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FILED
Superior Court of California
County of Los Angeles

DEC 01 2017

Sherri R. Carter, Executive Officer/Clerk
By V. Hillard, Deputy
Veronica Hillard

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES-CENTRAL CIVIL WEST

ERICK MONROY, an individual, and ILSE ASCENSIO, an individual

Plaintiffs,

v.

YOSHINOYA AMERICA, INC., a California corporation, YOSHINOYA HOLDINGS CO., LTD., a Japanese corporation, and DOES 1 to 100, inclusive, et al.,

Defendants.

Case No.: BC653419
Honorable Elihu M. Berle

NOTICE OF RULING ON DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION

Hearing Date:	November 27, 2017
Time:	2:30 p.m.
Department:	323
Complaint Filed:	March 7, 2017
Trial Date:	None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on November 27, 2017, at 2:30 p.m. in Department 323 of the above-referenced Court, the Honorable Elihu M. Berle presiding, Defendant Yoshinoya America, Inc.'s ("Defendant") Motion for Summary Adjudication of Plaintiffs Erick Monroy and Ilse Ascenscio's ("Plaintiffs") Second Cause of Action for Failure to Pay Reporting Time Pay for "On-Call Shifts" and Associated Penalties came on for hearing. The motion also sought to dismiss the Third through Sixth Causes of Action.

Ryan D. Saba and Tyler C. Vanderpool of Rosen Saba, LLP appeared on behalf of Plaintiffs. John L. Barber and Katherine C. Den Bleyker of Lewis Brisbois Bisgaard & Smith, LLP appeared on behalf of Defendant.

After reviewing the papers submitted by the parties and hearing oral argument thereon, and for good cause appearing thereon, the Court entered the following Orders:

1. Defendant's Motion for Summary Adjudication as to Plaintiffs' Second Cause of Action was DENIED.
2. Defendant's Motion for Summary Adjudication as to Plaintiffs' Third through Sixth Causes of Action as derivative of Plaintiffs' Second Cause of Action was DENIED.
3. Defendant's Request for Judicial Notice in support of its Motion was GRANTED.
4. Plaintiffs' Request for Judicial Notice in support of their Opposition to Defendant's Motion was GRANTED.
5. The Court elected not to rule on Plaintiffs' Objections to the evidence offered by Defendant in support of its Motion and Reply on the grounds that they were moot and immaterial to the Court's decision on the Motion.
6. The Court deferred its decision on Defendant's Objections to the evidence offered by Plaintiff in support of their Opposition to Defendant's Motion.

In reaching its decision, the Court provided held as follows:

In this case plaintiffs Erick Monroy and Ilse Ascensio filed putative class

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actions against defendant Yoshinoya America for failure to pay reporting time penalties and various derivative claims.

Defendant, according to the allegations and the evidence, owns and operates a chain of Japanese-inspired fast food restaurants in the State of California.

The defendant implemented an on-call shift for its kitchen and cashier positions. And the way the employment process works under those circumstances, if an employee is scheduled to be on call, the employee is expected to call the manager at the time set forth on the schedule two hours prior to the scheduled start time.

If an employee fails to call by the required time, the employee may be disciplined.

If the employee calls in at the required time and the employer needs the employee to work, the employee must go into work or the employee could face discipline action. Non-compliance may be treated as an unexcused absence or tardiness under some circumstances which could result in termination.

The defendant has filed a motion for summary adjudication on the plaintiffs' second cause of action for failure to pay reporting time penalty for on-call shifts and associated penalties.

As noted by both parties, the first two causes of action are based on the same statutes but involve different theories as to how those statutes were allegedly violated.

Only the second theory, the on-call theory, is put in issue in the motion before the Court today.

Defendant argues that a second cause of action fails as a matter of law because the employees who are not required to physically report to work are not owed reporting time penalty under California law.

Defendant further argues that insofar as the third through sixth cause of action are derivative to the second cause of action, those causes of action must also fail as a matter of law.

The heart of the dispute today is whether an employee's calling in to determine whether he or she must work a call-in shift constitutes reporting for work for the purposes of earned reporting time pay pursuant to wage order 5-2001, California Code of Regulations section 11050(5)(a).

Thus the Court is required to interpret the phrase as contained in the wage order "required to report for work and does report."

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As recognized by both parties and as evidenced by the parties' reliance on federal authorities, there has not yet been an appellate court in California with a published decision that has definitively addressed the issue of interpreting the reporting time provision of a wage order to accomplish on-call reporting.

Both parties, as already mentioned, did an excellent job in briefing the issue and each had discussed their respective papers and views of the federal authorities, which are all on point.

As identified by the defendant, the theory of liability has already been tested and dismissed in the Casas case -- that's Casas versus Victoria's Secret Stores from the Central District of California 2014, reported at Westlaw 12644922.

A few days after defendant filed its motion for summary adjudication the Court in the Eastern District, federal court issued and order in the case of Bernal versus Zumiez. That's identified as Westlaw 3585230, issued on August 17, 2017.

The Bernal court addressed the identical issue raised in the Casas case and the present case but came to the opposite conclusion than Casas.

Plaintiffs' argument is embodied by the Bernal court order.

There are basically two competing arguments.

In the Casas case, that was class action brought by store clerks against the retailer Victoria's Secret. The District Court interpreted the phrase "required to report to work and does report to work" as provided in wage order 7-2001, California Code of Regulations section 11070(5)(a).

