S244751

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

KURT STOETZL, ET AL.

Respondents-Plaintiffs-Appellants,

v.

STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES, ET AL.

Petitioners-Defendants-Respondents.

On Review From The Court Of Appeal For the First Appellate District, Division One, 1st Civil No. A142832

After An Appeal From the Superior Court For The State of California, County of San Francisco, Case Number CJC11004661, The Honorable John E. Munter

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REPLY TO ANSWER TO PETITION FOR REVIEW

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I.

THE PARTIES AGREE THIS COURT SHOULD REVIEW THE ISSUE OF THE STANDARD OF COMPENSABILITY APPLICABLE TO THE PLAINTIFF CLASS

Although the plaintiff class continues to mischaracterize the issue before this Court as involving application of the California minimum wage, the parties essentially are agreed that this Court should review the question whether the federal Fair Labor Standards Act (29 U.S.C. § 201, et seq. ["FLSA"]) or California state law establishes the applicable standard for determining compensable hours of work for the plaintiff class. It is the State Parties' position that for the Unrepresented Employees subclass, this question is answered by recognizing the legislatively delegated authority CalHR possesses to apply the FLSA to unrepresented state employees. Based on both the Court of Appeal's decision not to recognize this delegated authority possessed by CalHR, as well as the agreement of the plaintiff class that this question warrants review, this Court should grant State Parties' Petition for Review on the issue of the proper legal standard to be applied to the Unrepresented Employee subclass for determining compensable hours of work.

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II.

REVIEW OF THE COURT OF APPEAL'S DECISION FINDING THE UNREPRESENTED EMPLOYEE SUBCLASS CAN PURSUE A BREACH OF COMMON LAW CONTRACT THEORY ALSO SHOULD BE GRANTED

The terms and conditions of public employment are controlled by statute or ordinance rather than by contract. (*California Ass'n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 375.) "It is well settled that the terms and conditions of public employment including term of service, are fixed by the statute, rules or regulations creating it, not by contract (even if one is involved) as in private employment." (*Williams v. Department of Water and Power* (1982) 130 Cal.App.3d 677, 680, citing *Miller v. State of California* (1977) 18 Cal.3d 808, 813-814; *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 641; *Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, 134-135.) This Court has affirmed this principle. (See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 23-24.) The Court of Appeal's decision, as well as the position taken by the plaintiff class is contrary to this well-established principle and contrary to the decisions of this Court.

The plaintiff class' argument that it is entitled to pursue a breach of contract theory rests entirely on this Court's decision in *Madera Police Officers Assn v. City of Madera* (1984) 36 Cal.3d 403 ("*Madera*"). Yet, the plaintiff class grossly over-reads this Court's holding in that case.

In *Madera*, police officers filed an FLSA class action to recover overtime payment for hours worked in excess of eight hours in a workday or 40 hours in a workweek. Plaintiffs argued their time during lunch and dinner hours was so restricted that it had to be considered time worked and, therefore, compensable. (*Id.* at 406.) After concluding time spent by the plaintiffs during their meal breaks was, in fact, compensable, the Court turned to the question of whether they were entitled to overtime pay for that time. To resolve this issue, the Court analyzed "local compensation regulations" adopted by the City "to determine if overtime pay [was] authorized." (*Id.* at 412.) Resort to the City's compensation ordinances and regulations was necessary because "in the absence of preemptive legislation, employees of a city are entitled only to such compensation as the city charter, and the ordinances enacted pursuant thereto, provide." (*Ibid.*) Thus, the Court found 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.'" (*Id.* at 413; emphasis added, internal citations omitted.)

Far from holding that city policies established contract rights, this Court held in *Madera* that legislative enactments (city ordinances) adopted by the governing power, the City Council. gave rise to contractual

obligations. Read correctly then, this Court's holding in *Madera* is consistent with the holdings in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189 ("*Retired Employees*") and *Sonoma County Assn. of Retired Persons v. Sonoma County* (9th Cir. 2013) 708 F.3d 1109, 1114 ("*Sonoma County*"). Both *Retired Employees, supra,* 52 Cal.4th 1171, 1189 and *Sonoma County, supra,* 708 F.3d at 1114, hold that in order for an enactment by a public entity to create a contract right, "the legislation's text or the 'circumstances accompanying its passage' [must] clearly evince an intent to contract, *as opposed to an intent to make policy.*" (Emphasis added.) In *Retired Employees*, this Court stated that a public entity's intent to create a contract must be clear and must be the result of either legislative ratification of an already existing contract or a situation involving "an unambiguous element of exchange of consideration by a private party for consideration offered by the state." (*Retired Employees, supra,* 52 Cal.4th at 1187. As stated by the Court in *Retired Employees*, "[i]t also is equally well established that the intention of the Legislature thus to create contractual obligations, resulting in an extinguishment to a certain extent of governmental powers, must clearly and unambiguously appear." (*Id.* at 1186.)

Read together *Madera, Retired Employees,* and *Sonoma County*, hold that contract rights must be founded upon legislative enactments of the governing authority, be it the State Legislature, a City Council, or a County

Board of Supervisors and those legislative enactments must evince a clear intent by the governing authority to create contract rights as opposed to policy. What *none* of those cases hold is that policies adopted by an administrative agency such as CalHR create the type of contract rights the plaintiff class attempts to assert here. In fact, interpreting these cases to hold otherwise, as the Court of Appeal did in its decision, is contrary to the holdings in *Madera, Retired Employees,* and *Sonoma County* because it recognizes contract rights based on policies in the absence of any express legislative intent to create a contract. The danger in the plaintiff class' position, as well as the Court of Appeal's decision, is it runs the risk of morphing every policy into a contract, which would create an untenable situation for public employers. Accordingly, review by this Court is necessary to address this important question of law and to ensure uniformity of decision.

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III.

CONCLUSION

For the reasons stated above, as well as those set forth in State Parties' Petition for Review, State Parties respectfully request that this Court grant review of that portion of the Court of Appeal's decision in favor of the Unrepresented Employee subclass.

DATED: November 9, 2017

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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 1,100 words.

DATED: November 9, 2017

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California Correctional Employees Wage and Hour Cases
Appellate Case No. A142832

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/s/ May Marlowe
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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S244751**
Lower Court Case Number: **A142832**

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11-09-2017

Date

/s/David Tyra

Signature

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