

Civil Case No. S162818

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

Anthony Kirby, et al.,
Plaintiffs and Appellants

vs.

Immoos Fire Protection, Inc.,
Defendant and Respondent

Appeal from a Decision of the Third Appellate District,
Case Number C062306

**APPLICATION FOR LEAVE TO FILE AS *AMICUS CURIAE*
AND BRIEF IN SUPPORT OF APPELLANTS**

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Cal. R. Ct. 8.29(c)(1)

BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS
ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST
AS AMICUS CURIAE

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
C.R.C. Rule 8.208

The following application and brief are made by the California Employment Lawyers Association (CELA). This entity is a non-profit organization of attorneys and is not a party to this action. CELA knows of no entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Dated: July 11, 2011

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**APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS
ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS
CURIAE* IN SUPPORT OF APPELLANTS**

**TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF
JUSTICE:**

The undersigned respectfully asks permission to file a brief as *amicus curiae* in the matter of *Kirby, et al., v. Immoos Fire Protection, Inc.*, 113 Cal. Rptr. 3d 370, review granted November 17, 2010 (Case Number S185827) (hereafter, *Kirby*), under Rule 8.520(t) in support of the Appellants, on behalf of the California Employment Lawyers Association (CELA). CELA is a statewide non-profit organization with approximately 1000 members (987, as of June 2011), largely attorneys, who are dedicated to protecting workers' rights. Though some of CELA's attorneys work at law firms with five or more attorneys, the vast majority work as sole practitioners (like the undersigned) or at firms with fewer than five lawyers. Only a handful of CELA's attorneys work at law firms with more than 20 attorneys.

CELA's member attorneys represent employees in all types of employment cases in state and federal courts and before administrative agencies, including employment discrimination, wrongful discharge, wage and hour, and unemployment insurance

matters. In each of these substantive areas of law, CELA's members and their clients challenge employers who fail to adhere to California and federal employment laws. CELA frequently appears as *amicus curiae* in matters before this Court, including, *e.g.*, recent appearances in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, (hereafter, *Murphy*), *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, *Edwards v. Arthur Andersen, LLP* (2008) 44 Cal. 4th 937, and *Brinker Restaurant Corporation, et al. v. Superior Court* (2008) 80 Cal. Rptr. 3d 781 (hereafter, *Brinker*).

CELA's members have an abiding interest in interpretations of the California Labor Code, including §§ 218.5, 226.7, 512, and 1194, most directly at issue in this case, and the Industrial Welfare Commission ("IWC") Wage Orders. In particular, CELA seeks vigorous enforcement of the Labor Code's and Wage Orders' meal and rest period provisions which are construed "broadly in favor of protecting employees," as this Court required in *Murphy*, 40 Cal. 4th at 1104. CELA knows that its attorneys will be unable to pursue or recommend that their clients pursue such enforcement if they and/or their clients may be responsible for paying the exorbitant attorneys' fees of opposing counsel any time their efforts to pursue meal/rest

period premiums fall short. CELA's members throughout the state are awaiting the outcome of this case (and *Brinker*) in order to be able to move forward with their pending wage/hour litigation involving meal and rest period premium claims.

Like so many CELA members, the undersigned is a sole practitioner who brings (among other suits) class actions relating to meal/rest period violations. With most employment attorneys' billing rates ranging between \$300-\$800/hour in both the plaintiffs' and defense Bar, I have observed that attorneys' fees in these matters rise easily to the hundreds of thousands of dollars for each party after some discovery efforts and a motion or two between the parties. If *Kirby* is not decided in Appellants' favor, I will be unable to take the risk of bringing such class actions to enforce the meal/rest period statutes, because I cannot stake my practice and my home on each case that has – like all cases – an uncertain outcome, no matter how strong the perceived merits at the time the case is first filed. It is already a great risk to pursue contingency litigation, in which I must, each time, incur costs and work dozens or hundreds of hours, possibly without reimbursement or compensation of any kind.

In response to Rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. No party or counsel for a party has made a monetary contribution to fund the preparation or submission of the following *amicus* brief. The proposed brief follows.

