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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

UNITED PARCEL SERVICE WAGE AND HOUR CASES JOSE SALCIDO et al., Plaintiffs and Appellants, v. UNITED PARCEL SERVICE, INC., Defendant and Respondent.	B227556 JCCP No. 4606

APPEAL from orders of the Superior Court of Los Angeles County. Carl J. West, Judge. Reversed.

Furutani & Peters and John A. Furutani for Plaintiffs and Appellants.

Paul, Hastings, Janofsky & Walker, George W. Abele and Jessica Pae Boskovich for Defendant and Respondent.

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Plaintiffs and appellants Jose Salcido, Reginald Quinteros and David Taylor sued their employer, defendant and respondent United Parcel Service, Inc. (UPS), seeking recovery of unpaid overtime compensation and related claims. The trial court granted summary judgment against each of the plaintiffs, and we affirmed those judgments. UPS moved for an award of attorney's fees and costs. The trial court awarded attorney's fees to UPS against each plaintiff pursuant to Labor Code section 218.5.[1] Plaintiffs here appeal the award of attorney's fees. Plaintiffs and UPS agree that this joint appeal present the same issue we previously decided in *United Parcel Service Wage and Hour Cases (McGann)* (2011) 192 Cal.App.4th 1425, review granted May 11, 2011, S191908.

We remain of the view that UPS is not entitled to recover attorney's fees under section 218.5 for the successful defense of plaintiffs' claims for alleged failure to pay meal and rest break premiums under section 226.7, and therefore reverse the awards of attorney's fees.

Our review of an award of attorney's fees is ordinarily performed under the abuse of discretion standard. However, de novo review is warranted where, as here, determination of the propriety of such an award is dependent on statutory interpretation. (*Carver v. Chevron U.S.A., Inc*. (2002) 97 Cal.App.4th 132, 142; accord, *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1426 (*Earley*).) We therefore exercise our independent review.

Plaintiffs contend the fee awards were erroneous because section 218.5 does not apply to missed meal and rest break claims asserted under section 226.7. They also argue those claims were inextricably linked to their claims for unpaid overtime compensation, and section 1194 precludes an award of attorney's fees to the prevailing employer-defendant in an action for unpaid overtime. We need not address plaintiffs' claim that UPS may not recover attorney's fees for successfully defending the section 226.7 claims on the ground those claims were inextricably linked to their overtime claims, because we find UPS is not entitled to recover fees under section 218.5 for the successful defense of section 226.7 claims seeking remedies for missed meal and rest breaks.

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[1] All further section references are to the Labor Code unless otherwise indicated.

Section 218.5 contains a reciprocal fee recovery provision in favor of the "prevailing party" in certain wage disputes. Section 218.5 states: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action. . . . [¶] *This section does not apply to any action for which attorney's fees are recoverable under Section 1194*." (Italics added.)

Section 1194, subdivision (a) provides, in pertinent part, that "[n]otwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." Section 1194 provides a nonreciprocal or unilateral attorney's fee provision only in favor of prevailing employee-plaintiffs suing for unpaid minimum wages or overtime compensation. One-sided fee-shifting statutes "are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy." (*Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 324.)

UPS does not claim it is entitled to recover fees for the successful defense of plaintiffs' overtime claims. Section 1194 absolutely precludes a prevailing employer's recovery of attorney's fees in an overtime or minimum wage claim. (*Earley*, *supra*, 79 Cal.App.4th 1420.) The trial court awarded attorney's fees under section 226.7, the statute mandating meal and rest breaks for nonexempt employees. We find UPS is not entitled to recover fees for its successful defense of plaintiffs' claims seeking remedies for missed meal and rest breaks.

UPS relies on *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 (*Murphy*) as support for its argument that the meal and rest break premiums are wages within the meaning of Labor Code section 226.7, and thus, fees are recoverable under Labor Code section 218.5 to the prevailing party on such claims. But *Murphy* did not address the Labor Code statutes permitting recovery of attorney's fees. Instead, *Murphy*

decided an entirely different question: which statute of limitations in the Code of Civil Procedure applies to an action seeking compensation for missed meal and rest breaks. The *Murphy* court had to decide whether an action for compensation for missed breaks under Labor Code section 226.7 is subject to the one-year statute of limitations governing claims for penalties (Code Civ. Proc., § 340, subd. (a)) or the three-year statute governing claims for liabilities created by statute, other than a penalty or forfeiture (Code of Civ. Proc., § 338, subd. (a)). (*Murphy*, at pp. 1099-1100.) *Murphy* concluded the statutory remedy for missed breaks is more akin to a "wage" than a penalty, thereby giving aggrieved employees the benefit of the three-year statute of limitations. (*Murphy*, at pp. 1103-1111.)

