Supreme Court of California
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Supreme Court of California
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No. S244751

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KURT STOETZL, *et al.*

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, *et al.*

Defendants and Respondents.

On Review From The Court of Appeal for the First Appellate District,
Division Four, No. A142832

After an Appeal From the Superior Court for the State of California,
County of San Francisco, Case No. CJC11004661, Hon. John E. Munter

Coordination Proceeding Special Title: CALIFORNIA CORRECTIONAL EMPLOYEES WAGE AND HOUR CASES

APPELLANTS KURT STOETZL, ET AL.'S ANSWER BRIEF TO STATE OF CALIFORNIA ET AL.'S PETITION FOR REVIEW

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I.

INTRODUCTION

The Plaintiff Class agrees with the State that the issue of whether the California minimum wage and the employer control standard applies to the unrepresented class is an important question of state law that warrants this Court's review. (Cal. Rules of Court, rule 8.500(b)(1).)

Conversely, the second issue which the State presents for review—whether the unrepresented class needed to "adduc[e] evidence at trial of an implied contract" (State's Petition For Review ("PFR") at p. 8)—does not warrant review. The claims of the Plaintiff Class were based on *express* policies of the employer, not *implied* ones. As such, they fell clearly within this Court's ruling in *Madera Police Officers Assn. v. City of Madera* (1984) 36 Ca1.3d 403.

II.

THE APPLICATION OF THE CALIFORNIA MINIMUM WAGE TO UNREPRESENTED STATE EMPLOYEES IS AN IMPORTANT QUESTION OF STATE LAW

The Plaintiff Class argued at length in its Petition for Review (at pages 6-9 and 14-24) that the question of whether the California minimum wage and the employer control standard applied to rank-and-file correctional officers presented an important question of state law. It follows that application of the same question to sergeants and lieutenants likewise presents an important question.

The court below, relying on *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690 and *Martinez v. Combs* (2010) 49 Ca1.4th 35, concluded that the Industrial Welfare Commission ("IWC") had delegated legislative authority to apply the California minimum wages and standards to "*all* employees in the state." (Slip Op. at p. 10, quoting *Martinez*, 49 Cal.4th at p. 57, emphasis in original.) It further concluded that California's general minimum wage order (Cal. Code Regs., tit. 8, § 11000, Order No. MW-2001) and Wage Order 4-2001 (Cal. Code Regs., tit. 8, § 11040) ("Wage Order 4") applied to both the represented and unrepresented class "unless superseded." (Slip Op. at p. 19.) The court ruled that successive MOUs had "superseded" any possible application of MW-2001 and Wage Order 4 to the represented class. (*Id*. at pp. 15-17, a ruling the Plaintiff Class urges the Court to review in its Petition For Review.) But the court rejected the State's argument that CalHR's Pay Scales Manual superseded the wage orders because the manual was not a legislative enactment and "uses language parallel to Wage Order 4." (*Id*. at pp. 19-20.)

Moreover, the lower court determined "it is possible to harmonize the California Pay Scale Manual and Wage Order 4, as we must seek to do under *Brinker*." (*Id*. at p., 20, citing *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Ca1.4th 1004, 1027.) It explained: "[w]e may reasonably construe the regulatory schemes to mean that entitlement to overtime compensation is controlled by the FLSA but that the meaning of "hours

worked" is governed by Wage Order 4. Such a construction does violence to neither regulatory scheme." (Slip Op. at p. 20.)

The Plaintiff Class agrees with the lower court's determination that the minimum wage applies to unrepresented employees—but the issue is still important and it should be reviewed in tandem with whether the minimum wage applies to the represented class. While there are far fewer unrepresented than represented employees (see http://www.lao.ca.gov/StateWorkforce/BargainingUnits [estimating that approximately 160,000 of the total of 200,000 state employees are subject to collective bargaining]), the number of affected state employees is still likely in the tens of thousands. The unrepresented class of sergeants and lieutenants in this case alone numbers in the thousands.

III.

THE UNREPRESENTED CLASS'S BREACH OF CONTRACT CLAIMS DO NOT WARRANT THIS COURT'S REVIEW

The State manufactures the second issue it presents. There is no "direct conflict" between the ruling in the court of appeal and *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171. The State clearly disagrees with the ruling (just as the Plaintiff Class disagrees with court of appeal's ruling on the represented employees' breach of contract claims), but that in and of itself does not justify review.

The unrepresented employees brought a claim for failure to pay overtime in breach of common law contractual obligations based on allegedly uncompensated time they spent at the correctional institutions under defendants' control. (Slip Op. at p. 2.) Plaintiffs relied primarily on the proposition, drawn directly from *Madera* that:

> 'To the extent services are rendered under statutes or ordinances then providing mandatory compensation for authorized overtime, the right to compensation vests upon performance of the overtime work, ripens into a contractual obligation of the employer and cannot thereafter be destroyed or withdrawn without impairing the employee's contractual right.' [Citation.] The [meal period] time of the sergeants, officers and dispatchers was work in excess of the eight-hour day, and the employees' right to overtime compensation, mandated by the city regulations, vested upon performance.

