

Case No. S

S186357

(Court of Appeal Case No. B212893

Los Angeles Sup.Ct. Case No. BC313383)

SUPREME COURT

FILED

SEP 28 2010

Frederick K. Ohlrich Clerk

IN THE SUPREME COURT

Deputy

OF THE STATE OF CALIFORNIA

MORRY BROOKLER,

Plaintiff and Appellant,

vs.

RADIOSHACK CORPORATION

Defendant and Respondent.

After Decision by the Court of Appeal,
Second District, Division 7, Case No. B212893

PETITION FOR REVIEW

*Service on Attorney General and Los Angeles County District Attorney
Required by Bus. & Prof. Code § 17209*

Jones Day
Robert S. Brewer, Jr. (65294)
Randy S. Grossman (177890)
12265 El Camino Real Ste 200
San Diego, CA 92130
Telephone: (858) 314-1200
Facsimile: (858) 314-1150

Niddrie, Fish, & Buchanan LLP
Michael H. Fish (115615)
750 B Street, Suite 3300
San Diego, CA 92101
Telephone: (619) 238-6065
Facsimile: (619) 238-6036

Attorneys for RadioShack Corp.

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Attorneys for RadioShack Corp.

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ISSUE PRESENTED FOR REVIEW

Labor Code section 512 states that an employer must “provide” certain meal periods. Section 226.7 states that an employer cannot “require” an employee to work during a mandated meal period. Administrative regulations state “no employer shall employ any person” for certain work periods “without a meal period.” (Cal.Code Regs., tit.8, § 11070(11).)

Does an employer comply with these statutes and regulations by providing an uninterrupted meal period to employees, who may voluntarily choose to forego all or part of it? Or instead, is an employer required to ensure that a meal period is actually taken, whether the employee wants to take it or not?

This issue is presently before this Court in *Brinker Restaurant v. Superior Court (Hohnbaum)* (2008) 165 Cal.App.4th 1278 (review granted October 22, 2008); *Brinkley v. Public Storage, Inc.* (2008) 167 Cal.App.4th 1278 (grant and hold, January 14, 2009); and *Bradley v. Networkers International LLC*, unpublished (grant and hold, May 13, 2009).

As a factual matter, the issue presented in this Petition arises because there are a wide variety of reasons why an employee might not want to take all or some of a provided 30-minute meal period. In this case, for example, some RadioShack store employees have testified in deposition that they

routinely and freely chose to forego a meal period to make an extra sale to earn more money. (5 AA 1420-1421 [“You can’t sell if you’re eatin’’].) Other employees testified they voluntarily chose to forego a meal period to arrive late or leave early, or because they did not like to eat alone or simply had grown tired of the food choices nearby — “I mean, after so many burgers you just don’t want to touch that burger anymore.” (5 AA 1300.)

A frequently recurring issue in these cases is the one presented here: is the employer liable merely upon a showing that the employee did not take a full 30-minute meal period, regardless of the reason?

II

FACTUAL AND PROCEDURAL BACKGROUND

A. The Class Action Litigation

RadioShack owns and operates approximately 600 stores in California. (1 AA 258.) Morry Brookler was employed by RadioShack beginning in December 1996, and for many years he was a store manager. In 2003, RadioShack terminated Brookler’s employment.

In May 2004, Brookler filed a First Amended Class Action complaint against RadioShack asserting class wide meal period claims. (1 AA 1-16.) In May 2005, Brookler filed a motion for class certification. In that motion, Brookler asserted, “[T]he law ... places the burden squarely on the employer to make sure the employees take an uninterrupted meal period.” (3 AA 594.) According to Brookler, “either the employee received

a meal period, or he or she did not. Liability depends on that question.” (3 AA 598.)

Opposing class certification, RadioShack asserted that Labor Code section 512 only requires that an employer “provide” a meal period, i.e., make one available.¹ Similarly, RadioShack noted that § 226.7 only prohibits an employer from “requiring” an employee to work during any meal period. Therefore, RadioShack argued, individual issues predominated because before a violation exists, the court must inquire into the reason(s) for the skipped meal period. (2 AA 222-230.)

In February 2006, the superior court granted Brookler’s motion to certify a meal period class. Citing *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 963, the court held that an employer must ensure a meal period is actually taken.