The language in that provision is the same language at issue in the present case and reads:

"Each workday an employee is required to report for work and does report, but is not put to work and is furnished less than half said employees' usual and scheduled day's work, the employee shall be paid for half the usual scheduled day's work, but in no event no less than two hours and no more than four hours of the employees' regular rate of pay that shall not be less than the minimum wage."

According to the Casas plaintiffs, the plain meaning of "to report" meant to present oneself as ready to do something. That is, to hold oneself out as ready.

The Casas defendant argued the plain meaning of "to report" was to physically present oneself at the place of employment.

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The Federal District Court considered various dictionary definitions from multiple dictionaries and found that the plain meaning supported defendant's argument.

The Casas court also found that to report to work was susceptible to multiple interpretations, and thus it performed a statutory analysis. Specifically, the Court started its analysis by citing an earlier version of wage order 7, adopted on June, 1947, which read that, "No woman employee shall be required to report to work or be dismissed for work between the hours of 10:00 p.m. and 6:00 a.m. unless suitable transportation is available."

The Court reviewed minutes of the IWC meeting held on April 15, 1943, which read, in pertinent part, that, "It is necessary to afford some protection to women who are required to report to work or to leave work after 10:00 p.m, and thus the condition requires some method of providing transportation."

Based on the language concerning transportation, the Casas court reasoned that this use of "report to work" clearly contemplated physically showing up at a workplace. Otherwise the language about suitable transportation would be irrelevant.

The Court found that the legislative history is entirely consistent with the Court's earlier plain meaning interpretation that the ordinary meaning of the phrase "report to work" is to actually physically show up.

In the Bernal case in the Eastern District, the Court reached the opposite conclusion in its analysis interpreting the same wage order.

Bernal was a class action case brought on behalf of employees who used a cellphone to check in with their employer to see if they were scheduled to work and who called in around an hour before they would have to physically go to work.

The employer filed a motion for judgment on the pleadings asserting, in relevant part, that the wage order requires a worker to physically present themselves at a work site in order to qualify for reporting time penalty -- for reporting time pay.

After concluding that the plain language did not support that interpretation but rather supported the plaintiffs' construction that the wage order did not have a physical reporting requirement, the Court stated that the judicial inquiry reached and then there was no need for it to engage with the legislative history of the wage order.

The Court contemplated that even if it did so engage, the legislative history

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does not contain evidence that a physical reporting element is necessary in order to prove a reporting time violation.

The Court noted that the language requiring transportation is no longer in the statute and explained that in any event the statutory language referring to transportation to female workers does not rob the statute of application to situations where workers are required to telephonically or physically report to work.

The Court provided the following reason.

The bulk of interpretation and enforcement agency documents indicate that the purposes of the statute to limit contingent staffing and compensate workers for expenses incurred in setting up last-minute contingencies and preparing work shifts are met whether an employee telephones in or physically reports to work. This is key, because the court is tasked with interpreting statutes in a way that will result in a wise policy rather than mischief or absurdity.

The incentives that led employers to engage in behavior that caused the IWC to create the wage orders in the first place still exist, creating a surplus pool of contingent workers ready to begin work at a moment's notice. Only to notify some number of them that their services would not be required provides an enormous benefit to employers while forcing workers to prepare a set of contingency plans depending on whether they are given a shift to work or not.

Permitting workers to set up a system where workers use a telephone to report for work and are not liable for reporting time pay would cause mischief by allowing the total circumvention of the reporting time wage order.

Any employer need only set up a telephone line and deadline for calls from workers to completely relieve themselves of reporting time penalty -- excuse me, reporting time liability.

Such an absurdity would leave workers in the exact same situation as if the wage order had never been promulgated.

The Court is required to give a practical interpretation to the wage order that reflects the strong policy favoring protection of workers' general welfare and liberally construe the order to protect workers.

Citing the Brinker case in 53 Cal. 4th 1026:

"Sanctioning circumvention of wage order in an age where telephonic and digital technology makes it ever easier for workplace directives to creep into a worker's home life would be against the public policy of California."

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In the present case, the Court is persuaded by the sound reasoning of the Bernal case. Like the Court in Bernal, this Court concludes that a plain meaning and reading, one that applies a common sense interpretation, supports a conclusion that telephonically calling in falls under the ambit of activity enforceable by a wage order.

In the modern era, where many workers complete their task remotely using telephones to clock in or clock out for time-keeping purposes, and, as in the case at hand, check for shifts telephonically, the common sense and ordinary reading of the order would include the reporting that plaintiffs engaged in.

The same issue was addressed by this Court in June, 2016 in the Ward versus Tilly's case that we discussed earlier, Los Angeles Superior Court case number BC 595405. The Court notes that the Ward decision was not brought to the Court's attention by the defendant; that is, the defendant did not improperly cite to or imply in part some published order which is non-binding in the present case. And that's appropriate with regard to the standards of citable cases.

The case was set forth by plaintiffs in their opposition, and while the Court was already aware of the Ward decision, the plaintiffs here did candidly alert the Court to the similarity of the issues between the cases, despite the analysis in Ward being counter to plaintiffs' interest.

Accordingly, both parties each undertook a short analysis as to the similarities and differences, if any, between the issues as presented in Ward and the issues presented here since the Ward case issue is pending appeal and may result in a controlling decision.

