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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MORRY BROOKLER, Plaintiff and Appellant, v. RADIOSHACK CORPORATION, Defendant and Respondent.	B212893 (Los Angeles County Super. Ct. No. BC313383)

APPEAL from an order of the Superior Court of Los Angeles County. Edward A. Ferns, Judge. Reversed.

Law Offices of Stephen Glick and Stephen Glick; Daniels, Fine, Israel, Schonbuch & Lebovits, Paul R. Fine and Scott A. Brooks; Law Offices of Ian Herzog and Ian Herzog for Plaintiff and Appellant.

Jones Day, Robert S. Brewer Jr. and Randy S. Grossman; Niddrie, Fish & Buchanan and Michael H. Fish for Defendant and Respondent.

SUMMARY

Citing *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (*Cicairos*), the trial court granted the plaintiffs' motion for class certification of their claims against their employer for failure to provide meal periods as required under the Labor Code. The defendant employer's subsequent motion for decertification was also denied. However, in July 2008, the Fourth District filed its opinion in *Brinker Restaurant v. Superior Court* (2008) 165 Cal.App.4th 25 (*Brinker*), holding meal break claims were not amenable to class treatment because the employer need only make meal breaks available, not ensure they are taken. The employer filed another motion for decertification, arguing class certification was inappropriate under *Brinker*. This time, the trial court granted the motion for decertification. A week later, the California Supreme Court granted review in the *Brinker* case (review granted Oct. 22, 2008, S166350; see also *Brinkley v. Public Storage*, review granted Jan. 14, 2009, S168806), to address the proper interpretation of California's statutes and regulations applicable to an employer's duty to provide meal and rest breaks to hourly workers, and the matter is still pending.

Unless and until our Supreme Court holds otherwise, we agree with the analysis in *Cicairos* which held an employer's obligation under the Labor Code and related wage orders is to do more than simply permit meal breaks in theory; it must also provide them as a practical matter. Accordingly, we reverse.

FACTUAL AND PROCEDURAL SYNOPSIS

As relevant, Morry Brookler, on his own behalf and on behalf of others similarly situated, filed a complaint against Radioshack for its failure to provide employees with a meal period of not less than 30 minutes during a work period of more than five hours as required under Labor Code section 226.7, Section 11 of Industrial Welfare Commission Order No. 7, and Section 11010, paragraph 11, Title 8 of the California Code of Regulations. The trial court certified the class (and denied Radioshack's subsequent motion for decertification). Radioshack filed a second motion for decertification after

issuance of the opinion in *Brinker, supra,* 165 Cal.App.4th 25 which the trial court granted. The California Supreme Court granted review in *Brinker* and the matter is currently pending.

Brookler appeals.

DISCUSSION

"[T]he focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327.) The question is "'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" (*Id.* at p. 326, citation omitted.) A trial court's ruling supported by substantial evidence generally will not be disturbed "'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' . . . ." (*Id.* at p. 327, citations omitted.)

Here, in a detailed nine-page ruling, the trial court concluded under *Cicairos, supra,* 133 Cal.App.4th 949, that certification was appropriate, and later denied Radioshack's subsequent motion for decertification. Then, when Radioshack filed its second motion for decertification when *Brinker* was decided, the trial court determined certification was inappropriate as individual issues of *whether* and *why* meal periods were missed would predominate if, as the *Brinker* court concluded, the employer need only provide meal periods, but need not ensure meal periods are taken.

The Legislature authorized the Industrial Welfare Commission (IWC) to establish minimum wages, maximum hours and standard conditions of employment for all employees in the state. (*Collins v. Overnite Transportation Co.* (2003) 105 Cal.App.4th 171, 174.) As quasi-legislative regulations, IWC wage orders are to be construed in accordance with the ordinary principles of statutory interpretation. (*Id.* at p. 179.) Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage. (*Ibid.*) Statutes governing conditions of

employment are to be construed broadly in favor of protecting employees. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 (*Murphy*).)

Labor Code section 226.7 provides as follows: "(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 work day that the meal or rest period is not provided."

IWC Wage Order No. 7-2001 specifies: "Every employer shall keep accurate information with respect to each employee including the following: . . . Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded." (Cal. Code Regs., tit. 8, § 11070, subd. 7(A)(3).)

Moreover, "(A) No employer shall employ any person for a work period of more than five (5) hours without 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 the employer and the employee.

"(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

"(C) 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 being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

"(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

"(E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated." (Cal. Code Regs., tit. 8, § 11070, subd. 11.)

"'Employ' means to engage, suffer, or permit to work." (Cal. Code Regs., tit. 8, § 11070, subd. 2(D); *Martinez v. Combs* (2010) 49 Cal.4th 35, 69.)

In *Cicairos, supra,* 133 Cal.App.4th 949, the employer (a trucking company) used a computerized system to keep track of various aspects of its drivers' activities. (*Id.* at p. 962.) However, it did not schedule meal periods or monitor compliance in this regard. (*Ibid.*) The employer acknowledged drivers were entitled to take a 30-minute meal break on their own time after working five hours, but the decision was left to the employees' discretion. (*Ibid.*) The *Cicairos* court held "the [employer's] obligation to provide the [employees] with an adequate meal period is not satisfied by assuming that the meal periods were taken, because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.' (Dept. of Industrial Relations, DLSE, Opinion Letter No. 2002.01.28 (Jan. 28, 2002) p. 1.)" (*Id.* at pp. 962-963.)

Labor Code sections 226.7 and 512 mandate that non-exempt employees receive a 30-minute meal break for every five hours worked.[1] "Pursuant to IWC wage orders, employees are entitled to an unpaid 30-minute, duty-free meal period after working for five hours . . . . An employee forced to forego his or her meal period . . . loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period." (*Murphy, supra*, 40 Cal.4th at p. 1104, citations omitted.)

Our Supreme Court's decision in *Brinker* will resolve this issue. In the meantime, however, unless and until our Supreme Court holds otherwise, we agree with and adopt the analysis in *Cicairos, supra*, 133 Cal.App.4th 949, holding an employer's obligation under the Labor Code and IWC wage orders is to do more than simply permit meal periods in theory; it must also provide them as a practical matter. If the employer does not ensure compliance with meal period requirements, such behavior violates the Labor Code and corresponding wage orders. (See *id.* at p. 963.) "The IWC intended that, like overtime pay provisions, payment for missed meal and rest periods be enacted as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards." (*Murphy, supra*, 30 Cal.4th at p. 1110.)

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[1] Labor Code section 512, subdivision (a) provides: "(a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived."

DISPOSITION

The order is reversed. Brookler is entitled to his costs of appeal.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**