UPS contends *Murphy* establishes that an action for recovery of the statutory remedies for missed meal and rest breaks is a claim for wages within the meaning of Labor Code section 218.5. UPS argues the meal and rest break premiums are intrinsically not overtime or minimum wage claims under Labor Code section 1194 and "[t]hus, [Labor Code] section 226.7 payments fall squarely within the purview of [Labor Code] section 218.5." UPS offers no analysis to support its contention that *Murphy*, which decided a statute of limitations question under the Code of Civil Procedure, should control or guide our analysis of the Labor Code attorney's fees provisions. We are not persuaded that extending the holding in *Murphy* to the discreet fee issue presented here is appropriate or in keeping with our duty to construe statutes regulating the conditions of employment liberally, "with an eye to protecting employees." (*Murphy*, *supra*, 40 Cal.4th at p. 1111; accord, *Ramirez v. Yosemite Water Co*. (1999) 20 Cal.4th 785, 794.)

Recognizing that the statutory remedy for denial of breaks—payment of one additional hour of regular pay for each day a break is denied—was susceptible to an interpretation as a wage and also as a penalty, the Supreme Court in *Murphy* found the remedy provided in section 226.7 was primarily intended "to compensate employees for their injuries" occasioned by missed breaks and was, therefore, akin to a wage for purposes of assigning the appropriate statute of limitations. (*Id*. at p. 1111.) The court therefore gave employees the benefit of the three-year statute of limitations. However, nothing in the *Murphy* opinion suggests the court intended its decision to permit a

prevailing employer-defendant in a section 226.7 action to recover attorney's fees from the unsuccessful employee. To so find would undermine the Supreme Court's heavy reliance in its analysis on the principle that statutes governing working conditions must be liberally construed in favor of employees.

We find the analysis in *Earley* more instructive. *Earley* held section 1194 bars recovery of statutory fees by prevailing employer-defendants in an action for overtime compensation. *Earley* explained, however, that section 218.5 fees may be recovered by a prevailing defendant in any action brought "to recover nonpayment of *contractually agreed-upon or bargained-for 'wages, fringe benefits, or health and welfare or pension fund contributions*.'" (*Earley*, *supra*, 79 Cal.App.4th at p. 1430, italics added.) In rejecting the employer-defendant's claim for fees, the *Earley* court distinguished actions for unpaid wages from actions for unpaid overtime compensation. "An employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy. . . . 'The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer.' " (*Id*. at p. 1430, citations omitted.)

Like the statutory protections against working in excess of an eight-hour day or for less than the minimum wage, the provisions mandating meal and rest breaks are part of the core remedial employee protections embodied in the Labor Code and the implementing wage orders promulgated by the Industrial Welfare Commission. The obligation to provide meal and rest periods, like overtime compensation, is imposed by statute, and the statutory remedy for breach of that obligation is not akin to the types of compensation that have traditionally been encompassed within the definition of "wages."

The Labor Code defines "wages" as inclusive of "all amounts for labor performed." (§ 200.) Moreover, "[c]ourts have recognized that 'wages' also include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay." (*Murphy, supra,* 40 Cal.4th at p. 1103; see also *Prachasaisoradej v. Ralphs Grocery Co., Inc*. (2007) 42

Cal.4th 217, 228, italics omitted [" 'wages' or 'earnings' are the amount the employer has offered or promised to pay, or has paid pursuant to such an offer or promise, as compensation for that employee's labor"].) These forms of compensation an employer voluntarily offers its employees, or agrees to provide pursuant to a collective bargaining agreement, are fundamentally different than a state-imposed mandate to pay overtime, a minimum wage or compensation for a missed meal or rest break.

Nothing in the legislative history suggests the Legislature meant the reciprocal fee recovery provisions of section 218.5 to apply in an action for violation of the section 226.7 mandate that employers provide meal and rest breaks for certain nonexempt employees. The statutory remedy of section 226.7, providing compensation for missed breaks, was first enacted in 2000 in response to poor employer compliance with the meal and rest break requirements. (*Murphy*, *supra*, 40 Cal.4th at pp. 1105-1106; Stats. 2000, ch. 876, § 7.) Before 2000, the only remedy available to an aggrieved employee was injunctive relief to prevent future abuse. (*Murphy*, at p. 1105.)