In this context the defendant argues there is simply no basis for the Court to revisit the prior decision in the Ward case and create new law by supporting plaintiffs' new novel theory of liability.

Plaintiff obviously disagrees.

There are several important factors that justify revisiting the issue.

First, as noted by plaintiffs, there's a small although important distinction between the facts and argument made to the Court in the Ward case versus the present case. And that is, which we've already mentioned earlier, the matter of employee discipline with respect to whether an employee does not call in or refuses to work a call-in shift.

In an apparent justified concession, defendant notes on reply that it's unclear whether the employees in the Ward case were disciplined.

The parties have identified an issue with the Ward case that does not exist in

the present case. In Ward, defendant initially demurred to the plaintiffs' original complaint, which did not contain any allegations regarding employees being disciplined for failure to call in or refusing to work an on-call shift.

The Ward plaintiff amended the complaint, but in opposition to the subsequent demurrer the plaintiff outright conceded that the changes in the amended complaint did not substantively change the allegations in the original complaint related to the issue of whether calling in for an on-call shift constituted reporting for work.

Thus the distinction between the cases involving the couching of the argument in its important procedural posture is important in this analysis today.

Another factor to be considered is the California Supreme Court opinion in the case of Augustus versus ABM Security Services -- that's 2016 reported at 2 Cal. 5th 257 -- which was decided after the Ward case.

While the Augustus case has nothing to do with the reporting time pay, it is binding authority addressing employer control in the context of employees being on call.

Augustus settled the outstanding employment law question of can an employer satisfy its obligation to relieve employees of duties and employer control during rest periods when the employer, nonetheless, requires its employees to remain on call.

The Court concluded that the employer cannot be relieved of duties/responsibilities towards the employees.

The Court held that remaining on call exhibited control over the employees, and the employees were thereby performing the duty for the employer.

Of course, the Augustus case is distinguishable from the present case, as it involves on-call during rest periods, and analyzing rest period violations.

However, the Augustus case signals certain similar policy considerations addressed in Bernal and merely focuses the paradigm regarding how California courts are to view employees being duty-bound in light of the ubiquitous ability for instant communication between and employer and employee.

In the present case, the employee is still performing a duty for the employer. The employee must reserve his or her free day, giving the employer the option to require the employee to work without the mutual option of the employee to decline work.

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The employee must affirmatively call and spend time calling the employer or be faced with the reality of potential disciplinary action. All this is without compensation to the employee.

The policy considerations addressed in the Augustus and Bernal are applicable in this case.

Therefore, the Court concludes that the defendant has not met its burden to establish that plaintiff cannot prove the essential elements of its claim.

The Court cannot say as a matter of law that reporting for work may not be accomplished telephonically.

The issue before the Court is a novel one, as recognized in both the Casas and Bernal cases. But based upon the arguments that have been presented today and the authority of Bernal and the analysis of the Augustus case, the Court is going to find the defendant has not met its burden to show that plaintiff cannot establish its claim.

Therefore the Court is going to deny the motion for summary adjudication on plaintiffs' second cause of action for failure to pay reporting time penalty -- reporting time pay on on-call shifts and associated penalties.

The motion will be denied.

And the derivative claims stand and fall with the underlying claim.

So the motion is also denied as to the derivative claims.

(See Reporter's Transcript of Proceedings dated November 27, 2017, attached hereto as **Exhibit "A,"** at 14:20-25:15.)

Plaintiffs' counsel was asked to give notice of the Court's ruling and post it on Case Anywhere.

Respectfully submitted,

DATED: December 1, 2017

ROSEN ✧ SABA, LLP

By: _____

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EXHIBIT A

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 323 HON. ELIHU M. BERLE, JUDGE

ERICK MONROY, ET AL.,

Plaintiffs,

vs.

YOSHINOYA AMERICA INCORPORATION, ET AL.,

Defendants.

SUPERIOR COURT
CASE NO. BC 653419

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, November 27, 2017

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INDEX FOR MONDAY, NOVEMBER 27, 2017

CASE NUMBER:	BC 653419
CASE NAME:	MONROY V. YOSHINOYA
LOS ANGELES, CALIFORNIA	MONDAY, NOVEMBER 27, 2017
DEPARTMENT 323	ELIHU M. BERLE, JUDGE
REPORTER:	DAVID A. SALYER, CSR 4410
TIME:	2:30 P.M.

-oOo-

THE COURT: Good afternoon, counsel.

Calling the case of Monroy versus Yoshinoya America Corporation.

Counsel, your appearances, please.

MR. SABA: Good afternoon, your Honor. Ryan Saba on behalf of the plaintiffs.

MR. VANDERPOOL: Tyler Vanderpool on behalf of plaintiffs.

THE COURT: Good afternoon.

MR. BARBER: Good afternoon, your Honor. John Barber on behalf of the defendant.

THE COURT: Good afternoon.

MS. DEN BLEYKER: Good afternoon, your Honor. Katherine Den Bleyker also on behalf of defendant.

THE COURT: I have received a proposed order for the appointment of Mr. David Salyer as court reporter pro tem.

Any objections?

MR. SABA: No.

MR. BARBER: No, your Honor.

THE COURT: Without hearing objection, Mr. Salyer is hereby appointed court reporter pro tem.

