Filed 1/27/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DEBORAH MILLS, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. BED, BATH & BEYOND INC., Real Party in Interest.	B184760 (Super. Ct. No. BC316825) (Victoria G. Chaney, Judge) **O P I N I O N**

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Victoria G. Chaney, Judge. Petition denied.

Graves & Associates and Allen W. Graves for Petitioner.

Thelen Reid & Priest, Thomas E. Hill and David N. Buffington for Real Party In Interest Bed, Bath & Beyond Inc.

No appearance on behalf of Respondent.

Labor Code section 226.7 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 . . . 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."

The issue presented in this case is whether the above language describes a wage due to the employee or a penalty to the employer. We conclude it imposes a penalty on the employer.

FACTS AND PROCEDURAL HISTORY

Petitioner Deborah Mills is an employee of Bed, Bath and Beyond Inc. (BBB). She claims BBB frequently denied her and hundreds of other employees legally required meal and rest breaks. She filed a class action on behalf of herself and the other employees for back wages and penalties, stating causes of action under the Labor Code, applicable California wage orders, and Business and Professions Code section 17200, et seq. In her first, second and third causes of action, Mills asserted that Labor Code section 226.7 required BBB to pay her an additional hour's pay for missed break periods, but that BBB refused to pay.[1] In her fourth, fifth and sixth causes of action, Mills contended that because the money due her under section 226.7 constitutes wages that were not timely paid or

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[1] All further statutory references are to the Labor Code unless stated otherwise.

properly accounted for in her wage statements, BBB is further liable to her for penalties under the Labor Code.[2]

BBB demurred to Mill's complaint, arguing in part that any additional payments Mills might be entitled to receive under section 226.7 *are* penalties, so cannot be recovered separately as wages or support the additional timeliness or wage statement penalties. The trial court agreed with BBB's argument, so sustained its demurrer as to the fourth, fifth and sixth causes of action of the complaint. The demurrer was also sustained as to Mill's seventh cause of action, which alleged the failure to give employee breaks then not pay under section 226.7 constituted an unfair business practice under Business and Professions Code section 17200. Mills filed a petition for writ of mandate seeking to compel the trial court to vacate that portion of its order concluding section 226.7 payments are not wages and sustaining BBB's demurrer.[3]

DISCUSSION

Section 512 requires employers to provide a 30-minute meal break to employees who work more than 5 hours per day, and a second 30-minute meal break to those working more than 10 hours a day. (§ 512, subd. (a).) A wage order promulgated by the California Industrial Welfare Commission reiterates that requirement, and further requires a 10-minute rest break for every four hours an

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[2] Mills relies on sections 201, 202 and 204, which require all wages due an employee to be paid in twice monthly payments, and all wages due upon termination of employment to be paid promptly. (§§ 201, 202, 204.) She further relies on section 226, which requires employers to provide an itemized wage statement for each pay period that accurately states, among other things, the amount of wages earned and being paid. (§ 226.) Sections 203, 210 and 226.3 provide that failure to comply with the above requirements will result in civil penalties to the employer. (§§ 203, 201, 226.3.)

[3] BBB's demurrer was overruled as to the first through third causes of action, and leave to amend was granted as to the fourth through seventh causes of action. However, Mills did not file an amended complaint.

employee works, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11070, subds. 11, 12.) Should an employer fail to provide those breaks, section 226.7 mandates that "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." (§ 226.7, subd. (b).) The question posed by this writ proceeding is whether the required payment constitutes a wage or a penalty.

In considering that question, we begin by noting the settled rules of statutory construction. First, we look to the words of the statute itself as the most reliable indicator of legislative intent. (*People v. Jefferson* (1999) 21 Cal. 4th 86, 94.) The words are given their plain and common sense meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) The meaning of a statute may not be determined from a single word or sentence, but must be construed in context and given a reasonable construction. (*Ibid*; *Webster v. Superior Court* (1988) 46 Cal.3d 338, 344.) However, when the language is ambiguous or susceptible of more than one reasonable interpretation, the court may turn to a variety of extrinsic aids to assist in interpretation, such as the ostensible objects to be achieved by the statute, the evils to be remedied, the legislative history, public policy and the statutory scheme of which the statute is a part. (*People v. Jefferson*, *supra*, 21 Cal. 4th at p. 94; *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744.)