B. Brinker is Published; RadioShack’s Motion to Decertify

On July 22, 2008, the Fourth District, Division One issued its opinion in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 165 Cal.App.4th 25 (80 Cal.Rptr.3d 781) [“*Brinker*”]. *Brinker* held, “while employers cannot impede, discourage or dissuade employees from taking

¹ Unless otherwise specified, all statutory references are to the California Labor Code. When referring to statutory subparts, the word “subdivision” is omitted.

meal periods, they need only provide them and not ensure they are taken.”
(80 Cal.Rptr.3d at p. 786.)²

On August 8, 2008, RadioShack filed a motion to decertify the class based on *Brinker*. (4 AA 1102.)³ RadioShack also lodged deposition testimony showing that store employees voluntarily missed meal periods for a variety of reasons, including a desire to earn commissions or to leave work early. (5 AA 1207; 1387.)

On October 10, 2008, the superior court granted RadioShack’s motion to decertify. (6 AA 1704-1706.) Citing *Brinker*, the court held that an employer’s obligation “is only to provide, i.e., supply or make available meal breaks, not ensure that employees take their meal breaks.” (6 AA 1706.) The court held there was no common proof regarding “whether the reason why meal breaks were not taken was due to coercion, impediment, or discouragement from Defendant.” (6 AA 1706.) Rather, “in order to determine Defendant’s liability here, individual inquiry would be necessary

² RadioShack cites the depublished decision in *Brinker* (and subsequently, the depublished decision in *Brinkley*) merely to show the existence of the cases and the issue presented in them, not as authority or precedent. (9 Witkin, *Cal. Proc.* 4th (1997) Appeal, § 715, p. 949 [citation but not reliance on unpublished decision].)

³ Previously, in 2007, RadioShack brought a motion to decertify based on this Court’s decision in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, which characterized the employer’s meal period obligation as one prohibiting “forcing” employees to work through a mandated meal period. The superior court denied that motion and the Second District, Division 7 summarily denied RadioShack’s writ petition. This Court denied review. (Case No. S158083).

of each class member to determine if he/she missed a meal period, and if so, why.” (6 AA 1706.)

C. Review is Granted in *Brinker*

On October 22, 2008, this Court granted review in *Brinker*. The Weekly Summary states, “This case presents issues concerning the proper interpretation of California’s statutes and regulations governing an employer’s duty to provide meal and rest breaks to hourly workers.”

D. The Second District, Division 3 Issues *Brinkley*

A week after review was granted in *Brinker*, the Second District, Division 3 issued its opinion in *Brinkley v. Public Storage, Inc.*, 167 Cal.App.4th 1278 (84 Cal.Rptr.3d 873.) Without citing *Brinker* (because it was depublished upon the grant of review), *Brinkley* reached the same holding, i.e., employers must provide meal periods but need not ensure that they are actually taken. (84 Cal.Rptr.3d at p. 881-882.)

E. Grant and Hold in *Brinkley*

On January 14, 2009, this Court granted review (grant and hold) in *Brinkley*. The Weekly Summary states, “The court ordered briefing deferred pending decision in *Brinker Restaurant Corp. v. Superior Court*, S166350 (#08-157), which presents issues concerning the proper interpretation of California’s statutes and regulations governing an employer’s duty to provide meal and rest breaks to hourly workers.”

F. Appellate Opinion

Brookler appealed the order decertifying the meal period class. On August 26, 2010, the Second District, Division 7, issued a 7-page unpublished opinion, citing *Cicairos* but otherwise containing virtually no discussion or analysis, reversing the order decertifying the meal period class. (The Slip Opinion is attached as Exhibit 1.)

The Opinion acknowledges that “Our Supreme Court’s decision in *Brinker* will resolve this issue.” (Slip Op., p. 6.) Nevertheless, in the meantime, Division 7 stated, “we agree with and adopt the analysis in *Cicairos*.... If the employer does not ensure compliance with meal period requirements, such behavior violates the Labor Code and corresponding wage orders.” (Slip Op., p.6.) From this language and the reversal of the order decertifying the class, it appears that Division 7 in the instant case has interpreted *Cicairos*, the Labor Code, and administrative regulations to require that employers ensure that mandated meal periods are actually taken.

G. Rehearing Denied

On September 8, 2010, RadioShack filed a Petition for Rehearing. On September 13, 2010, Division 7 denied the petition for rehearing in a single sentence with no explanation. (Attached as Exhibit 2).