Good afternoon.

THE REPORTER: Good afternoon.

THE COURT: The matter is here on calendar today for a hearing on defendants' motion for summary adjudication on plaintiffs' second cause of action for failure to pay reporting time pay on on-call shifts.

Anyone wish to be heard on that?

MR. BARBER: Briefly, your Honor.

As the moving party, your Honor, I feel, although you often hear this, that the issues have been comprehensively briefed.

I want to add just a --

THE COURT: Yes. I must compliment the parties for an excellent job on the briefing.

MR. BARBER: Thank you. I wanted to add just a gloss.

First of all, I imagine there might have been an almost crushing sense of deja vu having seen this issue previously in this courtroom.

What the plaintiff is asking is for the trial court to simply rewrite the law.

I would suggest that given the weight, volume and length of the stare decisis which underlies and supports the defendants' position that the Court sustain and grant the motion for summary adjudication and allow the plaintiff to press this issue at the appellate level, which is the appropriate forum to change the law.

The second point, your Honor, that I wanted to make is that while both sides aggressively claimed dominion over

common sense and the definition of words, I think it's easy to lose sight of what I'll call the forest.

And that is the very wrong that was intended to be addressed by wage earner 5-2001, which is this idea that employees were going to be called in to work, show up and because of poor scheduling or the vagaries of the workplace be sent home, and therefore they're entitled to some pay.

That was addressed and solved by what? By an on-call system.

So the very system which was intended to remedy and avoid the problem that the wage order identified is now being claimed by the plaintiff to be itself an inadequate remedy and the plaintiff asks that this Court rewrite, as I said, the underlying law.

THE COURT: Well, yes, because there is a big distinction between the prior cases and this. That is, with respect to your claim that it's such a great innovation, attribute, to place someone on call.

But in this case you have a situation where you want the employee to make himself or herself totally available, to give up their time and yet be under the control of the employer, because if they're not available, they get disciplined.

MR. BARBER: Your Honor, that's exactly the same as in the Tilly's case.

THE COURT: That is an argument that was not raised in the Tilly's case.

MR. BARBER: Well, your Honor, what was identified in

Ward versus Tilly was the fact that failure to report, to make the call, was going to be deemed the same as not reporting for a scheduled shift.

Unless we make the assumption that the Tilly's employees could not show up for scheduled shifts without being disciplined, then it is precisely the same in this instance.

THE COURT: It's not the argument.

MR. BARBER: Well, your Honor -- in this instance --

THE COURT: What do you say to -- let's just talk as a matter of equity. What is fair? That the employer, if he needs an employee, calls and tells the employee by telephone show up? Okay. Show up, you get paid.

He doesn't need the employee. He tells the employee you don't have to show up. The employer says, okay, I don't have to pay.

What is the employee supposed to do during this time?

MR. BARBER: The employee is free to do whatever he or she wants to do.

THE COURT: How can he? He is going to be disciplined. She or she is going to be disciplined.

If you say, okay, you show up, you get paid. If you cannot show up, you have a doctor's appointment, you have home care issues and you can't make it today, okay. I'll call -- the employer will call somebody else on the list and go down the list of those employees who are available to show up that day, like substitute teachers, who's available.

But in this situation, you have a case where an employee has not reserved the whole day or half a day, does

not keep it free from any appointments to take care of the family, go to a doctor, to do shopping, because if the employer needs the employee, then the employee must show up or the employee will be penalized, will be disciplined.

What kind of fairness is that?

MR. BARBER: Well, your Honor, several responses.

First of all, that's the nature of on-call agreements which have been upheld by the courts in the State of California consistently.

THE COURT: This is different.

This is a question of discipline, employees being disciplined, and therefore the employee is under the control of the employer.

MR. BARBER: Directly on point, your Honor, several responses.

The first is there is no admissible evidence that anyone was ever disciplined.

THE COURT: Well, that may be.

The question is not actual control. That is the right to control.

MR. BARBER: And the second point is that all of the other indicia that Morillion and all of the other cases have identified, none of them are present.

The employee can be anywhere he or she wants, can pick up a cellphone and call in. There is no control whatsoever on what they're doing.

THE COURT: But the employee cannot make other arrangements to take care of his or her personal affairs.

MR. BARBER: But, your Honor, that's the nature of on-call agreements.

In the limited instances in which they're implemented -- and the facts in the record suggested they were utilized no more for any employee than once per week -- in those limited circumstances, there is definitionally some impingement upon --

THE COURT: Some? You're giving up a day of your life.

MR. BARBER: Well, your Honor, all you're doing is having them call in at 1.2 hours before a predestined time. And if you call in and you're not needed, you have the balance of your day free.

THE COURT: Well, supposing you are needed?

MR. BARBER: If you are needed, you show up for work.

THE COURT: And supposing you made other arrangements to do something else?

MR. BARBER: You're advised previously at the time that the schedule is posted that you're on call, and you only have to call in on those limited shifts that are identified.

THE COURT: And if the employee is needed?

MR. BARBER: If the employee is needed, the employee goes into work.

THE COURT: And the employee made other arrangements to do something else during the day?

MR. BARBER: Well, if the employee made other arrangements knowing that this was one of the few days in which they were scheduled to be on call, I would suggest that they were not paying attention to the schedule, number one.