The 2000 amendment providing a pay remedy bears sufficient hallmarks of a penalty designed to shape employer behavior, and is sufficiently distinct from the customary types of bargained-for wages recognized under the law, that we cannot conclude the Legislature intended a claim under section 226.7 to be interpreted as a claim for "nonpayment of wages" within the meaning of section 218.5. The section 226.7 pay remedy for missed meal and rest breaks was enacted 14 years *after* the Legislature enacted the reciprocal fee recovery provisions of section 218.5. It is therefore not reasonable to assume that when the Legislature enacted section 218.5 in 1986 to provide for recovery of prevailing party fees in claims for nonpayment of wages and benefits, it intended that provision to permit a prevailing employer-defendant to recover fees from an employee raising a claim for denial of breaks—a claim which at that time only supported injunctive relief.

UPS asked us to take judicial notice of parts of the legislative history of sections 226.7 and 218.5. Plaintiffs did not object, and accordingly, we grant UPS's request. However, we do not find the legislative history to be helpful. UPS argues it is significant that in 2000, when the Legislature amended section 226.7 to provide compensation as a

remedy for missed meal and rest breaks, the Legislature also amended section 218.5 to state the reciprocal fee recovery provisions do not apply to claims for unpaid overtime or minimum wages. UPS contends the Legislature would have also stated the reciprocal fee recovery provisions do not apply to claims for compensation for missed meal and rest breaks, if that is what the Legislature intended, and since the Legislature did not so state, that means the Legislature intended to permit the prevailing party on a missed meal and rest break claim to recover fees.

UPS's argument begs the question: The premise of UPS's argument is that the remedy for a missed meal or rest break is in the nature of a wage, fringe benefit or health or pension fund contribution within the meaning of section 218.5. UPS posits that, since in 2000, the Legislature excluded only claims for unpaid minimum wages and overtime from the reciprocal fee provisions of section 218.5, the Legislature meant to provide for recovery of prevailing party attorney's fees on a claim for missed meal and rest break compensation. But as discussed above, UPS has provided no persuasive authority for the underlying premise that the Legislature viewed the remedy for missed breaks as a wage within the meaning of section 218.5. Without either clear statutory language, or case law interpreting the interplay of sections 226.7 and 218.5, or statutory history to support its position, we find UPS's reasoning to be merely circular.

UPS acknowledges that the 2000 amendment to section 218.5 stating the reciprocal fee recovery provisions do not apply to section 1194 was intended to codify the holding of *Earley*, *supra*. (See Assem. Bill No. 2509 (1999-2000 Reg. Sess.) § 11 ["The amendments to Section 218.5 of the Labor Code made by Section 4 of this act do not constitute a change in, but are declaratory of, the existing law, and these amendments are intended to reflect the holding of the Court of Appeal in *Earley* . . . ."].) *Earley* held section 1194 precludes a prevailing employer from recovering attorney's fees in a claim for unpaid overtime or minimum wage. The plaintiff in *Earley* only sued for overtime compensation. *Earley* does not provide authority for the wholly different question whether attorney's fees may be recovered by a prevailing employer on a claim for missed meal and rest break compensation. Since the 2000 amendment to section 218.5 was meant to codify *Earley* and not change the law, we reject UPS's proposition that this

amendment shows the Legislature meant to permit a prevailing employer to recover attorney's fees in a missed break claim. There was no existing law in 2000 providing for prevailing party attorney's fees on a claim for missed break compensation, so we also find unhelpful UPS's citation of *Cramer v. Superior Court* (2005) 130 Cal.App.4th 42, 49, to support its position that the Legislature did not intend to "change the law" in 2000 to exclude reciprocal fee recovery on a section 226.7 claim.

UPS also argues the significance of the Legislature having twice included a unilateral fee provision in early versions of section 226.7, permitting recovery of fees only for a prevailing plaintiff, and having twice rejected and deleted that provision. UPS contends the deletion of the unilateral attorney's fee provision signaled the legislative intent that the prevailing party may recover attorney's fees on a claim for missed meal or rest break compensation. That may be so, but nothing in the legislative history states that was the Legislature's intent, and it would be speculation for us to so find. It is equally likely the Legislature deleted the unilateral fee provision because the Legislature did not intend to provide for the recovery of attorney's fees to either side, reasoning the additional hour of pay for a missed break was incentive enough to obtain compliance with the law mandating meal and rest breaks.

Construing the entire statutory scheme with a view toward protecting employees, as we must, we again find that a claim for remedial compensation under section 226.7 does not trigger the reciprocal fee recovery provisions of section 218.5.

DISPOSITION

The orders awarding UPS statutory attorney's fees are reversed. Plaintiffs shall recover their costs on appeal.

GRIMES, J.

We concur:

BIGELOW, P. J. FLIER, J.