III

WHY REVIEW SHOULD BE GRANTED

A. Grant and Hold Pending *Brinker*

This Court granted review in *Brinker* to address the meaning of the employer's duty to provide meal periods, and to resolve a split of authority between those cases requiring the employer to ensure the meal period is actually taken and those requiring the employer to provide or make meal periods available (*Brinker*). The Petition for Review filed in *Brinker* frames the issue as whether "an employer [must] actually relieve workers of all duty ... as held in *Cicairos*? Or may employers comply simply by making meal periods 'available'". (Petition for Review, 2008 wl 4566394.)

The issue presented here is identical to the main issue in *Brinker*. In fact, Division 7's Opinion recognizes this identity of issues, stating "Our Supreme Court's decision in *Brinker* will resolve this issue." (Slip Op., p.6.) Moreover, Brookler's lawyers have also conceded that this case and *Brinker* present the same basic meal period issue. In requesting the Court of Appeal to stay this case pending *Brinker*, Brookler's lawyers stated:

"[T]he issue here, as in *Brinker*, is the employer's obligation regarding meal periods... the outcome will be decided by the Supreme Court's forthcoming opinion in *Brinker*.... [I]t is but a foregone conclusion that a decision by this Court would come first yet end up in a grant of review and a hold pending *Brinker*

anyway.” (Plaintiff’s Motion for Stay, filed May 20, 2009 in the Court of Appeal.)

Given the identical nature of the issue here and in *Brinker*, this Court should grant review and order briefing in this case deferred until this Court issues its decision in *Brinker*. (Cal.Rules of Court, Rule 8.512(d)(2); Eisenberg et al., *California Practice Guide: Civil Appeals and Writs*, § 13:125 (2007) [“The ‘grant and hold’ procedure commonly occurs when several appeals present the same issue and in fact accounts for a significant number of cases granted review.”].)

Two other cases have been given “grant and hold” status on this same issue. (See *Brinkley v. Public Storage, Inc.* (2008) 167 Cal.App.4th 1278 (Case No. S168806, grant and hold, January 14, 2009 [hereafter, “*Brinkley*”]); and *Bradley v. Networkers International LLC*, unpublished (Case No. S171257, grant and hold, May 13, 2009).

To secure uniformity of decision, *Brookler* should be given the same grant-and-hold status as this Court has already done in *Brinkley* and *Bradley*. (Rule 8.500(b)(1).)

B. Review is Necessary to Secure Uniformity of Decision and to Settle an Important Question

One of the main functions of the Supreme Court is to resolve conflict in the courts of appeal. (*Warner v. Steamship Uncle Sam* (1858) 9 Cal. 697, 718.) As explained below, review should be granted to resolve the conflict in the courts of appeal and federal district courts (applying

California labor law) regarding an employer's obligation to provide meal periods, and thereby settle an important question of law. (Rule 8.500(b)(1).)

First, there is conflict among the state courts of appeal. The appellate court in *Jaimez v. DAIOWS USA, Inc.* (2010) 181 Cal.App.4th 1286, noted that *Brinker* and *Brinkley* "conflict with *Cicairos*." (181 Cal.App.4th at p. 1303.) Because the court of appeal here has rejected *Brinker's* analysis and instead has followed *Cicairos*, a like conflict exists here as well.⁴

Second, there is a split of authority between different Divisions of the same Second Appellate District. In *Brinkley*, the Second District, **Division 3** held, "The meal period laws do not obligate employees to take meal periods or employers to ensure that meal periods are taken." (*Brinkley, supra*, 84 Cal.Rptr.3d at p. 882.) In contrast, in the instant case, the Second District, **Division 7** has reached the opposite holding that an ["employer [must] ensure compliance with meal period requirements...."]. (Slip Op., p.6.)

⁴ Indeed, there is even a split of authority on whether *Cicairos* actually conflicts with a "provide" standard. Compare, for example, *Brown v. Federal Express Corporation et al.* (C.D. Cal. 2008) 249 F.R.D. 580, 586 [*Cicairos* consistent with a "make available" standard] and *Valenzuela v. Giumarra Vineyards Corp.* (E.D. Cal. 2009) 614 F.Supp.2d 1089, 1098 fn. 3 [recognizing a "split in California authority" between *Cicairos* and *Brinker*.]

Such intra-District conflicts are not common. But when they occur on a significant issue such as this one, the remedy is a grant of review in both cases. This is what happened in *Casas v. Thompson* (1985) 171 Cal.App.3d 458 (217 Cal.Rptr. 471) and *In re Marriage of Harmon* (1985) 184 Cal.App.3d 754 (217 Cal.Rptr. 329). These two cases from Division One of the Fourth District involved the same legal issue, but the panels in each case differed, with different results. This Court granted review in both. (*Casas v. Thompson*, review granted November 26, 1985 [220 Cal.Rptr. 124]; *In re Marriage of Harmon*, review granted November 27, 1985 [220 Cal.Rptr. 390].)

