial notice of two items: (1) "Working in Hot Environments," a document prepared by the National Institute for Occupational Safety and Health, and (2) "A Guide to Agricultural Heat Stress," an Agricultural Personnel Management Program newsletter. The documents are not relevant to the issues raised in this appeal, and are not proper subjects of judicial notice under Evidence Code section 452. Therefore, plaintiffs' supplemental request for judicial notice is denied.

Amicus curiae Employers Group et al., requests that we take judicial notice of various materials purportedly relevant to the legislative history of Assembly Bill No. 2509. That material consists of 28 separate items, comprised of (a) items we need not judicially notice, namely existing statutes (Exhibits 1 and 3); (b) items we cannot judicially notice, namely historical summaries apparently prepared by amicus curiae (Exhibits 4, 7, and 18); and (c) items that are not relevant to the Legislature's intent in enacting section 226.7, namely later proposed and subsequently vetoed legislation (Senate Bill No. 1538) that would have extended provisions of section 226.7 to piecework employees (Exhibits 19-21, 24, 25), letters from the California Chamber of Commerce and the California Farm Bureau opposing enactment of Senate Bill No. 1538

[footnote continued on next page]

Section 226.7 is the product of Assembly Bill No. 2509 (Bill No. 2509), which was introduced in February 2000, and addressed remedies for various employment law violations. (Leg. Counsel's Dig., Assem. Bill No. 2509 (1999-2000 Reg. Sess.).) As introduced, the pertinent provision of Bill No. 2509 stated that the bill would among other things "make any employer that requires any employee to work during a meal or rest period mandated by an order of the commission subject to a civil penalty of $50 per violation and liable to the employee for twice the employee's average hourly or piecework pay." (Leg. Counsel's Dig., Assem. Bill No. 2509 (1999-2000 Reg. Sess.).) Accordingly, as originally drafted, section 226.7, subdivision (b) provided that an employer who required an employee to work during a rest or meal period mandated by an IWC order "shall be subject to both of the following: [¶] (1) A civil penalty of fifty dollars ($50) per employee per violation. [¶] (2) Payment to the aggrieved employee of an amount equal to twice his or her average hourly rate of compensation for the full length of the meal or rest periods during which the employee was required to perform any work. . . ." (Assem. Bill No. 2509 (1999-2000 Reg. Sess.) § 12.) In addition, the section provided that an aggrieved employee could seek recovery of the payments specified in

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[footnote continued from previous page]
(Exhibits 22 and 23), the Governor's message vetoing that bill (Exhibit 26), a DLSE proposed regulation on meal and break periods (Exhibit 27), and a DLSE memorandum withdrawing certain opinion letters (Exhibit 28). The request of Employers Group for judicial notice is denied with respect to the identified exhibits.

Amicus Curiae Western Growers, California Grape and Tree Fruit League, California Citrus Mutual and Nisei Farmers League request that we take judicial notice of what they identify as "the rulemaking file of IWC Wage Order No. 14 (Title 8, California Code of Regulations, section 11140.)" That request for judicial notice is granted.

section 226.7, subdivision (b), either by filing a complaint with the Labor Commissioner in accordance with section 98, subdivision (a), or by filing a civil action. (Assem. Bill No. 2509 (1999-2000 Reg. Sess.) § 12.)

Various legislative materials refer to the payments specified in proposed section 226.7 as penalties. For example, an analysis of Bill No. 2509 prepared for the Assembly Committee on Labor and Employment states in pertinent part that the bill "[p]rovides for penalties for an employer who violates the requirement that no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission (IWC). Provides for penalties of $50 per employee per pay period and payment of an amount equal to twice the average hourly rate of compensation for the employee for the full length of the meal or rest period." (Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as introduced Apr. 12, 2000, p. 3.) Similarly, a bill analysis of Bill No. 2509, as amended on August 7, 2000, prepared by the Senate Judiciary Committee for a hearing on August 8, 2000, states that Bill No. 2509 would "[p]rovide for penalties of fifty dollars ($50) per employee per pay period and payment of an amount equal to twice the average hourly rate of compensation for the employee for the full length of the meal or rest period." (Sen. Judiciary Com., Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended August 7, 2000, pp. 2-3.)