(*Madera,* 36 Ca1.3d at pp. 413-414, quoting *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 23.) They also relied on *White v. Davis* (2003) 30 Cal.4th 528, 570-571 ("employees who work during a budget impasse obtain a right, protected by the contract clause, to the ultimate payment of salary that has been earned").

In *Madera*, the city's written ordinances and regulations mandated overtime pay for work performed in excess of the normal eight-hour day and 40-hour week. (36 Cal.3d at pp. 409-413.) The Court held that the ordinances and regulations could be enforced on contractual grounds by

employees who had performed services for the city under them. (*Id*. at pp. 413-414.)

The contractual claims of the unrepresented employees mirrored those in *Madera*. The unrepresented employees established extensive evidence of written employer policies which entitle them to overtime wages for hours worked in excess of their regular schedules. (See 18 AA at pp. 5017-5021 [stipulations]; see also RT Vol. III, 545:12-549:16; RT Vol. IV, 586:9-587:6, 591:3-592:8 [trial testimony establishing same].)

The State implies that *Retired Employees*, *supra*, overruled or at least narrowed *Madera*. It argues that a public employer's duly enacted policy providing for overtime pay for certain time worked—the touchstone of the *Madera* line of case—no longer provides the basis for a contractual right to enforce uncompensated overtime claims. (State's Pet. at pp. 35-38.) But *Retired Employees* did not overrule or in any way undermine decades of Supreme Court precedent encapsulated in *Madera*. The holding in *Retired Employees* turns on particular standards applicable to vested retirement benefits, which differ from those controlling overtime pay.

Retired Employees arose from a request by the Ninth Circuit Court of Appeals that the California Supreme Court answer whether, under California law, an implied contract could confer upon employees vested rights to health benefits from a public agency. (52 Cal.4th at p. 1176.) The

Supreme Court concluded such implied vested rights "can be implied under certain circumstances from a county ordinance or resolution." (52 Cal.4th at p. 1194.) But it stressed that, due to the "significant" *future* obligations potentially created, a "clear showing" must be established that a public agency intended to create *vested pension benefits*. (*Id*. at pp. 1187-1198.) The Court's concern about establishing future rights arose because vested pension benefits may only be changed under limited circumstances. (*See, e.g., Betts v. Board of Admin*. (1978) 21 Cal.3d 859, 863.)

In contrast, a public agency's overtime policies may be freely changed. Employee rights under them "vest" only in the sense that an employee is entitled to the pay mandated by the overtime policy that existed at the time his or her service was performed. (*Madera*, 36 Cal.3d at pp. 413-414.) So long as the overtime policies were authorized—notwithstanding whether they arose under a policy, ordinance, statute or contract— this suffices to create enforceable contract rights. (*Id*.; *White*, 30 Cal.4th at pp. 570-571.)

The State asserts that the unrepresented employees are pursuing claims based on an *implied* contract. (State's PFR at pp. 34-35.) Plaintiffs disagree. The claims are based on written overtime policies. This mirrors *Madera*, in which the claims were based on written overtime policies. (36 Cal.3d at p. 413.) It is dissimilar to the claims in *Retired Employees*, which were based on the claim that the county's prior consistent *practice* of

combining active and retired employees into a single unified pool for purposes of calculating health insurance premiums (which typically reduced the cost of such premiums for retirees) created an implied contract to continue pooling through retirees' lifetimes. (52 Cal.4th at p. 1177.)

The unrepresented employees' breach of contract claims stand separate and apart from whether the California minimum wage applies. Whether the compensability of the alleged uncompensated time is determined by federal or by state law, the parties stipulated that compensability of the uncompensated time was to be determined as phase 2 of the proceedings, which has not yet occurred. (See 3 AA 579-582.)

IV.
CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioners' Petition for Review, the Court should grant review of the question of the whether the California minimum wage, the employer control standard and Labor Code sections 222 and 223 apply to state employees but should not grant review of the breach of contract issues.

DATED: October 30, 2017 MESSING ADAM & JASMINE LLP

By: */s/ Gregg McLean Adam*
Gary M. Messing
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Lead Class Counsel for Petitoners

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 2,208 words.

DATED: October 30, 2017 MESSING ADAM & JASMINE LLP

By: */s/ Gregg McLean Adam*
Gary M. Messing
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PROOF OF SERVICE

Kurt Stoetzl et al. v. State of California, et al.
California Supreme Court Case No. S244751

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery St., Suite 828, San Francisco, CA 94104.

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San Francisco, CA 94102-4515

1st District Court of Appeal
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Executed on October 30, 2017, at San Francisco, California.

Joan Gonsalves

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **STOETZL v. STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES**
Case Number: **S244751**
Lower Court Case Number: **A142832**

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10-30-2017

Date

/s/Gregg Adam

Signature

Adam, Gregg (203436)

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Law Firm