Third, there is also conflicting authority among federal district courts applying California substantive law. Most federal district courts confronting the issue have followed *Brinker*, holding an employer must provide meal periods, not ensure such periods are taken. (*Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 585; *Gabriella v. Wells Fargo Financial, Inc.* (N.D. Cal. 2008) 2008 wl 3200190, *3; *Kimoto v. McDonald's Corp.* (C.D. Cal. 2008) 2008 wl 4690536, *4-6; *Marlo v. United Parcel Service* (C.D. Cal. 2009) 2009 wl 1258491, *9; *Perez v. Safety-Kleen Systems, Inc.* (N.D. Cal. 2008) 253 F.R.D. 508, 515; *Salazar v. Avis Budget Group, Inc.* (S.D. Cal. 2008) 251 F.R.D. 529, 533; *Kenny v. Supercuts, Inc.* (N.D. Cal. 2008) 252 F.R.D. 641, 646; *Watson-Smith v. Spherion Pacific Workforce, LLC* (N.D. Cal. 2009) 2008 wl 5221084, *3;

White v. Starbucks Corp. (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1089;
Wren v. RGIS Inventory Specialists (N.D. Cal. 2009) 256 F.R.D. 180, 209.)

However, at least two federal courts have reached the opposite result, holding that employers must ensure mandated meal periods are actually taken. (*Wang v. Chinese Daily News* (C.D. Cal. 2006) 435 F.Supp.2d 1042, 1059 and fn. 21; *Valenzuela v. Glumarra Vineyards Corp.* (E.D. Cal. 2009) 614 F.Supp.2d 1089, 1098 fn. 3 [discussing “split” between *Cicairos* and *Brinker* and adopting “ensure taken” standard].)

Fourth, granting review is also necessary in this case because of a rare conflict within the Department of Labor Standards Enforcement (“DLSE”). The DLSE is the state agency empowered to enforce California’s labor laws. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581.) Yet, the DLSE itself is embroiled in conflict over this same meal period issue.

Historically, the DLSE’s longstanding position was that the meal period obligation amounts to freeing the employee from the employer’s control, rather than affirmatively taking measures to prohibit the employee from performing any work or otherwise ensuring the meal period is actually taken. This view is well articulated by an Opinion Letter issued by the DLSE in 1991, which states:

“So long as the employer authorizes the lunch period within the prescribed period and the employee has a reasonable opportunity to take the full thirty-minute

period free of any duty, the employer has satisfied his or her obligation.” (DLSE Opinion Letter No. 1991.06.03 [Exhibit 9 to RadioShack’s Request for Judicial Notice, filed with the Respondent’s brief].

However, by 2001, the DLSE reversed itself. In October 2001, the DLSE’s Enforcement Manual stated for the first time that wage orders required employers to ensure meal periods were actually taken. (4 AA 1032.) Several DLSE Opinion Letters issued during this time period reinforced the DLSE’s “ensure taken” standard. (See, e.g., Opinion letter 2002.09.04, located at: <http://www.dir.ca.gov/dlse/opinions/2002-09-04.pdf>.)

Yet, in October 2008, after review was granted in *Brinker*, the DLSE abandoned the “ensure taken” position, and has returned to its original view that employers “must provide meal periods but do not have an additional obligation to ensure that such meal periods are actually taken.” (<http://www.dir.ca.gov/DLSE/CourtRulingsMemo-Brinke-10.23.08.pdf>)

This Court should grant review to secure uniformity of decision and settle an important question of law. (Rule 8.500(b)(1).)

IV

LEGAL DISCUSSION

A. **Class Actions Should Be Decertified When Individual Issues Will Predominate**

“[E]ven after an initial determination of the propriety of [a class action] the trial court may discover subsequently that it is not appropriate.”

(*Occidental Land, Inc. v. Super. Ct.* (1976) 18 Cal.3d 355, 360.) Class decertification is particularly appropriate when a party can show that individualized fact issues will predominate. (See *Grogan-Beall v. Ferdinand Roten Galleries, Inc.* (1982) 133 Cal.App.3d 969, 975 [decertification warranted where evidence offered at trial illustrated that common questions of fact did not predominate].)