Although Bill No. 2509 only designates the $50 civil payment as a "penalty," the above-quoted analyses suggest, by using the plural term "penalties," that the payment of twice the employee's average hourly rate of compensation is also intended to be a

penalty. Moreover, describing the payment as a penalty is accurate since it is calculated by doubling an employee's hourly rate of pay, and consequently the payment is punitive.

The version of section 226.7 ultimately enacted by the Legislature is the result of a Senate amendment on August 25, 2000, that, among other things, dropped the $50 civil penalty, and replaced it with the payment eventually adopted – "one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided." (Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Aug. 25, 2000, § 7.) The Senate amendment of section 226.7, subdivision (b) incorporates language that the IWC had included in numerous wage orders (other than Wage Order No. 14 pertinent to Agricultural Workers) following an IWC public hearing on June 30, 2000. (Assem. Concurrence in Sen. Amends., Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Aug. 25, 2000, p. 2.) At that IWC hearing, Commissioner Barry Broad proposed to include "an incentive" in the IWC Wage Orders "for employers to ensure that people are given their rights to a meal and rest period."[16]

Although we have recounted the legislative history of section 226.7, it is not particularly enlightening in that the legislative materials do not explain why the Legislature dropped the civil penalty provision or why it did not characterize the payment actually enacted in section 226.7 as either a penalty or wages. Several explanations are plausible, including the explanation that the Legislature may have tacitly agreed to let the

[16] We granted plaintiffs' request to take judicial notice of various documents, including the statements set out in the transcript of the June 30, 2000, IWC hearing.

courts decide the nature of the payment. The one thing that is apparent from the materials is that the Assembly consistently referred to the statutory payment as a "penalty." (See Assem. Concurrence in Sen. Amends., Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Aug. 25, 2000, p. 2. ["Delete[s] the provisions related to penalties for an employer who fails to provide a meal or rest period, and instead codif[ies] the lower penalty amounts adopted by the Industrial Welfare Commission (IWC)"].) Because the legislative intent is unclear, we must decide, by referring to sources other than the legislative history, whether the payment specified in section 226.7, subdivision (b) is a penalty, as defendant contends, or wages, as plaintiffs contend.

As a rule, a "statutory penalty . . . is one which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong." (*County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596; see also *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1242, quoting *Ballerino* and referring to it as the "seminal" case on the point.)

According to the above-noted principles, if the payment in section 226.7 for missed rest periods and meal breaks appears reasonably calculated to compensate for actual damage or detriment, i.e., loss of the meal and loss of 10 minutes of rest, it is unlikely to be a penalty. Conversely, if the pay is not calculated to compensate for actual damage or injury, and instead is compensation for the statutory violation, then it is a penalty.

The hour of pay specified in section 226.7 in our view is calculated to compensate an employee for the employer's statutory violation, and as such is a penalty. We reach this conclusion by comparing the pay specified in section 266.7 with overtime compensation set out in section 510 which must be paid when an employee is required to work more than the standard workday or workweek. Section 510 expressly states that employees are to be compensated at an increased rate of pay for overtime worked,[17] and section 1194 expressly authorizes an employee to sue an employer for any unpaid overtime compensation.

Although described as compensation and often referred to as wages (*Road Sprinkler Fitters Local Union No. 669 v. G. & G. Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 778), "[p]remium pay for overtime is the primary device for enforcing limitations on the maximum hours of work." (*Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 250, overruled on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.) The Legislature has established that "'eight hours of labor constitutes a day's work'" and the overtime pay provisions are intended to discourage employers from working employees excessive

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[17] Section 510, subdivision (a) states, in part, that, "Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. . . ."

hours. (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 712.) The overtime compensation provisions are also designed to encourage employers to hire more workers. (*California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 111.) In this respect, overtime pay functions as, and therefore was intended to be, a penalty, or disincentive, by deterring undesirable conduct and encouraging socially positive action.

In addition to its deterrent function, premium pay for overtime also has a recognized compensatory element. The overtime pay scheme recognizes that when an employee is required to work more than the standard workday, the employee will have less time to accomplish tasks unrelated to work and, therefore, may have to pay others to perform those tasks. (*Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 30.) Thus, overtime compensation under section 510 is a hybrid, with a substantially penal, or deterrent component, but also with a significant compensatory element.