I certify under the penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed at Oakland, California, this 5th day of July, 2011.

Application for Leave to File Amicus Brief

Dated: July 11, 2011

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I. INTRODUCTION

The Third District Court of Appeal, in *Kirby, et al., v. Immoos Fire Protection, Inc.*, 113 Cal. Rptr. 3d 370 (2010), *review granted* November 17, 2010 (Case Number S185827) (hereafter, *Kirby*), chose to construe California Labor Code § 218.5 in a manner that would significantly harm the state's employees' and their advocates' ability to enforce statutory meal and rest period protections. This Court should reverse to ensure that the Labor Code is reasonably construed, as it must be, with an eye toward employee protection.

This Court has recognized that the Labor Code's meal and rest period provisions are intended as an enforcement device for significant public policies seeking to limit employees' hours of work, in the same manner as overtime premiums. *See Murphy v. Kenneth Cole* 40 Cal. 4th 1094, 1109-1110 (2007) (hereafter, *Murphy*). This Court has also noted repeatedly the Legislature's acknowledgement of the importance of private efforts to enforce the Labor Code provisions designed to protect workers. *See, e.g., Gentry v. Superior Court* 42 Cal. 4th 443, 455-456 (2007) (hereafter, *Gentry*) ("it is the clear intent of the Legislature in section 1194 that minimum wage and overtime laws should be enforced in part by private action brought by

aggrieved employees.”) (citing *Bell v. Farmers Ins. Exchange* 115 Cal. App. 4th 715, 746 (2004) (hereafter, *Bell*) (noting declaration of former chief counsel of [California’s Division of Labor Standards Enforcement (DLSE)] indicating that without private enforcement through class actions department’s resources to resolve claims would be overtaxed); *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009) (hereafter, *Arias*) (discussing the rationale for the Private Attorneys General Act of 2004, Lab. Code, § 2698, *et seq.*, stating, “staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations”). At stake in the present appeal of the Third District Court of Appeal is nothing less than the viability of private enforcement of the Labor Code’s meal and rest period premium statutes, Lab. Code §§ 226.7 and 512, and the Industrial Welfare Commission (IWC) Wage Orders requiring such premiums — especially in the class action context.

Class actions are a preferable way of prosecuting meal/rest period deprivations that affect large groups of workers similarly. *See*

generally Gentry, 42 Cal. 4th at 459-462 (citing *Bell* and *Sav-On Drug Stores, Inc. v. Superior Court* 34 Cal. 4th 319, 340 (2004)). In putative class actions, typically brought pursuant to employees' contingency agreements with counsel (often a member of the California Employment Lawyers Association, CELA), the attorneys frequently undertake the risks of litigation in the representation contracts with their clients, who are (as non-exempt employees) typically low-income or middle class people without the means to pay several hundred dollars an hour or many thousand dollars in out-of-pocket litigation costs. CELA's attorneys, almost entirely solo or very small-firm practitioners, cannot responsibly stake their entire practices and/or place themselves and their families in jeopardy of financial ruin (especially in the case of CELA's numerous sole practitioners) on each meal/rest case they seek to bring. Yet, they would often be doing so, if they were required to risk paying tens or hundreds of thousands of dollars, or even over a million dollars, in defense attorneys' fees for each meal/rest class action filed.

Likewise, in any action in which CELA's attorneys do not personally undertake the litigation risks, CELA's attorneys could not in good conscience advise clients to bring meal/rest period claims,

particularly on a class basis, when each of these clients could only generally hope to gain several hundred or several thousand dollars personally, but could be risking personal bankruptcy if they do not succeed. *See Earley v. Superior Court*, 79 Cal. App. 4th 1420, 1433 (2000) (hereafter, *Earley*) (“it would be entirely appropriate to place the entire cost burden on the named representative plaintiff(s) who has (have) chose to instigate the action rather than on the absent class members.”).

