SUPREME COURT OF CALIFORNIA
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Supreme Court of California
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CASE NO. S253677

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNEDY DONOHUE,

Plaintiff-Appellant and Petitioner,

v.

AMN SERVICES, LLC,

Defendant and Respondent.

After a Published Decision by the Court of Appeal,
Fourth Appellate District, Division One, Case No. D071865
San Diego Superior Court Case 37-2014-00012605-CU-OE-CTL
The Honorable Joel Pressman, Judge

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Plaintiff seeks review of two issues, neither of which is present in this case. The petition instead is built entirely on straw-man arguments. There is no basis for reviewing the court of appeal's proper application of settled law to the facts of this case. In addition, the trial court's undisturbed finding that plaintiff waived the theory that underlies her request for review is another independent reason to deny the petition.

Plaintiff's first stated issue is whether the rounding of recorded work time can excuse a failure to provide a meal period. But the court of appeal *never held* that rounding can excuse a failure to provide a meal period. In suggesting otherwise, Plaintiff improperly conflates two distinct questions that the court of appeal separately decided. One question is whether an employer may use a neutral time rounding policy to compensate employees for all time worked. In answering this question "yes," the court of appeal applied well-accepted principles of neutral time rounding to the context of this case. The other question is whether there was any evidence that the employer improperly denied meal periods under *Brinker* without paying the statutory penalty. In answering this question "no," the court of appeal relied on the undisputed facts, including admissions by the plaintiff, showing that no meal period violations occurred for which premiums were not paid. The core premise of plaintiff's request for review is therefore false: the court of appeal never made the holding that plaintiff wants this court to "review."

Second, she asks whether the court of appeal decision conflicts with other cases regarding use of a rebuttable presumption to establish liability. As shown below, no such conflict exists. Rather, *Donohue* is consistent both with the *Brinker* concurrence that advocated a rebuttable presumption in the context of class certification and with other court of appeal decisions in this area.

In light of all of this, and buttressed by the trial court's finding that the plaintiff had waived the theory underlying her request for review, the petition should be denied.

In *Donohue*, the trial court was obliged to determine whether AMN's time rounding policy was compliant with California law in connection with three matters on which summary adjudication was sought in competing motions: AMN's Issue No. 1 which related to proper payment for all time worked; AMN's Issue No. 2 which sought summary adjudication of the meal period claim based on (a) lack of evidence of any policy to deny meal periods and (b) failure to plead the meal period rounding claim in the complaint; and Donohue's Issue No. 1 concerning alleged improper alteration of meal period times via rounding. *Donohue v. AMN Services, LLC,* 29 Cal. App. 5th 1068, 1082 and n.16 (2018). None of those issues resulted in an outlier decision. And, as shown below, the court of appeals' ruling with respect to the use of the at-issue rebuttable presumption was remarkable only for its consistency with existing case law.

Because the Petition in *Donohue v. AMN Services, LLC* has no bearing on the reconciliation of conflicting legal outcomes or the resolution of an important question of law, review should be denied.

ARGUMENT

I. Plaintiff Improperly Conflates the Issue of Time Rounding – a Recognized, Lawful Employment Practice – with Meal Period Violations.

Plaintiff states that "[u]ntil now, there has been a bright-line rule regarding two meal period guarantees – (i) employers must provide employees with meal periods of 'not less than 30 minutes' . . . *and* (ii) meal periods must start 'no later than the end of an employee's fifth hour of work[.]'" Petition at 10, citing *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.

4th 1004, 1041 (2012) (emphasis in original). She then suggests that *Donohue* "held for the first time, and in a reported decision, that employers can use 'facially neutral' practices to round their employees' time up or down to the nearest ten-minute increment even if this frequently shortens the meal period to 'less than 30 minutes' or delays it 'later than the end of an employee's fifth hour of work.'" Petition at 10.

Donohue held no such thing. Rather, in reviewing the parties' competing cross-motions for summary adjudication, *Donohue* found that "there is no basis on which to deny application of AMN's California-compliant rounding policy to a recruiter's meal period." *Donohue*, 29 Cal. App. 5th at 1089. Indeed, as argued below, there is nothing at all to suggest that time rounding as authorized in *See's Candy Shops, Inc. v. Super. Ct.* contains an unstated exception for the time punches surrounding a meal period. 210 Cal. App. 4th 889 (2012) (hereinafter "*See's Candy I*"). In fact, such an exception would very quickly swallow the rule, making rounding all but impossible. *Cf. Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1077 (9th Cir. 2016) (finding that plaintiff's incorrect interpretation of the rounding rule, "if accepted, would undercut the purpose and would gut the effectiveness of a rounding policy"). In any event, the court of appeal noted that Plaintiff never raised the meal period rounding claim in the complaint, thus providing an independent basis for trial court's denial of the claim. *Donohue*, 29 Cal. App. 5th at 1086.