Like overtime compensation, pay for lost meal and rest breaks under section 226.7 has both compensatory and penal aspects and, therefore, could also be viewed as a hybrid. However, the nature of the pay authorized by section 226.7 is predominately penal. In reaching this conclusion we first note the compensatory aspect of pay for lost meal and rest breaks is far weaker than that of overtime compensation, which at least bears a relationship to the detriment suffered by the overworked employee. An employee required to work overtime is entitled to an increased wage for each extra hour worked, with an additional increase in pay after a specified number of extra hours have been

worked. Section 226.7, on the other hand, requires only one extra payment, and that payment is per day. The statute does not tie pay to the number of rest or meal periods an employee has missed as a result of being required to work. An employee required to work through the 30-minute meal break and both 10-minute rest breaks receives the same pay under section 226.7 as an employee who has been deprived of only one 10-minute rest break. Moreover, under existing regulations employees are paid for rest breaks whereas meal breaks presumptively are unpaid (Cal. Code Regs., tit. 8, § 11010 *ff.*), facts that undermine the "compensatory" aspect of the payment.

Because the pay specified in section 226.7 is computed per day, even though the amount is based on an employee's hourly compensation, it bears little if any relationship to the potential detriment an employee might suffer as a result of missing one, two or even all three breaks. For example, the purpose of the mandatory 30-minute "meal" break is for the employee to eat. An employee deprived of that 30 minutes cannot realistically be viewed as having lost time to do other things, such as run personal errands. The monetary value of a lost opportunity to eat is incalculable in our view, as is the monetary value of a lost 10-minute "rest" break, which more accurately should be called a restroom break. (See *California Manufacturers Assn. v. Industrial Wage Com.*, *supra,* 109 Cal.App.3d at p. 115.)

For each of the reasons discussed, we conclude that the pay specified in section 226.7 is designed primarily to encourage employers to provide the rest and meal breaks mandated in the pertinent IWC wage orders. Because the pay functions as a penalty, we characterize it as such. The conclusion that the pay is a penalty compels the further

conclusion that plaintiffs do not have a vested or proprietary interest in that pay, and may not recover it in an action under section 17203 of the Business and Professions Code. Accordingly, we conclude the trial court correctly granted summary adjudication in favor of defendant on that aspect of plaintiffs' first cause of action.

Our conclusion that the pay specified in section 226.7 is a penalty rather than wages, compels the further conclusion that the trial court correctly sustained defendant's demurrer to plaintiffs' second and fourth causes of action. As previously noted, those causes of action sought waiting time penalties under section 203 that plaintiffs alleged were recoverable on their own behalf and on behalf of the general public under the Business and Professions Code. Section 203 penalties apply when an employer fails to pay wages. Because we conclude the "pay" authorized in section 226.7 is not wages but, rather, is a penalty, section 203 does not apply. In short, we affirm the trial court's order sustaining defendant's demurrer without leave to amend to plaintiffs' second and fourth causes of action.

(3) Plaintiffs Have a Private Right to Recover Under Section 226.7

Although we conclude that the pay specified in section 226.7 is a penalty, the question remains whether plaintiffs may sue directly to recover that penalty. Defendant contended in its summary judgment motion, as it does on appeal, that section 226.7 may only be enforced by the Labor Commissioner and not by an employee in a private civil action. We disagree.

As noted above, when introduced Bill No. 2509 included enforcement language[18] that the Senate deleted, and as a result, section 226.7 does not include an enforcement provision. Defendant contends that only the Labor Commissioner may pursue an action to recover the penalty specified in section 226.7. Defendant contends this conclusion is compelled, first, by the fact that section 558, subdivision (a) authorizes the Labor Commissioner to recover civil penalties for violations of "this chapter," and section 512, which defines required meal periods, is included in the identified chapter. The defect in defendant's argument is that it does not distinguish between statutory penalties, such as those in section 226.7, and civil penalties, such as those set out in section 558. This distinction was recently discussed by Division Seven of the Second District in *Caliber*, *supra*, 134 Cal.App.4th 365.