Section 1194 of the Labor Code permits employees’ recovery of attorneys’ fees, among other relief, in cases brought to recover “the legal minimum wage” and does not permit employers to shift their attorneys’ fees when they successfully defend such actions. Lab. Code §§ 218.5, 1194. *See Earley*, 79 Cal. App. 4th at 1429-1430. This Court, in *Murphy*, held that meal and rest period premiums are a wage required when employees work through meal or rest periods (*Murphy*, 40 Cal. 4th at 1114) – and as such, these premiums are (at least arguably) the “legal minimum wage” required in every instance in which a worker does not receive a required meal or rest break. *See Appellants’ Opening Brief on the Merits*, at pp. 13-21. *See also Road Sprinkler Fitters Local Union No. 699 v. G&G Fire Sprinklers, Inc.*

102 Cal. App. 4th 765, 779 (2002) (hereafter, *Road Sprinkler*) (prevailing wages are minimum wages covered by Lab. Code § 1194). Moreover, because Labor Code § 218.5 specifically excludes two-way fee-shifting in “any action for which attorney’s fees are recoverable under Section 1194,” and the underlying lawsuit, or civil “action,” articulated, *inter alia*, overtime claims (*Kirby*, 113 Cal. Rptr. 3d at 373) covered by § 1194, the two-way fee-shifting in § 218.5 is precluded here as to any claims alleged in the same action. *See* Appellants’ Opening Brief on the Merits, at pp. 36-39. As such, at the very least, section 218.5 permits multiple interpretations – Appellants’,¹ and that of the *Kirby* court.

Since the two-way fee-shifting provision of Labor Code § 218.5 was enacted more than a decade before the premium requirements in Labor Code § 226.7 were implemented, it would be disingenuous to claim that § 218.5, regarding bargained-for wages, was clearly designed to apply to § 226.7, regarding a newer statutory premium requirement. *McGann*, 122 Cal. Rptr. 3d at 671-672 (citing *Earley*,

¹ Appellants’ view was also embraced by the Second District Court of Appeal in *In re United Parcel Service Wage and Hour Cases* 122 Cal. Rptr. 3d 661, 670-672 (2011), *review granted* May 11, 2011 (depublished) (S191908) (hereafter, *McGann*).

79 Cal. App. 4th at 1430). Indeed, the *Kirby* court acknowledged that Plaintiffs advance “a plausible reading of the legislative history” (*Kirby*, 113 Cal. Rptr. 3d at 1372), but chose not to adopt this more employee-protective reading.

Where, as in *Murphy*, multiple statutory readings are permissible, this Court will give great weight to public policy considerations – here, the policy favoring strong private enforcement of the meal/rest period laws. *See, e.g., Murphy*, 40 Cal. 4th at 1105 (where statute permits multiple interpretations, this Court will look to “the ostensible objectives to be achieved by the statute, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction and the statutory scheme of which the statute is a part.”). As such, to promote these private enforcement efforts, the Court should interpret the one-way fee-shifting provisions of Labor Code § 1194 to encompass the minimum meal/rest period premium wages required under Labor Code §§ 226.7, 512, and the IWC Wage Orders, and should reverse.

II. STATEMENT OF THE CASE

In August 2007, Plaintiffs, employees of a construction subcontractor, brought an action against multiple defendants in

Sacramento County Superior Court, articulating a host of wage/hour class claims, including (among others): overtime claims under Labor Code §§ 204.3, 510 and 1194 and Industrial Welfare Commission (IWC) Wage Order 16-2001; itemized wage statement claims, under Labor Code § 226; unfair competition under Business & Professions Code § 17200, *et seq.*; and claims relating to denied meal and rest periods under Labor Code §§ 226.7 and 512, and IWC Wage Order 16-2001. *Kirby*, 113 Cal. Rptr. 3d at 1364-1366. There is no evidence in the opinion below that their claims were frivolous.