THE COURT: Well, I think what you're suggesting is that they would be under the control of the employer and that they have to give up their time without compensation.

MR. BARBER: No, your Honor, I'm not suggesting that. I'm saying that they can be -- it should be viewed --

THE COURT: They could be wherever they want except if they're needed, they have to show up at work.

MR. BARBER: Correct, but --

THE COURT: If they're not needed, they can't be wherever they want.

MR. BARBER: Your point is well taken, your Honor.

But what the courts have consistently said --

THE COURT: It's not the courts. There is no case in California that has dealt with the issue. There are two federal cases.

MR. BARBER: I understand, your Honor.

But the point is that those courts that have looked at this and the practice in the industry is that on-call scheduling was intended to remedy this problem.

I think that the Court's concern would be more robust, if you will, if the evidence in this record suggested that, A, they were used often and, B, people were actually disciplined.

But there is no evidence of either one of those things in the record.

What is in evidence is that you were sporadically scheduled. You had advance notice. You were allowed to be anywhere you wanted to be as long as you called in and made that one phone call, and in the event you were needed you

would show up for work. And if you were not, you had the balance of your day free.

THE COURT: If you are not, you had the balance.

All right. Thank you.

Before I hear from the plaintiff, did we receive a request for filing any documents under seal?

I have two documents, two packages conditionally sealing documents. But I don't know if there's been an application.

MR. VANDERPOOL: We noticed and lodged them and gave a conditional under seal.

THE COURT: Well, these are defendants' documents?

MR. SABA: Yes, they are.

THE COURT: And defendant has not filed an application. So the choice is, I guess, just to file them in the open record.

Is there a problem with that?

MR. BARBER: I don't think we have a problem with that, your Honor.

THE COURT: Okay. Let me hear from the plaintiff.

MR. SABA: Your Honor, in all due respect, an employee cannot be anywhere they want to be. They can't be in New York. They can't be in Hawaii. They can't actually be anywhere that's more than two hours away from their home.

They're tethered to being within a drivable distance to their job.

They can't take another job. They can't make doctor's appointments. They can't even make arrangements to take

school classes, because if on that day they are told to come to work, they have to face the choice of either missing that doctor's appointment, missing their job at another location or potentially not being able to go to a school class.

That's exactly the point. These employees are making themselves available to work for the benefit of a company.

When a company uses on-call shifts for their convenience, for their scheduling purposes, so they can save money on their bottom line, the reality is the employee is the one that suffers.

And the California Supreme Court has been crystal clear on this. When there is a dispute, the ball is to break towards the employee when interpreting a wage order. It should be for the benefit of the employee when we're talking about how to apply wage orders, not for the employer.

The difference between the Tilly case and this case is dramatic.

First of all, Tilly was a demurrer. It was not a case where people put forth evidence, depositions, documents and a large amount of -- volume of paperwork in front of you.

But what was most important about the Tilly case compared to this case is in Tilly there was no punishment requirement, which is what we highlighted to you in the paperwork.

The reality is the wage order says that an individual is to be compensated if they report forward. Report forward is the key. And they do not report. They do not have to report. They should be compensated.

There is a huge distinction between the word "for" and "it." The wage order does not say report "to work," but rather "for work."

THE COURT: Well, what's your view if there were no discipline involved? Do you think that they would be required to be compensated?

Supposing that the employer adopted a policy, listen, we have a list of 20 employees, and when we need someone extra, we're going to call on that list. And if you can show up for work, then you're going to compensated for that. If you made other plans for the day, then we'll go down to the next individual on the list.

But the reality is those people who are available, they are the most favored employees, and they'll get called back the most and they'll earn the most compensation.

MR. SABA: I think that's a more equitable way to deal with it, because the individual would not have to keep their day open. They would not be under the control of their employer.

THE COURT: So you recognize that if there is no discipline, then there would not a requirement for any compensation to be on call?

MR. SABA: Or threat of discipline, yes. That's correct.

And the threat is as equally important as the actual imposition of discipline because we have no idea who would have followed the policy or not followed the policy if there was no threat of discipline, just like they have a control and

right to control. It's an important distinction as well.

THE COURT: All right. Thank you.

MR. SABA: Thank you.

THE COURT: Any final words from defendant?

MR. BARBER: A couple thoughts, your Honor.

The first is if you look at the wage order itself, it's presented in the conjunctive.

In other words, the wage order says that you must report for work, that the employee must report for work and does report.

In Ward and Casas, in all of the cases, they have said a physical appearance, physical presence is the sine qua non of the entitlement to pay.

I would suggest that if you look at the case law that talks about controlled standby, there is a significantly greater level of control, and that numerous cases, some of which are cited in the papers, there has been a much greater level of control and the employees have not been required to be paid.

In this instance the only requirement is that you call in. That's it. You don't have to be in uniform. You don't have to be in any specific area.

The second point I would make is that there is no requirement of punishment. And in the record there is no evidence of punishment, at all.

And the third, which I think comprehensively addresses the Court's first express concern, is this. There is evidence in the record that you can trade the shifts. So to the extent

that the Court's concern is, well, you're identified as having been placed on schedule to be on call this day and the employee then has some scheduling conflict, the record is abundantly clear that you could trade shifts and that that was freely done.

So it isn't quite the onerous policy that perhaps it might at first blush appear.