In *Caliber*, the issue was whether the plaintiffs had to comply with the requirements of the Labor Code Private Attorneys General Act of 2004, section 2698 et seq. (the Act), before bringing a civil action against their employer for various Labor Code violations. In a writ proceeding challenging the trial court's order overruling the employer's demurrer to the plaintiffs' complaint, the *Caliber* court held that the Act applied only to those causes of action in which the employees sought civil penalties. (*Caliber*, *supra*, 134 Cal.App.4th at 378.) The court reached this conclusion by

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[18] As introduced, Bill No. 2509 provided that an aggrieved employee could seek recovery of the pay specified in section 226.7, subdivision (b), either by filing a complaint with the Labor Commissioner in accordance with section 98, subdivision (a), or by filing a civil action. (Assem. Bill No. 2509 (1999-2000 Reg. Sess.) § 12.)

distinguishing between statutory and civil penalties. Statutory penalties are those that are "provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the Act became part of the Labor Code, and . . . 'civil penalties' [were] previously enforceable only by the State's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid. [Citation.] Examples of the latter are section 225.5, which provides, in addition to any other penalty that may be assessed, an employer that unlawfully withholds wages in violation of certain specified provisions of the Labor Code is subject to a civil penalty in an enforcement action initiated by the Labor Commissioner in the sum of $100 per employee for the initial violation and $200 per employee for subsequent or willful violations, and section 256, which authorizes the Labor Commissioner to 'impose a civil penalty in an amount not exceeding 30 days pay as waiting time under the terms of section 203.'" (*Caliber*, at pp. 377-378, fns. omitted.)

We agree with *Caliber* that section 226.7 creates a statutory penalty rather than a civil penalty. (*Caliber*, *supra*, 134 Cal.App.4th at p. 380, fn. 16.) An employee may recover such penalties in a direct action against the employer, and without complying

with the Act. (*Caliber*, at p. 377.) Such actions are authorized under section 218.[19] Accordingly, we conclude that the trial court incorrectly granted summary judgment on plaintiffs' third cause of action because plaintiffs have a private right of action under section 226.7, albeit one to recover the statutory penalty set out in that section.

B. INJUNCTIVE RELIEF

As previously noted, plaintiffs alleged two unfair business practices in their complaint, the alleged violation of section 226.7 for which plaintiffs sought restitution, a claim we have discussed, and the alleged practice of requiring employees to taste unwashed grapes to determine whether the grapes were sweet and therefore ready to pick, a practice plaintiffs sought to enjoin under the UCL. In this regard, plaintiffs alleged that the practice of requiring employees to taste grapes to determine their ripeness, without allowing employees first to wash their hands and to wash the grapes, was unsafe and unhealthful, and therefore violated defendant's duty under section 6400 through section 6407, which set forth the general duties an employer owes to an employee.[20] Because the practice violates statutory duties, plaintiffs alleged that it constitutes an unfair business practice, a practice plaintiffs sought to enjoin under the UCL.

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[19] Section 218 provides, in relevant part, "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

[20] Although plaintiffs' complaint alleged duties under sections 6400, 6401, 6403, and 6401.7, for simplicity we will refer only to section 6400, subdivision (a), which states, "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein."

In its motion for summary judgment, defendant asserted that plaintiffs' grape-tasting claim was within the exclusive jurisdiction of workers' compensation. Defendant also asserted that because the grape-tasting allegation raises an issue of workplace safety, and the Legislature has authorized the Division of Occupational Safety and Health (DOSH) to enforce Cal-OSHA, that the trial court should abstain from addressing the safety issue. Defendant further asserted that the Legislature has invested the DOSH with primary jurisdiction to enforce Cal-OSHA.[21] The trial court agreed and granted summary judgment on the noted allegations. Consequently, the next issue we address is whether plaintiffs' allegations regarding mandatory grape tasting state a claim within the exclusive jurisdiction of workers' compensation.