Plaintiffs lost their class certification motion in January 2009, and Plaintiffs settled and dismissed their claims on an individual basis with some defendants shortly thereafter, in February 2009. *Id.* at 1366-1367. There is no indication in the record of how much time or the extent of litigation costs Plaintiffs' counsel expended uncompensated, on the ultimately failed effort to certify a class, but it can be inferred, based on CELA's experience, that, since the matter settled on an individual basis shortly after the major certification motion was denied, the result for Plaintiffs' counsel would not have compensated them for their extensive litigation efforts. This is the

considerable risk undertaken by plaintiffs' wage/hour class action attorneys in virtually every case.

Still, after Defendant Immoos (hereafter, Immoos) moved to recover attorneys' fees, under the premise that they were a prevailing party in a wage suit covered by Labor Code § 218.5, the trial court partially granted Immoos' motion, awarding \$49,846.05 in fees against Plaintiffs. *Id.* at 1367-1368. On July 27, 2010, the Third District Court of Appeal upheld the award requiring Plaintiffs to pay Immoos' fees for defending the meal and rest period claims. *Id.* at 1364.

Though it is well-established that "the Legislature did not regard the general provisions of section 218.5 as applicable to overtime claims" (*id.* at 1371, citing *Earley*, 79 Cal. App. 4th at 1428-1429; Lab. Code § 218.5, as amended), this Court has never explicitly addressed whether the meal/rest premiums required under Labor Code § 226.7, *inter alia*, are similar. That is, this Court has yet to decide whether meal/rest period claims are subject to two-way fee-shifting, or are, rather, "the legal minimum wage" required when employees miss meal/rest periods, and hence subject (like overtime premiums) to Labor Code § 1194. Moreover, this Court has never determined

whether an “action” for overtime or the legal minimum wage, in which two-way fee-shifting pursuant to Labor Code § 218.5 is precluded, refers to an entire civil action (as Plaintiffs/Appellants maintain), or merely the single cause of action for overtime or the minimum wage (as Defendant/Respondent argues).

On November 17, 2010, this Court granted review of the Third District Court of Appeal’s decision *Kirby*, and on May 11, 2011, this Court granted review of *McGann*, in which the Second District Court of Appeal examined the same question and came to the opposite conclusion – namely, that “construing the entire statutory scheme with a view toward protecting employees, as we must, we find that a claim for remedial compensation under Labor Code section 226.7 does not trigger the reciprocal fee recovery provisions of section 218.5.”

McGann, 122 Cal. Rptr. 3d at 672. CELA files this brief as *amicus curiae* urging the Court to adopt the Second District’s position in *McGann*, rather than the Third District’s *Kirby* position, which would squelch CELA members’ private enforcement of the meal/rest period statutes.

III. ARGUMENT

A. **Though this Court Supports Private Enforcement of the Labor Code and IWC Wage Orders, CELA's Members and Their Clients Will Be Unable or Unwilling to Prosecute Meal/Rest Class Actions if Two-Way Fee Shifting Applies to Meal/Rest Period Litigation.**

This Court has repeatedly reinforced that it supports private “attorneys’ general” enforcing the Labor Code, in light of the limitations of government efforts. *See supra, citing, e.g., Gentry*, 42 Cal. 4th at 455-456; *Bell*, 115 Cal. App. 4th at 746; *Arias*, 46 Cal. 4th at 980. What was true in 2004, when *Bell* was decided – that California’s DLSE lacked the budget to enforce the state’s wage/hour laws without extensive assistance from private enforcement efforts – can only be more true today, with near-constant discussion in the news and by California’s Governor of the deep cuts that state and local governments must endure in the current economic climate.

Simply put, private enforcement of the Labor Code depends on the results of a costs-benefit analysis conducted by would-be plaintiffs and their would-be attorneys (many of whom are CELA members) before filing each case, to wit – is this case worth the risk to those considering bringing it? This Court has discussed this kind of analysis extensively, in *Gentry*, 42 Cal. 4th at 458-462.