To determine whether individualized questions will predominate, the plaintiff's theory of recovery is the threshold consideration. "The trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) If, under the substantive law applicable to the plaintiffs' claim, each class member's recovery depends upon a separate set of facts applicable only to him or her, common issues do not predominate and class certification is improper. (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 809.)

B. Under the Plain Language in Sections 512 and 226.7, Employers Have An Obligation to Provide Meal Periods, Not Ensure They are Taken

The cardinal principle of statutory interpretation is to interpret the words of the statute themselves, giving them their ordinary meaning, and reading them in the context of the statute as a whole. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 315.) "The Legislature's chosen language is the most reliable indicator of its intent...." (*Sustainability of Parks,*

Cal.App.4th 1350, 1361.)

1. Section 512

Section 512(a) states:

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

In reading statutes, courts “are mindful that words are to be given their plain and commonsense meaning.” (*Murphy, supra*, 40 Cal.4th at p. 1103.) Accordingly, courts often look to dictionary definitions to ascertain legislative intent. (*Murphy, supra*, 40 Cal.4th at p. 1104; *Trope v. Katz* (1995) 11 Cal.4th 274, 279-280; *People v. Anderson* (1986) 70 Cal.2d 15, 26.) The word “provide” means “to supply or make available.” (Merriam Webster’s Collegiate Dictionary (11th ed. 2006), p. 1001).

By its plain language, §512 thus imposes on employers only the duty to “provide” meal periods. Nothing in the statutory text even hints at an additional obligation to ensure that employees take every meal period that

is offered.

2. Section 226.7

Section 512 does not provide a remedy for meal period violations.

In 2001, the Legislature enacted section 226.7 to do so. Subdivision (a) states:

“No employer shall **require** any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.” (Emphasis added.)

Subdivision (b) of section 226.7 states:

“If an employer fails to **provide** an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not **provided**.” (Emphasis added.)

Significantly, §226.7 regulates the employer's duty to *provide* a meal period; it says nothing about an employee's *taking* of one. To “require” is to compel or coerce. (Black's Law Dictionary (5th Ed. Abridged 1983).) Thus, §226.7(a) prohibits an employer from forcing an employee to work during a mandated meal period. When RadioShack provides a 30-minute uninterrupted meal period that an employee freely elects to forego, RadioShack has not violated §226.7(a) because it has not “required” the employee to work. This interpretation is consistent with this Court's interpretation of the meal period law in *Murphy*:

“Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being **forced** to miss a rest or meal period.” (*Murphy*, 40 Cal.4th at p. 1108 [emphasis added.])

Because §§512 and 226.7 relate to the same subject matter, they must “be read together and reconciled whenever possible.” (*Womack v. San Francisco Community College Dist.* (2007) 147 Cal.App.4th 854, 860-861.) By stating in §512 that an employer’s obligation is only to “provide” a mandated meal period, and by stating in §226.7(a) that an employer cannot “require” any employee to work during a mandated meal period, liability for a missed meal period can only arise when an employer forces an employee to forego a mandated meal period that the employee wishes to take. Noticeably absent from both §§512 and 226.7 is any language compelling an employer to ensure that an employee takes any meal period despite the employee’s desire to skip or shorten it for personal reasons.

C. The Legislature Precluded the IWC From Altering the “Provide” Standard

In September 2000, the Legislature amended §516 to preclude the IWC from adopting any regulation inconsistent with §512. The Legislative Counsel’s Digest for Senate Bill 88 (1999-2000 Session) states in part:

“Existing law authorizes the [Industrial Welfare] commission to adopt or amend working condition orders with respect to meal periods. Other existing law prohibits, except as provided, an employer from employing an employee for more than 5 hours per day without *providing* the employee with a meal period of not less than 30

minutes, or for employing an employee for more than 10 hours per day without *providing* the employee with a 2nd meal period of not less than 30 minutes. [¶] **This bill would prohibit the commission from adopting a working condition order that conflicts with those 30-minute meal period requirements....**⁵ (Emphasis added).

As amended, section 516 states in full:

“Except as provided in Section 512, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.” [Emphasis added].)

Thus, even if the current wage orders could be read to require employers to ensure that provided meal periods are actually taken, they would be void. Section 516 expressly prohibits the IWC from doing that. (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 438.)

D. The Court of Appeal Erred in Applying *Cicairos*

The Court of Appeal here rejected *Brinker*, and instead relied on *Cicairos* for the “ensure taken” standard of liability. As explained below, the Court misread *Cicairos*.