Separately, the court of appeal found that no meal violation occurred where the employer provided workers with the opportunity to take a compliant meal period at a time of their choosing, and employees made no report of a missed meal. *Donohue*, 29 Cal. App. 5th at 1091-92 ("AMN has a complete defense to Donohue's claim of meal period violations," citing the Company's undisputed evidence that it "had in place an effective

complaint procedure for an employee to inform the employer of any potential violation, but Donohue failed to inform AMN of any such violation.").

Per the trial court, "Don[o]hue, the class representative was unable to identify a single occasion when she was denied a compliant meal period. . . .

Q. Did any supervisor ever say you can't take a meal period today?

A. I don't remember.

Q. Did anybody ever tell you that you had to cut a meal period short so that it was less than thirty minutes?

A. No."

Trial Court Minute Order, 13 AA 3473 (citations omitted). Donohue's testimony is consistent with the sworn statements of 30 out of 39 Nurse Recruiters who reported that they 'always' or 'usually' take uninterrupted lunches of at least 30 minutes on workdays at AMN. ***None said that a supervisor had ever tried to prevent them from taking a meal period.*** 11 AA 2991.

Further, Plaintiff certified each week on her timesheet that:

> "I was provided the opportunity to take all meal breaks to which I was entitled*, or, if not, I have reported on this timesheet that I was not provided the opportunity to take all such meal breaks[.]"*

Donohue, 29 Cal App. 5th at 1091 (emphasis in decision). The lower court also found that "[t]he relevant AMN policies allow for meal and rest periods exactly as provided in Labor Code Section 226.7 and 512, and IWC Wage Order No. 4 . . . . Nor is there a uniform practice that is tantamount to a policy denying meal breaks." Trial Court Minute Order, 13 AA 3472.

The court of appeal thus found that there was no violation of California's meal period law, and that rounded punch times "do not establish (or imply) noncompliant meal periods for which Donohue did not

receive an appropriate penalty payment." *Donohue*, 29 Cal. App. 5th at 1091; *see also Brinker*, 53 Cal. 4th at 1040 (holding that employers must provide, not ensure meal periods).

Indeed, the evidence in *Donohue* established neutral time rounding of all punches. In fact, rounding of actual punches benefitted the employees, including the named Plaintiff who was overpaid $151.03 for actual time worked. *Donohue*, 29 Cal. App. 5th at 1084 n. 19. The evidence also proved the payment of myriad meal period premiums, either as a result of an automatic payment systems, or later as a result of employees reporting on weekly certifications that they had no opportunity for a compliant meal period. 8 AA 2168 at ¶¶ 25, 26.

Plaintiff's cherry-picked examples of time punches do nothing to advance her request for further judicial review. At every stage of this lawsuit, Plaintiff has repeatedly seized on specific time punch examples to try to establish a violation of the law. But as both the trial court and the court of appeal noted, Plaintiff totally side-stepped AMN's expert analysis with respect to both rounded punches and the payment of meal period penalties. "Donohue's expert only considered the recruiters' uncompensated time as a result of 'Short Lunches' and 'Delayed Lunches,'" and failed to "consider evidence that Plaintiffs may have *gained* (and, in fact, did gain) compensable work time by the rounding policy." *Donohue*, 29 Cal. App. 5th at 1085. Plaintiff thus failed to establish a triable issue of fact related to rounded meal periods. *Id.* *See also* Trial Court Minute Order, 13 AA 3472.

By contrast, AMN's expert analysis showed that over a five-year period, "rounding punch times to the nearest 10-minute increment resulted overall in 'a *net surplus* of 1,929 work hours in paid time for the Nurse Recruiter class as a whole.'" *Donohue*, 29 Cal. App. 5th at 1084. AMN's expert thus found the rounding to be "*neutral*" in the long run. *Id.*

Importantly, AMN's expert also confirmed that "[d]uring the pay periods corresponding to the Rounding Period, *AMN made a total of 2,104 Meal Period Payments* to the Nurse Recruiters." 8 AA 2168 at ¶ 25 (emphasis added). Such evidence belies any policy or practice to either deny meal periods or refuse to pay meal premiums.