The *Gentry* court noted that, even where Labor Code § 1194 permits employees to recover reasonable attorney fees if they prevail, “employees and their attorneys must weigh the typically modest recovery, and the typically modest means of the employees bringing overtime lawsuits, with the risk of not prevailing and being saddled with the substantial costs of *paying their own attorneys.*” *Id.* at 458-459 (emph. added.). In *Gentry*, this Court concluded that class action bans in arbitration agreements are generally unconscionable, “[g]iven these risks and economic realities,” because “class actions play an important function in enforcing overtime laws by permitting employees who are subject to the same unlawful payment practices a relatively inexpensive way to resolve their disputes.” *Id.* at 459. Class actions are necessary to provide “small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.” *Id.* “[T]he requirement that numerous employees suffering from the same illegal practice each separately prove the employer’s wrongdoing is an inefficiency that may substantially drive up the costs... and diminish the prospect that the overtime laws will be enforced.” *Id.*

The Court should consider the same cost-benefit analysis here and find the Appellants' argument at least as compelling as that in *Gentry*. CELA members and their putative clients already have a significant risk of expending significant effort to litigate without compensation of any kind (in the event of unsuccessful litigation) or with only minimal compensation (in the event a class is not certified). CELA members who pursue meal/rest period litigation forego the opportunity to work on other types of cases with the time spent on these Labor Code and IWC Wage Order enforcement actions. CELA members and their would-be plaintiffs already have the risk of incurring significant unreimbursed costs and fees, *just on the employees' side*. The employees endure the further risk of retaliation, intimidation, and black-balling, discussed in *Gentry*. *Id.* at 459-461. What if, in addition to all of these hurdles, the putative plaintiff and his/her counsel had to endure the risk of bearing tens or hundreds of thousands or even over a million dollars in defense fees (*i.e.*, 2000 hours of attorney time at \$500/hour), in a hotly-litigated case? The answer is clear: private enforcement of the meal/rest period laws will cease.

As the *Gentry* court noted, overtime claims are not the sort of claims which tend to result in large awards per person – they are unlike the \$269,000 noted with respect to each average age discrimination plaintiff. *Id.* at 459. Meal and rest period claims – limited to an hour for each premium at the regular rate of pay (not multiple hours at 1.5 times the regular rate, like overtime claims – *see Skyline Homes Inc. v. Dept. of Indus. Relations*, 165 Cal. App. 3d 239 247-248 (1985) (disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 572-573 (1996)) tend to be *even smaller* than overtime claims. Moreover, employee advocates, like CELA members, may be placed in a conflicted position, seemingly having to pursue clients' claims less zealously because these small-firm or solo practitioners cannot afford the risk of escalating defense costs associated with bringing additional motions, no matter how meritorious. Employees' attorneys may be forced to push matters to a conclusion prematurely, seeking to avoid the more time-consuming (and therefore, defense fee-generating) parts of litigation.

In *Gentry*, 42 Cal. 4th at 462, this Court recognized that most individuals would not undertake the risk of litigation by themselves,

and so emphasized the importance of the class action. How much more would a putative plaintiff be cowed from stepping forward, then, with the added risk imposed by the *Kirby* court, of possibly being held accountable for more defense attorneys' fees than an average non-exempt worker could afford to pay in a lifetime of work? Recall that under *Earley*, 79 Cal. App. 4th at 1433, the representative plaintiff(s) alone bear the cost of prosecuting the litigation, unless their attorneys contract to absorb such costs. A worker earning \$10/hour who missed meal and rest periods every day over the course of a year (for example) based on an improper company policy might stand to gain at most \$5,200 in premiums under Labor Code §§ 226.7, 512, and an applicable IWC Wage Order² – but a defense attorney will easily charge this amount (10-20 hours of billable work) well before even answering the complaint.

For the foregoing reasons, given the public policy which supports private enforcement of the Labor Code and IWC Wage

² The Second District Court of Appeal recently explained, in *United Parcel Service, Inc., v. Superior Court* (2011) 125 Cal. Rptr. 3d 384, that an employee can recover up to two premiums per day – one for a missed meal period, and one for one or more missed rest periods. Taking 260 workdays in a year (2080 hours in a typical year, divided by 8), times two premiums, times \$10/hour, equals a \$5,200 maximum claim.