THE COURT: What's your view about the change in the work environment since the wage orders were first promulgated; that is, two developments. One, technology, that we have many more electronic means of communication rather than showing up physically to work. And secondly, by the culture, with the advent of individuals who are working at home on the computer.

MR. BARBER: I think those are great questions, your Honor. My answer in reverse order is this.

Were this a case where there was any capacity to perform the work at home, it would be a more difficult call. But these employees are cooks and they are employees that are actually working at the cash register. They cannot perform a single aspect of the job anywhere other than at Yoshinoya.

So physical presence is an absolute mandate to perform the job, number one.

Number two, technology actually cuts in favor of our policy, because if we were arguing this case 25 years ago or maybe even longer, 40 years ago, we would be talking about the fact that you had to be at home or somewhere elsewhere there was a physical landline to call in.

The fact of the matter is that if you're anywhere

within a two-hour radius of work, you can just pick up the cellphone and call in say, hey, I know that I was placed on call today. I opted not to trade my shift with someone else. I'm aware of the fact I might be needed. I'm in north San Diego County. Do you need me today?

No. Okay. I'm going to keep what I'm doing.

Yes, we do need you today. There's a rush.

All right. I'll be up there at the time my scheduled shift was identified on the schedule.

So I would suggest that the technological innovation cuts in favor of this being a less restrictive policy than many of the controlled standby cases that the Court has undoubtedly looked at.

THE COURT: All right. Thank you.

MR. BARBER: Thank you, your Honor.

MR. SABA: Just briefly on two points. A new issue was raised.

First of all, as you pointed out earlier, there were two federal cases that looked at this issue. One was the Casas case, which, as we know, settled on appeal.

The other was a Bernal versus Zumiez case.

And in that Bernal case, the District Court there found that telephone appearance is enough to report for work and that physical appearance is not required.

But I wanted to actually answer the questions that you asked opposing counsel. That is, do you physically have to appear?

Well, when you're interpreting a wage order, you can't

look at just what happens in this particular case. If you're going to look at the language of the wage order, that wage order is broad enough to cover multiple industries, multiple types of jobs, multiple types of employees.

If we're going to interpret that order to mean you physically have to appear, then you need to look at all those industries, all those types of employment and all those different jobs.

And I don't think in this day and age, where 25 percent of the work population is working remotely, that that is a reasonable current definition of the law.

More importantly, it's not actually in the wage order. The wage order does not say physical appearance. Nowhere in there does it say it.

It just says report for work.

And the interpretation of reporting for work is left up to the equity and discretion of you, the decision maker.

THE COURT: All right. Thank you.

MR. SABA: Thank.

THE COURT: In this case plaintiffs Erick Monroy and Ilse Ascensio filed putative class actions against defendant Yoshinoya America for failure to pay reporting time penalties and various derivative claims.

Defendant, according to the allegations and the evidence, owns and operates a chain of Japanese-inspired fast food restaurants in the State of California.

The defendant implemented an on-call shift for its kitchen and cashier positions. And the way the employment

process works under those circumstances, if an employee is scheduled to be on call, the employee is expected to call the manager at the time set forth on the schedule two hours prior to the scheduled start time.

If an employee fails to call by the required time, the employee may be disciplined.

If the employee calls in at the required time and the employer needs the employee to work, the employee must go into work or the employee could face discipline action.

Non-compliance may be treated as an unexcused absence or tardiness under some circumstances which could result in termination.

The defendant has filed a motion for summary adjudication on the plaintiffs' second cause of action for failure to pay reporting time penalty for on-call shifts and associated penalties.

As noted by both parties, the first two causes of action are based on the same statutes but involve different theories as to how those statutes were allegedly violated.

Only the second theory, the on-call theory, is put in issue in the motion before the Court today.

Defendant argues that a second cause of action fails as a matter of law because the employees who are not required to physically report to work are not owed reporting time penalty under California law.

Defendant further argues that insofar as the third through sixth cause of action are derivative to the second cause of action, those causes of action must also fail as a

matter of law.

The heart of the dispute today is whether an employee's calling in to determine whether he or she must work a call-in shift constitutes reporting for work for the purposes of earned reporting time pay pursuant to wage order 5-2001, California Code of Regulations section 11050(5)(a).

Thus the Court is required to interpret the phrase as contained in the wage order "required to report for work and does report."

As recognized by both parties and as evidenced by the parties' reliance on federal authorities, there has not yet been an appellate court in California with a published decision that has definitively addressed the issue of interpreting the reporting time provision of a wage order to accomplish on-call reporting.

Both parties, as already mentioned, did an excellent job in briefing the issue and each had discussed their respective papers and views of the federal authorities, which are all on point.

As identified by the defendant, the theory of liability has already been tested and dismissed in the Casas case -- that's Casas versus Victoria's Secret Stores from the Central District of California 2014, reported at Westlaw 12644922.

A few days after defendant filed its motion for summary adjudication the Court in the Eastern District, federal court issued and order in the case of Bernal versus Zumiez. That's identified as Westlaw 3585230, issued on August 17, 2017.

The Bernal court addressed the identical issue raised

in the Casas case and the present case but came to the opposite conclusion than Casas.

Plaintiffs' argument is embodied by the Bernal court order.

There are basically two competing arguments.

In the Casas case, that was class action brought by store clerks against the retailer Victoria's Secret. The District Court interpreted the phrase "required to report to work and does report to work" as provided in wage order 7-2001, California Code of Regulations section 11070(5)(a).