(1) Plaintiffs' Grape-tasting Allegations Do Not State a Workers' Compensation Claim

Plaintiffs contend, as they did in the trial court, that workers' compensation exclusivity applies only when a claim seeks damages, or compensation, for a work-related injury. Plaintiffs argue that they do not seek compensation but, rather, seek to preclude defendant from engaging in the dangerous and unhealthy practice of requiring its employees to taste grapes without first affording plaintiffs a means to wash their hands

[21] Defendant also asserted that Cal-OSHA has primary jurisdiction in matters of workplace safety and in any event, plaintiffs have failed to allege facts sufficient to state a cause of action for injunctive relief under section 6323 or the federal counterpart, section 552 of title 29 of the United States Code. Those sections concern injunctions against the use or operation of any dangerous machine, apparatus, or device, and are irrelevant to the grape-tasting allegation in plaintiffs' complaint.

and to wash the grapes. We agree with plaintiffs that the allegations do not state a claim within the exclusivity provisions of the Workers' Compensation Act.

Workers' compensation, as the name suggests, applies to claims for compensation based on work-related injuries and is the exclusive remedy for such claims. (See *Fitzpatrick v. Fidelity & Cas. Co. of New York* (1936) 7 Cal.2d 230, 233; see also §§ 3600, 3602 regarding liability for such compensation.) Plaintiffs' allegations regarding defendant's grape-tasting practice do not seek compensation for injuries suffered as a result of that practice. Rather, plaintiffs seek to preclude defendant from engaging in the practice, presumably to foreclose the possibility of eventual injury to employees. Plaintiffs' complaint does include allegations regarding the physical impact defendant's grape-tasting practice has on defendant's employees. However, those allegations are included, along with allegations that other means exist to determine whether grapes are ripe, to show that the practice poses a health risk to employees and therefore should be enjoined. In short, plaintiffs do not seek compensation for a work-related injury. Therefore, the Workers' Compensation Act does not apply.[22]

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[22] *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal.App.4th 517, which defendant cites, involves an action by the injured employee against the employer's workers' compensation insurer for bad faith refusal to settle a lien claim against the recovery the employee obtained from the third party tortfeasor. The case stems from a work-related injury and involves liens and attorney fees claims governed by the Workers' Compensation Act. As such the claims were derivative of or collateral to the workers' compensation process. That is not the situation in this appeal and therefore the case is inapposite.

(2) Abstention and Primary Jurisdiction Principles Do Not Apply

Plaintiffs contend as they did in their opposition to defendant's summary judgment motion, that neither the abstention doctrine nor the related concept of primary jurisdiction applies to the grape-tasting allegations. Plaintiffs' assertion is correct. However, it also is irrelevant because defendant did not show in the trial court, nor has it shown in this appeal, that any provision of Cal-OSHA pertains specifically to grape tasting, or to a similar activity such that the DOSH has the requisite expertise to address the underlying safety issue.[23]

In short, unlike the auto insurance rate claim at issue in *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, over which the Department of Insurance had complete authority and in fact had initiated an investigation before the People filed their UCL complaint,[24] Cal-OSHA is not "'a "pervasive and self-contained system of administrative procedure" [citation]'" designed to address the precise health and safety issue raised in this case. (*Farmers Ins. Exchange*, 2 Cal.4th at p. 396.) As they pointed out in their opposition to defendant's summary judgment motion, plaintiffs have alleged a violation of defendant's general duty to provide safe employment for its workers under

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[23] Defendant requests that we take judicial notice of legislative history compiled by the Legislative Intent Service of Senate Bill No. 1901, introduced in 2004 and enacted but vetoed by the Governor. That bill would have prohibited employers from requiring agricultural employees to taste unwashed grapes in the field. Defendant's request to take judicial notice of the purported legislative history of Senate Bill No. 1901 is granted.

[24] See *Farmers Ins. Exchange, supra,* 2 Cal.4th at p. 397, fn. 17, which notes that the Insurance Commissioner had issued a notice of noncompliance regarding the practice at issue in the complaint over four months before the complaint was filed.

section 6400. The DOSH does not have authority to enforce the general duty provisions,[25] and plaintiffs cannot force the DOSH to investigate a claim, issue a citation, or adopt a regulation regarding the health hazards involved in grape tasting. For these reasons we conclude that the trial court abused its discretion in relying on the doctrine of primary jurisdiction with respect to plaintiffs' request for injunctive relief under the UCL against defendant's grape-tasting practice as alleged in their first cause of action.