“[T]he language used in any opinion is to be understood in the light of the facts and the issue then before the court.” (*McDowell and Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38.) Accordingly, the analysis of *Cicairos* must begin with the facts of *Cicairos*.

⁵ http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0051-0100/sb_88_bill_20000919_chaptered.html.

In *Cicairos*, truck drivers sued their former employer for violating the Labor Code and wage order relating to meal periods. The trial court granted the employer's motion for summary judgment. The appellate court reversed. (133 Cal.App.4th at pp. 962-963.)

The evidence in *Cicairos* was that although the employer closely regulated its drivers' activities with an on-board computer, it "did not schedule meal periods, include an activity code for them, or monitor compliance." (133 Cal.App.4th at p. 962.) In fact, the employer did not even record its employees' meal periods; it simply "assumed" the meal periods were taken. (133 Cal.App.4th at pp. 962-963.) Moreover, the employer actively discouraged meal periods by "pressuring drivers to make more than one daily trip, making drivers feel that they should not stop for lunch." (133 Cal.App.4th at p. 962.) As a result, "most drivers ate their meals while driving or else skipped a meal nearly every working day." (*Ibid.*)

Thus, *Cicairos* is a case where the employer's policies and practices affirmatively discouraged employees from taking their meal periods. (*Watson-Smith v. Spherion Pacific Workforce, LLC, supra*, 2009 wl 426122 at *2 fn. 1.) The facts in *Cicairos* supported a finding that the employer did not meaningfully make meal periods available, i.e., that it did not provide meal periods. (133 Cal.App.4th at p. 962 [finding the employer had not

satisfied “its obligation to *provide* the plaintiffs with an adequate meal period.”].)

If the *Cicairos* court had adopted an “ensure” standard of liability, as held by the Court of Appeal here, *Cicairos* would not have had to discuss or analyze the employer’s policies and practices, but instead would have simply inquired whether the meal period was actually taken or not. Moreover, the *Cicairos* court’s conclusion that employers “have an affirmative obligation to ensure that workers are actually relieved of all duty” and cannot simply “assum[e] that the meal periods were taken (133 Cal.App.4th at p. 962) is consistent with RadioShack’s position that under §§512 and 226.7, an employer’s obligation to provide meal periods is active — i.e., an employer has an obligation to provide or make available uninterrupted (i.e., “off duty”) 30-minute meal periods. RadioShack acknowledges that meal periods are not, as the employer in *Cicairos* argued, the “sole responsibility of the [employees].” (133 Cal.App.4th at p. 963.)

To the extent that *Cicairos* can be read to hold, as the Court of Appeal did here, that an employer must “ensure” a provided meal period is taken, that analysis is flawed. The *Cicairos* court quoted the sentence — that employers “have an affirmative obligation to ensure that workers are actually relieved of all duty” — from a Department of Labor Standards Enforcement (“DLSE”) opinion letter. (133 Cal.App.4th at pp. 962-963.)

However, DLSE opinion letters are not binding and do not have the force of law. (*Conley v. Pacific Gas & Electric* (2005) 131 Cal.App.4th 260, 270-271.) Moreover, the opinion letter quoted by *Cicairos* does not even discuss or analyze the applicable Labor Code statutes. For these reasons, many federal courts have refused to follow *Cicairos*, including:

- *Kenny v. Supercuts, Inc., supra*, 252 F.R.D. at p. 646 [“The [*Cicairos*] court did not analyze the statutory language *Cicairos* is not persuasive authority for the proposition that employers must ensure that their employees take meal breaks....”]
- *Salazar v. Avis Budget Group, Inc., supra*, 251 F.R.D. at p. 533;
- *White v. Starbucks, supra*, 497 F.Supp.2d at p. 1089 [holding *Cicairos* is consistent with a “provide” standard because “the defendant in *Cicairos* knew that employees were driving while eating and did not take steps to address the situation. This, in combination with management policies, effectively deprived the drivers of their breaks.”];
- *Perez v. Safety-Kleen Systems, Inc., supra*, 253 F.R.D. 508, 513 [“The court in *Cicairos* was careful to limit its holding to the specific facts of the case.... *Cicairos* can thus be read to hold that an employer is liable for failing to “provide” meal breaks if it has a policy or practice of prohibiting or discouraging meal breaks.”]