Applying those principles here, we first find that section 226.7 is ambiguous as to whether the payment it requires constitutes an additional wage or a penalty. At first blush, the statute appears to impose a penalty on an employer who does not provide required breaks. The California Supreme Court has described a penalty as "a sum of money made payable by way of punishment for the nonperformance of an act or the performance of an unlawful act, and which, in the former case, stands in lieu of the act to be performed." (*County of San Diego v. Milotz* (1956) 46 Cal.2d 761, 766). Moreover, a penalty is an amount recoverable to satisfy a wrong or injury suffered without reference to actual

damage sustained. (*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.) As measured by those definitions, section 226.7's requirement that an employer who "fails" to provide mandated break periods must pay a fixed sum of money to the employee, without regard to the actual amount of break time missed, certainly appears to be a penalty rather than a wage. (§ 226.7, subd. (b).)

However, Mills reads section 226.7 as merely requiring additional wages to be paid to an employee who missed break time. Focusing on the words "pay the employee one additional hour of pay," she contends section 226.7 must be interpreted as obligating the employer to compensate the employee for missed break periods. Indeed, citing dictionary references, Mills asserts the word "pay" is itself synonymous with "wage." While we are not convinced that the phrase "pay the employee one additional hour of pay" does anything more than establish the measure of the employer's obligation to remit payment, we accept Mills' reading of section 226.7 as a reasonable, alternative interpretation of the statutory language which describes a wage rather than a penalty. Accordingly, we acknowledge that section 226.7 creates an ambiguity as to the nature of the payment it requires, and turn to evidence outside the statutory language for guidance in discerning its meaning.[4]

Unfortunately for Mills, the legislative history of § 226.7 confirms our initial impression that the required payments were intended to be penalties.

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[4] We also grant BBB's request to take judicial notice of a statement published by the Department of Industrial Relations Division of Labor Standards Enforcement (DLSE) regarding its intent to promulgate regulations clarifying that section 226.7 payments constitute penalties. In that statement, the DLSE indicates its own staff has wavered over the years in their interpretation of section 226.7, thus recognizing the ambiguity inherent in the statutory language. (Cal. Dept. of Industrial Relations, Div. of Labor Standards Enforcement, Initial Statement of Reasons re: proposed regulation of meal and rest periods, p. 3, at <http://www.dir.ca.gov/dlse/InitialStatementofReasons4.doc> [as of Jan. 24, 2006].)

Section 226.7 began as Assembly Bill 2509 in the 1999-2000 legislative session. As drafted, the bill provided for penalties of $50 per violation against employers who fail to give meal and rest breaks, and further made them liable to the employee for double pay for the length of the break period in which the employee was required to work. (Assem. Bill No. 2509 (1999-2000 Reg. Sess.) § 12; Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as introduced Feb. 24, 2000, p. 3; Assem. Com. on Appropriations, Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Feb. 24, 2000, p. 1; see also Sen. Judiciary Com., Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Aug. 7, 2000, pp. 2-3, 16-18.)[5] Once in the Senate, however, the penalty provisions of the bill were conflated into one payment: the employer would be liable to the employee for one additional hour of wages for the workday, regardless of the amount of break time actually worked. The Senate also eliminated language providing for a private right of action by the employee to recover the additional payment. (Sen. Amend. to Assem. Bill No. 2509 (1999-2000 Reg. Sess.) Aug. 25, 2000, § 7.) Significantly, the Legislature noted that "penalty" was the same as the one that had been adopted by the Industrial Welfare Commission to punish employers who failed to give breaks. (Assem. Concurrence in Sen. Amend. to Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Aug. 25, 2000, p. 2.) And, in agreeing to the Senate's change, the Assembly continued to describe the additional payment as a "penalty." (*Ibid.*) The statute was then enacted as amended by the Senate. In short, though its calculation was changed, to the very end of the legislative process

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[5] The parties requested that we take judicial notice of a patchwork of documents they submitted regarding section 226.7's legislative history. However, those documents do not provide a comprehensive view of the relevant history. Accordingly, except where noted otherwise, we deny the parties' various requests for judicial notice. Instead, on our own motion, we take judicial notice of the legislative materials cited herein. (Evid. Code, § 452.)

the additional money an employer would have to pay for failing to ensure mandated break periods was considered a penalty.[6]

Indeed, the payment required by section 226.7 is at odds with the definition of wages contained elsewhere in the Labor Code. Section 200 defines wages as "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." (§ 200, subd. (a).) Wages have been found to include all forms of compensation provided to an employee in exchange for his or her labor. For example, vested vacation time earned by an employee constitutes wages. (*Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal.App.4th 1595, 1600-1601.) Bonuses paid to employees may constitute wages. (E.g. *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1376.) An employee's interest in a profit-sharing plan constitutes wages. (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44.) And, the amount necessary to purchase and maintain uniforms an employer requires employees to wear constitutes wages. (E.g. *Department of Industrial Relations v. U.I. Video Stores,*