The language in that provision is the same language at issue in the present case and reads:

> "Each workday an employee is required to report for work and does report, but is not put to work and is furnished less than half said employees' usual and scheduled day's work, the employee shall be paid for half the usual scheduled day's work, but in no event no less than two hours and no more than four hours of the employees' regular rate of pay that shall not be less than the minimum wage."

According to the Casas plaintiffs, the plain meaning of "to report" meant to present oneself as ready to do something. That is, to hold oneself out as ready.

The Casas defendant argued the plain meaning of "to report" was to physically present oneself at the place of employment.

The Federal District Court considered various dictionary definitions from multiple dictionaries and found that the plain meaning supported defendant's argument.

The Casas court also found that to report to work was susceptible to multiple interpretations, and thus it performed a statutory analysis.

Specifically, the Court started its analysis by citing an earlier version of wage order 7, adopted on June, 1947, which read that, "No woman employee shall be required to report to work or be dismissed for work between the hours of 10:00 p.m. and 6:00 a.m. unless suitable transportation is available."

The Court reviewed minutes of the IWC meeting held on April 5, 1943, which read, in pertinent part, that, "It is necessary to afford some protection to women who are required to report to work or to leave work after 10:00 p.m, and thus the condition requires some method of providing transportation."

Based on the language concerning transportation, the Casas court reasoned that this use of "report to work" clearly contemplated physically showing up at a workplace. Otherwise the language about suitable transportation would be irrelevant.

The Court found that the legislative history is entirely consistent with the Court's earlier plain meaning interpretation that the ordinary meaning of the phrase "report to work" is to actually physically show up.

In the Bernal case in the Eastern District, the Court

reached the opposite conclusion in its analysis interpreting the same wage order.

Bernal was a class action case brought on behalf of employees who used a cellphone to check in with their employer to see if they were scheduled to work and who called in around an hour before they would have to physically go to work.

The employer filed a motion for judgment on the pleadings asserting, in relevant part, that the wage order requires a worker to physically present themselves at a work site in order to qualify for reporting time penalty -- for reporting time pay.

After concluding that the plain language did not support that interpretation but rather supported the plaintiffs' construction that the wage order did not have a physical reporting requirement, the Court stated that the judicial inquiry reached and then there was no need for it to engage with the legislative history of the wage order.

The Court contemplated that even if it did so engage, the legislative history does not contain evidence that a physical reporting element is necessary in order to prove a reporting time violation.

The Court noted that the language requiring transportation is no longer in the statute and explained that in any event the statutory language referring to transportation to female workers does not rob the statute of application to situations where workers are required to telephonically or physically report to work.

The Court provided the following reason.

The bulk of interpretation and enforcement agency documents indicate that the purposes of the statute to limit contingent staffing and compensate workers for expenses incurred in setting up last-minute contingencies and preparing work shifts are met whether an employee telephones in or physically reports to work. This is key, because the court is tasked with interpreting statutes in a way that will result in a wise policy rather than mischief or absurdity.

The incentives that led employers to engage in behavior that caused the IWC to create the wage orders in the first place still exist, creating a surplus pool of contingent workers ready to begin work at a moment's notice. Only to notify some number of them that their services would not be required provides an enormous benefit to employers while forcing workers to prepare a set of contingency plans depending on whether they are given a shift to work or not.

Permitting workers to set up a system where workers use a telephone to report for work and are not liable for reporting time pay would cause mischief by allowing the total circumvention of the reporting time wage order.

Any employer need only set up a telephone line and deadline for calls from workers to completely relieve themselves of reporting time penalty -- excuse me, reporting time liability.

Such an absurdity would leave workers in the exact same situation as if the wage order had never been promulgated.

The Court is required to give a practical interpretation to the wage order that reflects the strong

policy favoring protection of workers' general welfare and liberally construe the order to protect workers.

Citing the Brinker case in 53 Cal. 4th 1026:

> "Sanctioning circumvention of wage order in an age where telephonic and digital technology makes it ever easier for workplace directives to creep into a worker's home life would be against the public policy of California."

In the present case, the Court is persuaded by the sound reasoning of the Bernal case. Like the Court in Bernal, this Court concludes that a plain meaning and reading, one that applies a common sense interpretation, supports a conclusion that telephonically calling in falls under the ambit of activity enforceable by a wage order.

In the modern era, where many workers complete their task remotely using telephones to clock in or clock out for time-keeping purposes, and, as in the case at hand, check for shifts telephonically, the common sense and ordinary reading of the order would include the reporting that plaintiffs engaged in.

The same issue was addressed by this Court in June, 2016 in the Ward versus Tilly's case that we discussed earlier, Los Angeles Superior Court case number BC 595405.

The Court notes that the Ward decision was not brought to the Court's attention by the defendant; that is, the defendant did not improperly cite to or imply in part some published order which is non-binding in the present case. And

that's appropriate with regard to the standards of citable cases.

The case was set forth by plaintiffs in their opposition, and while the Court was already aware of the Ward decision, the plaintiffs here did candidly alert the Court to the similarity of the issues between the cases, despite the analysis in Ward being counter to plaintiffs' interest.

Accordingly, both parties each undertook a short analysis as to the similarities and differences, if any, between the issues as presented in Ward and the issues presented here since the Ward case issue is pending appeal and may result in a controlling decision.