Orders regulating meal/rest periods, and the doubtful future of private enforcement if meal/rest period premium litigation carries a risk of two-way fee-shifting, this Court should adopt any plausible way of reading Labor Code § 1194's one-way fee-shifting to encompass the minimum meal/rest period wages.

B. Reading the Labor Code in the Reasonably-Supported Manner Most Protective of Employees Requires a Holding that Meal/Rest Period Claims Under §§ 226.7, 512, and the IWC Wage Orders Come Within the Scope of § 1194's One-Way Fee-Shifting Provision.

Where, as here, a strong public policy underlies Appellants' argument, the Court's precedents require liberally construing Labor Code § 1194 "with an eye to protecting employees." *Murphy*, 40 Cal. 4th at 1111. Yet, the Third District Court of Appeal in *Kirby* admitted not doing so, rejecting what it described as Plaintiffs' "plausible reading of the legislative history" of Labor Code § 1194 to include meal/rest claims (*Kirby*, 113 Cal. Rptr. 3d at 1372) in favor of its more restrictive reading. This was error.

As discussed, *supra*, reading section 1194 with an eye to protecting employees, this Court should understand the term "legal minimum wage" in that section to encompass the legal minimum wage that must be paid when meal/rest periods are missed – *i.e.*,

including the premiums under § 226.7 – just as it has long been understood that the term encompasses the legal minimum wage that must be paid on prevailing wage jobs. *See Road Sprinkler*, 102 Cal. App. 4th at 779. Reading section 218.5 with an eye to protecting employees, the phrase “any action for which attorney’s fees are recoverable under section 1194” in the statute should be read to reference any civil action in which overtime claims are brought, not the narrower reading – *i.e.*, that it relates only to overtime-specific causes of action.

The same reasoning in *Earley*, 79 Cal. App. 4th at 1428, which found no two-way fee-shifting by understanding overtime premium payments as a type of minimum wage requirement (*i.e.*, the minimum wage required when an employee works overtime is 1.5 times his/her regular rate), applies to meal/rest period premiums, and with equal force. As in *Earley*, here, “one-sided statutory and judicially mandated fee-shifting provisions serve a specific public policy which would be vitiated by the grant of reciprocity.” *Id.* at 1429 (citing *Brown v. West Covina Toyota* 26 Cal. App. 4th 555, 562) (1994). This Court’s chief authority on meal/rest period requirements, *Murphy*, turned on this Court’s lengthy discussion of the parallels

between meal and rest period premium pay and overtime premium pay. 40 Cal. 4th at 1109-1114. The California meal/rest period laws, like overtime laws, “serve the important public policy goal of protecting employees in a relatively weak bargaining position against the ‘evil of overwork.’” *Gentry*, 42 Cal. 4th at 456 (citing *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981) [commenting on overtime provision of the FLSA]). The California meal/rest period laws, like the FLSA’s requirements for overtime and minimum wages, are “designed to prevent consenting adults from transacting”³ about whether or not workers should take the breaks to which they are entitled, and as such, provide a form of legal minimum wage when workers do not receive breaks.

Likewise, the statutes use virtually identical language to describe employers’ overtime and meal period requirements. The Wage Orders governing meal periods state: “*No employer shall employ any person for a work period of more than five (5) hours*

³ *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir.1986). See also *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945) (statutory wages cannot be waived by agreement).

without a meal period of not less than 30 minutes” *E.g.*, 8 Cal. Code Regs., § 11050, subd. 11(A) (emph. added). The provisions are strikingly similar to the corresponding overtime Wage Order provision. The latter says: “[E]mployees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee’s regular rate of pay for all hours worked over 40 hours in the workweek.” *E.g.*, 8 Cal. Code Regs., § 11050, subd. 3(A)(1) (emph. added). The only difference is the use of the passive voice. The applicability of section 1194 should likewise be identical – permitting only one-way fee-shifting in cases brought to vindicate workers’ meal/rest period claims.