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6 Mills alerts us to a recent resolution passed by the Legislature in which the Legislature states section 226.7 payments were not intended to be penalties. (Assem. Conc. Res. No. 43 (2005-2006 Reg. Sess.).) Mills contends the new resolution is superior to any other statement of legislative intent and must be followed. We grant Mills' request to take judicial notice of that resolution. However, we do not find the resolution helpful to our analysis. Statutory interpretation is a judicial function in which legislative pronouncements carry little weight. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472-473; *People v. Cruz* (1996) 13 Cal.4th 764, 781.) Particularly, one legislature's interpretation of the intent of a prior legislature is not definitive. (*Cruz* at p. 781; *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52.) Moreover, even were the Legislature's statements as to prior legislative intent appropriate, it is not clear that is what the new resolution was attempting to accomplish. The resolution primarily expresses the Legislature's dissatisfaction with attempts by the executive branch, through the DLSE, to regulate meal breaks in a manner that invades what the Legislature considers its exclusive jurisdiction. References to the intent behind section 226.7 are mentioned only secondarily, as part of the Legislature's criticism of the DLSE.

Inc. (1997) 55 Cal.App.4th 1084, 1091-1092.) In the end, however, wages are fundamentally "compensation for services rendered." (*Ware, supra*, 24 Cal.App.3d 35, 44; see also *Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [wages include benefits employee is entitled to as part of compensation].) The payments that become due under section 226.7 for missed breaks do not compensate an employee for additional services rendered. To the contrary, section 226.7 payments are fixed sums that become due the moment a break period is missed, regardless of the amount of time wrongly worked during a break period. For example, if even one 10-minute rest break is missed during a day, an entire hour's pay is due. If a 30-minute meal break is missed, an entire hour's pay is due. If all of the break periods in an eight-hour shift are missed, an entire hour's pay is due. The failure of section 226.7 to correlate the payment due to any additional labor performed by an employee undermines any argument the payment is a wage. (*County of San Diego v. Milotz*, *supra*, 46 Cal.2d at p. 766; *County of Los Angeles v. Ballerino, supra*, 99 Cal.3d at p. 596.)

Mills argues our analysis must follow the decision in *Huntington v. Attrill* (1982) 146 U.S. 657, 667-668, which sets forth a test for determining whether one state's statutory remedy is penal or remedial for purposes of requiring another state to enforce it under the full faith and credit clause of the United States Constitution. However, California courts have declined to follow *Huntington*'s analysis in evaluating whether statutorily mandated payments constitute penalties. For example, in *Prudential Home Mortgage Co.*, *supra*, 66 Cal.App.4th 1236 borrowers sued various lenders for violations of Civil Code section 2941, which regulates the process for recording reconveyance of a deed of trust once a secured loan is paid. At the time, Civil Code section 2941 mandated that for each violation of the section the lender forfeit $300 to the borrower. The question presented to the *Prudential* court was whether that forfeiture constituted a penalty subject to a one year statute of limitations as stated in Code of Civil Procedure section 340, subdivision (a). (*Id.* at pp. 1240-1242.) Rejecting an argument under

Huntington and its progeny that the statutory forfeiture was remedial rather than penal in nature, the *Prudential* court noted *Huntington* limited its use of the term "penal" to situations barring enforcement of a statute in a foreign state, as opposed to other contexts, such as the applicable statute of limitations. (*Id*. at p. 1244; *Huntington, supra,* 146 U.S. at pp. 666-667, 676-683; see also *Moss v. Smith* (1916) 171 Cal. 777, 784 [*Huntington*'s analysis limited to determination of what is penal in an "international" sense].) Instead, the *Prudential* court adhered to the test set forth by the California Supreme Court for determining whether a statutory payment constitutes a penalty: whether the payment punishes wrongdoing and imposes an amount unrelated to actual damages. (*Prudential, supra,* 66 Cal.App.4th at pp. 1242, 1245; see also *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 386-387 [provision requiring refund of fees to students misinformed about school's accreditation describes a penalty because amount due bears no relation to actual damages, distinguishing *Huntington*].)

It is true, as Mills points out, that the court in *Chavarria v. Superior Court* (1974) 40 Cal.App.3d 1073, 1076-1077, followed the *Huntington* rule when deciding whether Texas would permit recovery of double damages due under the California Labor Code as part of an inconvenient forum analysis. However, the question before the *Chavarria* court was much more akin to the question presented in *Huntington* – whether a foreign sovereign would permit a remedy provided by California law – than the question presented in this case. Accordingly, we find *Huntington* and *Chavarria* of little value in conducting our analysis, and instead follow the California Supreme Court's guidelines for determining whether section 226.7 describes a penalty or a wage.