Moreover, to the extent *Cicairos* holds employers must ensure meal periods must be actually taken, it is inconsistent with this Court’s recent decision in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094. In deciding that the remedy for a meal period violation was a wage, this Court stated that Labor Code section 226.7 was intended “to address the problem of employees being forced to work through their meal and rest periods....” (*Murphy, supra*, 40 Cal.4th at p. 1106 [emphasis added].)

Moreover, this Court added that “under ... section 226.7, an employee is entitled to [the statutory remedy] upon being **forced** to miss ... a meal period.” (*Id.*, at p. 1108.) Quoting from the relevant administrative history, this Court observed:

“This meal ... pay provision applies to an employer who says, ‘You do not get lunch today ... you must work now.’ That is — that is the intent...” (*Murphy, supra*, 40 Cal.4th at p. 1110.)

E. The Wage Order is Consistent With a “Provide” Standard

In setting forth the meal period obligation, §226.7 refers to applicable “wage orders.” Section 226.7(a) states, “No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.” (Emphasis added.) Similarly, §226.7(b) states, “If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.” (Emphasis added.) As explained below, the Wage Order applicable in this case (7-2001) is consistent with a “provide” standard.

Wage Order 7-2001, section 11 states:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the

day's work the meal period may be waived by mutual consent of the employer and the employee.

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

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided. (Cal.Code Regs., tit. 8, § 11070, subd. (11) [emphasis added].)

The Court of Appeal's decision here quotes the Wage Order, but does not analyze it. There are at least three reasons why the Wage Order states a "provide" and not an "ensure taken" standard.

First, the Wage Order itself uses the word "provide," and does not contain the words "ensure" and "taken."

Second, where the employee voluntarily chooses to work during an "off duty" meal period that has been provided, the employer has not

employed the employee for a work period *without* the requisite meal period. To the contrary, the employer has employed the employee *with* a meal period. Thus, the employer has complied with the wage order and would not be subject to paying the premium pay remedy under section 226.7.

Third, the regulatory history that Brookler himself filed in the Court of Appeal demonstrates that when the IWC intends to require an employer to ensure meal periods are taken, it knows how to say so. For example, in the 1920 version of the Wage Order, the IWC stated:

“Every woman and minor shall be entitled to at least forty-five (45) minutes for noon day meal; provided, however, that no woman or minor shall be permitted to return to work in less than one-half hour.” (Ex. 177 of Brookler’s Request for Judicial Notice filed in the Court of Appeal [emphasis added].)

In 1932, the Wage Order contained a similar language that required an employer to ensure the employee actually took at least one-half hour of meal period break:

“Every woman and minor shall be entitled to at least one hour for meals; provided, however, that no woman or minor shall be permitted to return to work in less than ½ hour....” (Ex. 11 and 80 of Brookler’s Request for Judicial Notice filed in the Court of Appeal [emphasis added], which was also quoted in Brookler’s Reply Brief in the Court of Appeal, at page 12.)

Similarly, the 1933 Wage Order governing office workers expressed the same ensure-taken rule, again with clear and unambiguous language:

“A meal period of not less than one-half (1/2) hour must be given to all employees after not more than five (5) hours of employment. **The employer is responsible for seeing that this time is taken.**” (Ex. 141 of Brookler’s Request for Judicial Notice filed in the Court of Appeal [emphasis added].)

The regulator history Brookler filed in the Court of Appeal shows that the IWC changed this language during World War II, when the national interest would have supported a different rule in which employees who wanted to voluntarily keep working to maintain war production would be free to do so (without imposing liability on employers for a meal period violation). The 1943 Wage Order states:

“Every employer shall **allow a meal period of not less than thirty (30) minutes....**” (Exhibit 180 of Brookler’s Request for Judicial Notice filed in the Court of Appeal [emphasis added].)

To “allow” a meal period is equivalent to making one available or providing one. After the end of World War II, the IWC never returned to ensure-taken type of the language.

As quasi-legislative regulations, the wage orders are to be construed in accordance with the ordinary principles of statutory interpretation (*Collins v. Overnite Transp. Co.* (2003) 105 Cal.App.4th 171, 178.)

From 1920 to 1943, the IWC deliberately changed the Wage Orders. This deliberate change — from not permitting employees to return to work during meal periods, to merely “allowing” meal periods — manifests a change and different intent. (See *Mosk v. Superior Court* (1979) 25 Cal.3d

474, 493 [superseded by statute as stated in *Adams v. Comm'n on Judicial Performance* (1994) 8 Cal.4th 630, 650-651]; *Estate of Simpson* (1954) 43 Cal.2d 594, 600; *Las Virgenes Mun. Wat. Dist. v. Dorgelo* (1984) 154 Cal.App.3d 481, 486).