Plaintiff's Petition also suggests that the *Donohue* decision somehow endorsed the notion that the gain of a few minutes time on some meal breaks as a result of rounding supplanted the need for a penalty where a meal period violation had occurred. *See* Petition at 24. The court of appeal asserted no such "new judicial remedy" as asserted by Plaintiff. *Id.* It simply stated that no penalty was owed absent a violation, and that in this case, no violation was ever proved. *Id. Donohue*, 29 Cal. App. 5th at 1087 (rejecting Plaintiff's argument that "any meal period of less than 30 actual minutes is a per se violation of law"); and 1092 (finding that AMN had "a complete defense to Donohue's claim of meal period violations").

In its amicus brief supporting Plaintiff's Petition, the Division of Labor Standards Enforcement thus misapprehends both the facts and the legal outcome of *Donohue*. Nowhere does that decision suggest that rounding of time worked eliminates the Labor Code requirement that an employer provide meal periods consistent with the strict requirements of California law. *Donohue* simply finds that (a) rounding is lawful when an employee is paid for all time worked and (b) on the evidence presented, including admissions by the plaintiff, no meal violations occurred for which premiums were not paid.

No one in *Donohue* ever suggested that meal time be averaged out across workdays to achieve compliance with California Labor Code. That is a phantom argument that makes no appearance in the trial court or appellate records. Rather, as demonstrated above, record evidence showed that across a five-year period, workers overall benefited from rounding with

respect to payment for time worked. Separately, the evidence showed that the company's policies were fully compliant with California law, and that meal premiums were regularly paid — including to Plaintiff — where appropriate. *Donohue*, 29 Cal. App. 5th at 1073 n. 4; AA 2168 at ¶¶ 25-26. AMN provided voluminous evidence to rebut any presumption of meal period violations, including compliant written policies, 40 class member declarations to which no evidentiary objections were raised, reams of data showing compliant meal periods being taken, more than 2,000 meal penalty payments being made, regular compliance certifications that the class members themselves provided in Team Time, and Plaintiff's own testimony. *See* 1 AA 235-64; 10 AA 2772; 5 AA 1288-7 AA 1899, Tabs 1-40 at ¶¶ 19-20; 8 AA 2162-71 at ¶¶ 17, 26, 28-29, 31; 8 AA 2066-67. *Donohue* therefore was decided entirely consistent with this court teachings in *Brinker*, as well as court of appeals' decisions in *See's Candy I* and other cases. *E.g.*, *Silva v. See's Candy Shops, Inc.*, 7 Cal. App. 5th 235, 252 (2016), *review denied* (Mar. 22, 2017) ("*See's Candy II*").

II. Plaintiff's Misplaced Reliance on the *Brinker* Concurrence Does Not Warrant Review.

Plaintiff suggests a conflict in the law where none exists. Plaintiff leans heavily on a concurring opinion in *Brinker* that discussed a "rebuttable presumption" of meal period violations where time records indicate meal breaks were missed, late, or short. Notably, the presumption is (a) *rebuttable* and (b) appears in a concurring opinion, joined by one other justice, rendered in the context of determining whether a class might be properly certified. *See Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1052-53 (2012) (Werdegar, J., concurring). But as recognized in *Donohue*, and stated by this Court's majority in *Brinker*:

> "[T]he certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious' . . . . '[T]he question is not whether the plaintiff

> or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [class certification] are met.'"

53 Cal. 4th at 1023 (citations omitted).

In *Donohue*, Plaintiff attempts to export the *Brinker* concurrence to reach a decision on the merits. Thus, she argues that the Fourth District, "[d]isplaying its own confusion," declined to apply the rebuttable presumption on summary judgment in *Donohue*, "yet it separately affirmed judgment for employees after a trial based on time records, in conjunction with other evidence," in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), 241 Cal. Rptr. 3d 647, 667-69 (Ct. App. 2018). Petition at 13-14.

There is no confusion on display. One case – *Donohue* – found that time records, without more, could not establish liability. The other, *Carrington*, found "substantial evidence supporting the trial court's conclusion that Starbucks did not provide Carrington meal breaks as required by law[.]" *Carrington*, 241 Cal. Rptr. 3d at 662 (citation omitted). In particular, Carrington testified that when the store was busy, she would be required to work beyond the end of her scheduled 5-hour shift without taking a meal period. *Id.* at 657. She further testified that she was not permitted to start her break until she received approval from her supervisor. "This testimony, *coupled with Carrington's time records* . . . is substantial evidence to support the trial court's conclusion that Starbucks did not provide Carrington with a meal break or the required premium . . . ." *Id.* at 664. (emphasis added). *Carrington* in no way supports a finding of liability based on meal punches alone. In fact, because the Plaintiff had established the existence of unlawful meal period practices, the *Carrington* court expressly "decline[d] to determine the nature or effect of any

rebuttable presumption that might be created by such time records. *Id.* at 667.