The *Kirby* court erred in failing to see the meal/rest premium statutes as requiring a minimum wage, saying, for example, “*Kirby*’s claim was not based on a failure to pay the statutory minimum wage for hours he actually worked. Instead, the cause of action was one for failure to provide rest periods.” *Kirby*, 113 Cal. Rptr. 3d at 380. However, this Court in *Murphy* saw the meal and rest period claims differently, holding: that, where an employee had to work through rest periods, he or she was essentially not receiving minimum wages for

time that was his, and the employer was being unjustly enriched by receiving an extra 20 minutes of “free” work (*Murphy*, 40 Cal. 4th at 1104); and, that “[a]n employee forced to forgo his or her meal period...loses a benefit to which the law entitles him or her” (*id.*) – *i.e.*, engendering a required minimum wage payment for having done so.

The *Kirby* decision remarks that “inclusion of a claim subject to section 1194 does not preclude attorney’s fees to be awarded to a prevailing defendant for *unrelated* claims subject to the bilateral fee-shifting provision of section 218.5.” (emph. added) *Kirby*, 113 Cal. Rptr. 3d at 379. However, the use of the term *unrelated* misunderstands the reality of meal/rest period premium claims like those brought daily by CELA’s attorneys – which are anything but *unrelated* to overtime claims. In addition to sharing the same public policy justifications, as discussed *supra*, missed meal/rest periods generally lead to overtime claims.

For example, if an employee worked through lunch, he/she is not only entitled to a meal/rest period premium, but entitled to overtime wages to the extent the extra time worked leads to more than eight hours worked in a day. Frequently, an employee’s meal/rest

period claim results from off-the-clock time during lunch (e.g., half-hour auto-deducted from each timecard, though the employee continued to work), resulting also in a claim of unaccounted-for overtime.

As such, it makes more sense to construe the Legislature's reference to "any action," in section 218.5, as a reference to "any civil action" rather than "any cause of action," because meal/rest and overtime claims generally tend to occur together – just as they did in *Kirby* – and should be subject to same fee-shifting scheme. Take the common event where a plaintiff makes a class claim, e.g., resulting from auto-deducted half-hour lunch periods, shortchanging eight-hour-a-day employees a half-hour of overtime per day, and the employee fails to certify a class and decides to dismiss her claims. Is the plaintiff: a) responsible for the employer's attorneys' fees, because he/she lost the meal period claim; or b) not responsible, because he/she lost the overtime claim? The defendant will only prevail on the class certification motion once, and based on one fact or set of facts – typically, failure to prove a common policy, or the predominance of individualized issues relating to the missed meal periods. However, the "cause of action" approach would leave the result of the loss

uncertain, whereas the more appropriate “civil action” approach would make it clear: the employee and his/her counsel have lost enough already, and cannot now be held liable also for the employer’s fees.

IV. CONCLUSION

CELA, as *amicus curiae*, asks the Court to reverse.


Dated: July 11, 2011

Respectfully submitted,

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CRC RULE 14(c)(1) Certification

I, Bryan J. Schwartz, certify that the foregoing Brief of the California Employment Lawyers Association as *Amicus Curiae* in Support of Appellants, was prepared using Word, is double-spaced, contains 1.5 inch margins to the right and left, and is in 14-point font. I further certify that the word count for the text and footnotes is 4,095 words, as reported by an appropriate word count command to the Word program.



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**CERTIFICATE OF SERVICE
(C.C.P. Section 1013A and 2015.5)**

I, Brian Kennedy, declare that I am a citizen of the United States, and a resident of California, over 18 years of age, and not a party to the within action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, California 94612.

Upon this day, I served the following document(s):

**APPLICATION FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF
IN SUPPORT OF APPELLANTS**

on the following party(s) by placing true copies thereof in sealed envelopes addressed as shown below for service by First Class Mail, and deposited each such envelope, with first-class postage thereon fully prepared, in a recognized place of deposit of the U.S. Mail in Oakland, California, for collection and mailing to the office of the addressee on the date shown herein.

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

Executed at Oakland, California, on July 11, 2011.



Brian Kennedy