Mills further argues that the payment of an additional hour's wage cannot be viewed as a penalty because it is not a sufficiently large punishment to deter violation of the mandates requiring meal and rest periods. However, that argument goes to the effectiveness of the statutory penalty, not its fundamental nature. Nor does Mills persuade us that payments due under section 226.7 are

wages in the same manner as allowances due for uniforms are simply because neither is directly related to the amount of labor performed. Payments due for failing to provide a mandated break period are coercive in nature, coming due only if the mandate is violated. There is nothing coercive about requiring employers compensate employees for the cost of purchasing and keeping uniforms the employer chooses to have the employees wear as part of their job performance.

Finally, Mills relies on the U.S. District Court decision in *Tomlinson v. Indymac Bank, F.S.B.* (C.D. Cal. 2005) 359 F.Supp.2d 891, as authority for the proposition that the payment required by section 226.7 is a wage. Preliminarily, we note that a federal trial court's decision on an issue of California law is not binding on this court. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) While we may follow the reasoning in a decision that is persuasive, that is not the case here. In *Tomlinson*, in the context of a motion for judgment on the pleadings, the court concluded that section 226.7 payments constituted wages rather than penalties. (*Id.* at p. 896.) The court reasoned that payments under section 226.7 are effectively additional payments for overtime work, and so, like overtime, constitute wages. It suggested that, much like overtime, employers did not really have to provide meal and rest breaks, but could instead make an economic determination that paying an additional hour's wage would be worthwhile. (*Ibid*.) However, as is discussed above, the payment due under section 226.7 has nothing to do with the amount of additional time actually worked, so cannot be characterized as a kind of overtime payment. Rather, a fixed sum becomes due regardless of the amount of missed break period in order to punish employers for failing to give required breaks. Moreover, the California Labor Code and wage orders mandate that break periods be provided; they do not leave it to employers to exercise their judgment as to whether breaks should be provided. (§ 512, subd. (a); Cal. Code Regs., tit. 8, § 11070, subds. 11, 12.) Nor did the *Tomlinson* court review the legislative history behind § 226.7, which reveals the additional payment was consistently described as a penalty. Having looked at the question

more closely than the *Tomlinson* court, we cannot follow its reasoning. Indeed, the court in the recent decision of *Murphy v. Kenneth Cole Productions, Inc.* (2005) 134 Cal.App.4th 728, 752-753, petn. for review pending, petn. filed Jan. 11, 2006, similarly rejected the *Tomlinson* court's conclusion and finds, as do we, payments under section 226.7 constitute penalties.

In conclusion, we read section 226.7 as imposing a penalty on employers who fail to ensure mandated break periods are provided to their employees. Accordingly, the trial court correctly sustained BBB's demurrer as to causes of action predicated on the idea that section 226.7 payments are wages. Mills' petition for a writ of mandate is denied.

DISPOSITION

The petition for writ of mandate is denied. Costs of this proceeding are awarded to the real party in interest.

CERTIFIED FOR PUBLICATION

ARMSTRONG, J.

I concur:

TURNER, P. J.

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MOSK, J., Concurring

I concur in order to state an additional—and to me, the most persuasive—reason why the judgment should be affirmed.

Labor Code section 226.7, subdivision (a), prohibits an employer from requiring an employee to work during mandated meal or rest periods. Labor Code section 226.7, subdivision (b), provides the consequence of a violation of subdivision (a). The employer does not have the option to require the employee to work during the meal or rest periods and pay the extra compensation. Labor Code section 226.7, subdivision (a), flatly prohibits such a requirement. A violation of that prohibition results in what can only be viewed as a penalty.[1]

Accordingly, I concur in the judgment.

MOSK, J.

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[1] I agree with Justice Irion's dissent in *National Steel and Shipbuilding Company v. Superior Court* (Jan. 20, 2006) __ Cal.4th __, 2006 WL 147520. That the provision is a penalty seems clear to me notwithstanding the conflict in the cases. (Compare *Tomlinson v. Indymac Bank, F.S.B.* (C.D. Cal. 2005) 359 F.Supp.2d 891 [wage] and *National Steel and Shipbuilding Company v. Superior Court, supra*, __ Cal.4th __, 2006 WL 147520 [not a penalty for statute of limitations] with *Murphy v. Kenneth Cole Productions, Inc.* (2005) 134 Cal.App.4th 728 [penalty] and *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 381, fn. 16 [penalty].)