Donohue further argues that a schism exists in the law because this Court elected to de-publish three other decisions where the *Brinker* concurrence was found not applicable. Petition at 12-14. But setting aside the question of whether Plaintiff is permitted to cite de-published cases in this manner under Rule 8.1115 of the California Rules of Court, Plaintiff cannot dispute that two other *published* cases—as in *Donohue*—have likewise rejected arguments that time records showing potentially non-compliant meal periods could alone establish liability at the summary judgment stage. *See Serrano v. Aerotek, Inc.*, 21 Cal. App. 5th 773, 781 (2018) (court disagreed "that Aerotek should have investigated potential violations as revealed in the time records, noting that Aerotek did nothing to prevent Serrano from taking breaks and she never complained about not receiving them"); *see also See's Candy II*, 7 Cal. App. 5th at 259. Rather than muddying the waters, *Donohue* falls directly in line with these cases, as well as the majority opinion in *Brinker*.

In Plaintiff's world, any time record reflecting a missed, late or short meal period *ipso facto* establishes a meal period violation—even if the overwhelming weight of the evidence indicates that the non-complaint meal period was entirely the employee's own choice. But Plaintiff's interpretation is not the law. On the contrary, Plaintiff essentially demands that this Court reverse its previous guidance in *Brinker* and reject California courts' subsequent application of that decision. *See Brinker*, 53 Cal. 4th at 1040 (finding that an employer has an "obligation to provide a meal period to its employees;" however, "the employer is not obligated to police meal breaks and ensure no work thereafter is performed"). *See also, e.g.*, *Washington v. Joe's Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010) ("plaintiff's suggested solution of simply examining time records to

determine when meal breaks were not taken would be unavailing, as that would not answer the question *why* the employees did not take breaks") (emphasis added). As stated by the majority in Brinker, "[p]roof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay[.]" *Brinker,* 53 Cal. 4th at 1040. Whatever the time records say, where, as here, the employer puts forth uncontroverted evidence that workers were provided the opportunity to take meal periods, and received premium payments where such did not occur, no violation exists.

III. The Trial Court's Waiver Finding Makes This Case an Inappropriate Vehicle for Review in any Event.

The trial court granted summary adjudication of AMN's Issue No. 2 directed at Plaintiff's meal period claims:

> on two independent grounds: (1) There was no evidence of a uniform policy or practice to deny meal periods; and (2) Donohue did not plead in the complaint that the rounding practice resulted in meal period violations.

Donohue 29 Cal. App. 5th at 1086. *See also* 13 AA 3470-71 (Minute Order on summary judgment holding that "[t]he Court agrees with AMN that the pleadings frame the issues on a motion for summary adjudication and a party cannot successfully resist such a motion based on allegations that are not contained in the complaint") (citations omitted).

Plaintiff never raised her theory regarding meal violations based on rounding in any of the three iterations of her complaint. The trial court later ruled that Plaintiff could not rely on such a theory never stated in the lawsuit. 13 AA 3471. On appeal, Plaintiff's Appellant Brief failed to address this alternative basis for granting summary adjudication of her meal period claim, and she still ignores this critical finding. But waiver of this failure-to-plead issue provides an alternative ground for affirmance that the court of appeal did not reach. This defect alone makes this case an

inappropriate vehicle for review. Thus, even if this Court finds some issue here worthy of review, it would be more appropriate to wait for a case uncontaminated by waiver of a key issue below.

CONCLUSION

Donohue reiterates the utility of time rounding and falls directly in line with this Court's other pronouncements regarding payment for all time worked. *See, e.g., See's Candy I,* 210 Cal. App. 4th 889 . Separately, and consistent with *Brinker*, the case reiterated that meal period violations occur only where the employer fails to provide the opportunity to take a compliant meal period. Because expert analysis showed that rounding benefited the workers, and further because AMN provided both the opportunity to take meals, and a regular opportunity to report any infractions and to receive penalty payments, no meal period violation was proved. The unanimous opinion in *Donohue* need not be disturbed.

Dated: February 11, 2019

s/ *Mary Dollarhide*

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, counsel hereby certifies that the enclosed brief contains 3,282 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 11, 2019

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ANSWER TO PETITION FOR REVIEW

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/s/ Mary Dollarhide
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