Thus, when the IWC wants to write a Wage Order establishing an ensure taken standard, it knows how to say so. The fact that the current Wage Order does not contain ensure taken language is strong evidence that the Wage Order requires employers to provide meal periods, but not ensure they are actually taken. (See, e.g. *General Motors Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 773, 792.)

V

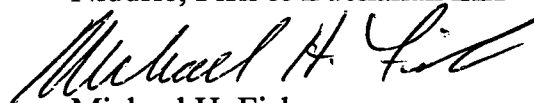
CONCLUSION

Based on the foregoing, RadioShack requests that the Court grant review and hold the case pending this Court's decision in *Brinker*, or alternatively, grant review to resolve important issues affecting almost every employer in California.

Respectfully submitted,

Jones Day
Randy S. Grossman

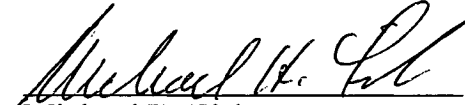
Niddrie, Fish & Buchanan LLP



Michael H. Fish
Co-counsel on Appeal for
RadioShack Corp.

WORD COUNT CERTIFICATE

I certify that this Petition for Review contains 5,843 words,
including footnotes, as calculated by the Microsoft Word application used
to generate this document.


Michael H. Fish

1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MORRY BROOKLER,

Plaintiff and Appellant,

v.

RADIOSHACK CORPORATION,

Defendant and Respondent.

B212893

(Los Angeles County
Super. Ct. No. BC313383)

APPEAL from an order of the Superior Court of Los Angeles County.

Edward A. Ferns, Judge. Reversed.

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

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

SUMMARY

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

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

FACTUAL AND PROCEDURAL SYNOPSIS

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

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

Brookler appeals.

DISCUSSION

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

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

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

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

Labor Code section 226.7 provides as follows: “(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.”

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

Moreover, “(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employer and the employee.

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

“(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an ‘on duty’ meal period and counted as time worked. An ‘on duty’ meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

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

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

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

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

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

DISPOSITION

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

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.

2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 7

September 13, 2010

Michael Herbert Fish
Niddrie, Fish & Buchanan, LLP
750 B. Street, Suite 3300
San Diego, CA 92101

MORRY BROOKLER, Individually and as Personal Representative, etc.,
Plaintiff and Appellant,

v.

RADIOSHACK CORPORATION,
Defendant and Respondent.

B212893
Los Angeles County No. BC313383

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

1 **Brookler v. RadioShack**

2 **Supreme Court Case No. S _____ Court of Appeal Case No. B212893**

3 **PROOF OF SERVICE**

4 I am a citizen of the United States, employed in the County of San Diego, State of California I am over
5 the age of 18 and not a party to the within action; my business address is 750 B St Ste 3300 San Diego,
6 CA 92101

7 On September 27, 2010, I served the following document via U.S. Mail: **Petition for Review**

8 on each interested party in this action by placing the true copies thereof enclosed in a sealed
9 envelope addressed with postage fully prepaid thereon. I then placed the envelopes in a U.S.
10 Postal Service mailbox in San Diego, California, addressed as follows:

11 Scott A. Brooks
12 Daniels Fine et al.
13 1801 Century Park East
14 9th Floor
15 Los Angeles, CA 90067

Attorneys for Plaintiff Morry Brookler

16 Stephen Glick
17 Law Offices of
18 1055 Wilshire Blvd.
19 Suite 1480
20 Los Angeles, CA 90017-2454

21 Ian Herzog
22 Law Offices of
23 233 Wilshire Blvd.
24 Suite 550
25 Santa Monica, CA 90405

26 Hon. Edward A. Ferns
27 Los Angeles County Superior Court
28 111 N. Hill St
Los Angeles CA 90012

Trial Judge

Court of Appeal, 2nd Dist., Div. 7
300 South Spring St. Ste 2217
Los Angeles CA 90013

Court of Appeal

Office of the Attorney General
300 South Spring Street
Fifth Floor, North Tower
Los Angeles, CA 90013

***Bus. and Prof. Code 17209 (Unfair
Competition Act) : Other***

Office of the District Attorney
320 W. Temple St. #540
Los Angeles, CA 90012

26 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and
27 correct.

28 Dated: Sept 27, 2010



Michael H. Fish