(3) Equitable Defense of Laches Does Not Apply

Defendant asserted the equitable defense of laches as the final ground upon which it moved for summary judgment on the first cause of action. In granting defendant's motion, the trial court found that plaintiffs "were subject to a required grape-tasting practice for more than four years before seeking injunctive relief. This delay necessarily requires consideration of the principles of laches, and strongly indicates that there is no imminent threat of irreparable harm." Plaintiffs challenge the correctness of the ruling, to the extent the trial court intended it to constitute a separate basis for granting defendant's summary judgment motion.

The trial court's statement is simply that, a statement. It is not a finding, nor is it a specification of the trial court's reason for granting summary judgment or more correctly,

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[25] Section 6317 authorizes the DOSH to investigate and issue citations for violations of "any standard, rule, order, or regulation established pursuant to Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code, or any standard, rule, order, or regulation established pursuant to this part . . . ." Because its enforcement authority is specifically limited under section 6317, the DOSH has no authority to enforce the general duty sections of Cal-OSHA and, therefore, cannot enforce section 6400.

summary adjudication on the issue. (See Code Civ. Proc., § 437c, subd. (g) ["upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determinations"].) In addition, even if we assume without actually deciding that laches is a valid defense to a UCL action, the trial court failed to identify the evidence "which indicates that no triable issue exists" as it is required to do under Code of Civil Procedure section 437c, subdivision (g).

Moreover, as plaintiffs asserted in the trial court, and contend in this appeal, when, as in this case, injunctive relief is authorized by statute, imminent harm need not be shown. (*Paul v. Wadler* (1962) 209 Cal.App.2d 615, 625 ["where an injunction is authorized by statute, a violation thereof is good and sufficient cause for its issuance"].) An imminent threat of irreparable injury need only be shown in order to obtain a temporary restraining order or a preliminary injunction. (See Code Civ. Proc., §§ 526 subd. (a)(2), 527, subd. (a).) Plaintiffs sought to enjoin defendant's practice of requiring its employees to taste unwashed grapes as a remedy under Business and Professions Code section 17203 for defendant's alleged unfair business practice. Because the remedy is expressly authorized in Business and Professions Code section 17203, plaintiffs were not required to show irreparable injury or harm in order to obtain that remedy. In short, to the extent the trial court purported to rely on the equitable principle of laches, the trial court erred.

For each of the reasons discussed, we conclude the trial court incorrectly granted summary judgment on plaintiffs' first cause of action. That cause of action states a

lawful claim and valid theory of recovery under the UCL based on defendant's alleged practice of requiring employees to taste grapes before picking them in order to determine their ripeness.

CONCLUSION

Because we conclude that the pay authorized in section 226.7, subdivision (b) is a penalty, plaintiffs do not have a property interest in that pay, and therefore may not recover it as restitution in a UCL action brought under Business and Professions Code section 17200 et seq. The trial court should have granted summary adjudication on that issue because it completely disposes of plaintiffs' claim for restitution under the UCL. (Code Civ. Proc., § 437c, subd. (f)(1).) However, the allegations regarding defendant's grape-tasting practice state a valid claim for injunctive relief under the UCL, and therefore are properly included in the first cause of action. In finding otherwise, and granting summary judgment on plaintiffs' first cause of action, the trial court erred.

Plaintiffs have an individual right to pursue recovery of the penalty set out in section 226.7, subdivision (b), and therefore the trial court erred in granting summary judgment on plaintiffs' third cause of action.

The trial court properly sustained defendant's demurrer to plaintiffs' second and fourth causes of action, without leave to amend, because the pay specified in section 226.7 is a penalty, not wages, and therefore plaintiffs are not entitled to the waiting time penalties under section 203 alleged in those two causes of action.

DISPOSITION

The summary judgment is reversed as to the first and third causes of action of plaintiffs' first amended complaint. The trial court is directed to enter summary adjudication in favor of defendant on plaintiffs' request for restitution as alleged in the first cause of action. The judgment is affirmed in all other respects.

Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ Gaut
J.