In this context the defendant argues there is simply no basis for the Court to revisit the prior decision in the Ward case and create new law by supporting plaintiffs' new novel theory of liability.

Plaintiff obviously disagrees.

There are several important factors that justify revisiting the issue.

First, as noted by plaintiffs, there's a small although important distinction between the facts and argument made to the Court in the Ward case versus the present case. And that is, which we've already mentioned earlier, the matter of employee discipline with respect to whether an employee does not call in or refuses to work a call-in shift.

In an apparent justified concession, defendant notes on reply that it's unclear whether the employees in the Ward case were disciplined.

The parties have identified an issue with the Ward case that does not exist in the present case. In Ward, defendant initially demurred to the plaintiffs' original complaint, which did not contain any allegations regarding employees being disciplined for failure to call in or refusing to work an on-call shift.

The Ward plaintiff amended the complaint, but in opposition to the subsequent demurrer the plaintiff outright conceded that the changes in the amended complaint did not substantively change the allegations in the original complaint related to the issue of whether calling in for an on-call shift constituted reporting for work.

Thus the distinction between the cases involving the couching of the argument in its important procedural posture is important in this analysis today.

Another factor to be considered is the California Supreme Court opinion in the case of Augustus versus ABM Security Services -- that's 2016 reported at 2 Cal. 5th 257 -- which was decided after the Ward case.

While the Augustus case has nothing to do with the reporting time pay, it is binding authority addressing employer control in the context of employees being on call.

Augustus settled the outstanding employment law question of can an employer satisfy its obligation to relieve employees of duties and employer control during rest periods when the employer, nonetheless, requires its employees to remain on call.

The Court concluded that the employer cannot be

relieved of duties/responsibilities towards the employees.

The Court held that remaining on call exhibited control over the employees, and the employees were thereby performing the duty for the employer.

Of course, the Augustus case is distinguishable from the present case, as it involves on-call during rest periods, and analyzing rest period violations.

However, the Augustus case signals certain similar policy considerations addressed in Bernal and merely focuses the paradigm regarding how California courts are to view employees being duty-bound in light of the ubiquitous ability for instant communication between and employer and employee.

In the present case, the employee is still performing a duty for the employer. The employee must reserve his or her free day, giving the employer the option to require the employee to work without the mutual option of the employee to decline work.

The employee must affirmatively call and spend time calling the employer or be faced with the reality of potential disciplinary action.

All this is without compensation to the employee.

The policy considerations addressed in the Augustus and Bernal are applicable in this case.

Therefore, the Court concludes that the defendant has not met its burden to establish that plaintiff cannot prove the essential elements of its claim.

The Court cannot say as a matter of law that reporting for work may not be accomplished telephonically.

The issue before the Court is a novel one, as recognized in both the Casas and Bernal cases. But based upon the arguments that have been presented today and the authority of Bernal and the analysis of the Augustus case, the Court is going to find the defendant has not met its burden to show that plaintiff cannot establish its claim.

Therefore the Court is going to deny the motion for summary adjudication on plaintiffs' second cause of action for failure to pay reporting time penalty -- reporting time pay on on-call shifts and associated penalties.

The motion will be denied.

And the derivative claims stand and fall with the underlying claim.

So the motion is also denied as to the derivative claims.

I would ask counsel for the plaintiff to give notice and post it on the website.

MR. SABA: Yes, your Honor.

THE COURT: Do we have further hearings set up in this case? Another status conference?

MS. DEN BLEYKER: I don't believe we have a further status conference, your Honor. But there is a class certification deadline that's already been set on this case, which I believe is the next operable date. And a status conference associated with the remainder.

THE COURT: Oh, we do have a status conference.

THE CLERK: June 29th.

THE COURT: We'll wait for the next hearing for further

discussions in this case.

Thank you.

MR. BARBER: Your Honor, if I may, has the Court made rulings on evidentiary objections and as to the request for judicial notice?

THE COURT: Well, as far as the judicial notice is concerned, the documents that are requested are all documents that are documents coming from the executive branch of the government or from the judicial record. So the Court is going to -- and, in fact, also there is no objection by any of the parties. The Court will grant judicial notice with respect to those requests.

As far as the evidentiary objections, the plaintiffs' objections are immaterial to the outcome of the motion. And the objections are, in effect, moot to any of the issues that have been decided by the Court.

So the Court is not going to rule on those objections.

As far as defendants' objections, most of them appear to be boilerplate. But nevertheless I will issue a specific order on them on a later date.

MR. BARBER: Thank your Honor, your Honor. I appreciate it.

THE COURT: Thank you. We'll be in recess.

(End of proceedings.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 323 HON. ELIHU M. BERLE, JUDGE

ERICK MONROY, ET AL.,

Plaintiffs,

vs.

YOSHINOYA AMERICA INCORPORATION, ET AL.,

Defendants.

SUPERIOR COURT
CASE NO. BC 653419

I, DAVID A. SALYER, Official Pro Tem Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 1 through 26 , inclusive, comprise a true and correct transcript of the proceedings taken in the above-entitled matter reported by me on November 27, 2017.

DATED: November 29, 2017.

DAVID A. SALYER, CSR, RMR, CRR
Official Pro Tem Court Reporter
CSR No. 4410