

FEB 13 2019

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Case No. S248702

IN THE SUPREME COURT OF THE Deputy
STATE OF CALIFORNIA

CHARLES E. WARD, ET AL., *Plaintiffs and Appellants,*

v.

UNITED AIRLINES, INC, *Defendant and Respondent*

AFTER DECISION BY THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, CASE NO. 16-16415
THE HONORABLE JUDGE WILLIAM ALSUP,
CASE NO. 3:15-CV-02309-WHA

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
AND [PROPOSED] BRIEF OF *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS AND APPELLANTS, CHARLES E. WARD, *ET AL.***

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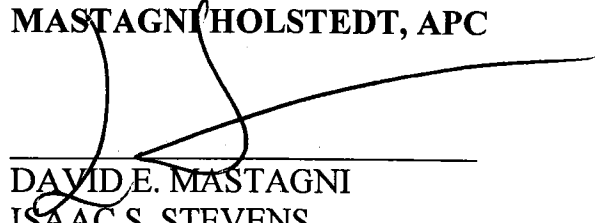
DAN GOLDTHORPE, JAMES DONOVAN, CHRIS BENNETT, JAMES
ISHERWOOD and DAVID VINCENT

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court 8.208

Pursuant to California Rule of Court 8.488, Amici Curiae, DAN GOLDTHORPE, JAMES DONOVAN, CHRIS BENNETT, JAMES ISHERWOOD and DAVID VINCENT, by and through the undersigned counsel, certify that there are no interested entities or persons that must be listed in this Certificate under Rule 8.488.

Dated: February 1, 2019

MASTAGNI/HOLSTEDT, APC



DAVID E. MASTAGNI
ISAAC S. STEVENS
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**APPLICATION TO FILE AMICI CURIAE BRIEF
IN SUPPORT OF PLAINTIFFS AND APPELLANTS CHARLES E.
WARD, ET AL.**

TO THE HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-
SAKAUYE AND ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE STATE OF CALIFORNIA:

Pursuant to Cal. Rules of Court, Rule 8.520(f), the Amici Curiae respectfully ask for leave to file the attached brief of Amici Curiae in support of Appellants Charles E. Ward, *et al.* This application is timely made.

THE AMICI CURIAE

This application is submitted on behalf of Amici Curiae Dan Goldthorpe, James Donovan, Chris Bennett, James Isherwood, and David Vincent (collectively referred to as the “Amici.”) The Amici are, or were, employed as pilots by Cathay Pacific Airways Limited and USA Basing Limited. They are also plaintiffs in a wage and hour lawsuit currently pending in the Northern District of California, *Goldthorpe v. Cathay Pacific Airways Limited and USA Basing Limited* (N.D. Cal. Case No. 3:17-cv-03233) (hereafter referred to as “*Goldthorpe.*”)

INTEREST OF AMICI CURIAE

The Amici have a significant interest in the resolution of this issue, both as persons engaged in work that takes them in and out of California, and as plaintiffs in *Goldthorpe.*

The Amici are current and former employees of Cathay Pacific Airways Limited (“Cathay”) and USA Basing Limited (“USA Basing”). The Amici worked as pilots for Cathay and USA Basing. The companies scheduled the Amici to fly transpacific flights to and from Hong Kong out of their respective home bases in Los Angeles and San Francisco. They require pilots to perform pre-flight and post-flight duties without compensation. Additionally, the companies require pilots to spend time in “reserve” status, where they are subject to being called in to replace sick or otherwise unavailable pilots. While serving in reserve status, pilots are considered to be on duty. They cannot drink alcohol, and must immediately respond to phone calls from their employer. They are not compensated for their time in reserve status.

As plaintiffs in the *Goldthorpe* case, the Amici allege defendants Cathay and USA Basing violated the Labor Code. One of the issues in the case is whether the Labor Code’s overtime provisions apply where employees spend time working in and out of California in the same workweek. The court in *Goldthorpe* stayed that case pending this Court’s rulings in the instant case and *Oman v. Delta Airlines, Inc.* (Cal. Sup. Ct. Case No. S248726.))

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NEED FOR FURTHER BRIEFING

The Amici are familiar with the issues before the Court and the scope of their presentation. They believe further briefing is necessary to address matters not fully considered by the parties' briefs, to ensure the issues affecting the Amici are fully heard and considered by this Court.

Unlike some employees in the airline industry, the Amici's work in the United States occurred solely in California. If the Court determines the Labor Code does not apply extraterritorially, the Amici would not be protected by any state's wage and hour laws. Thus, the Amici have a particularly significant interest in ensuring the Labor Code applies to their overtime work.

CONCLUSION

For the foregoing reasons, the Amici respectfully ask the Court to accept the accompanying brief for filing in this case.¹

Respectfully submitted,

Dated: February 1, 2019

MASTAGNI HOLSTEDT, APC


DAVID E. MASTAGNI

ISAAC S. STEVENS

Attorneys for the Amici Curiae

¹ Pursuant to California Rule of Court 8.520(f)(4), no party to this case authored the accompanying amicus brief in whole or in part, and no party other than the amici made a monetary contribution intended to fund the preparation or submission of the brief.

**AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND
APPELLANTS CHARLES E. WARD, ET AL.**

**I
INTRODUCTION**

The Court should find that California Labor Code section 226 applies to wage statements provided to California residents regardless of where those residents worked to earn the wages reflected in those statements.

California has a strong interest in ensuring its residents receive accurate and understandable information about the wages they earn. Labor Code section 226 furthers this interest by governing what information an employer must put on a wage statement when it gives it to a California resident, including the employee's hours worked, applicable hourly rates, and other information. The fact that the employee may spend some of his or her time working outside California does not justify depriving them of the protections of Labor Code section 226.

The Amici also respectfully ask the Court to affirm that Labor Code section 226 applies to wage statements provided to workers who receive pay in California, but do not work exclusively within the state. Additionally, the Amici ask the Court to reject the district court's assertion that California's labor laws, as a whole, do not apply to employees who work outside California. This assertion lacks merit, and ignores this Court's prior case law interpreting the reach of California's protections for workers.

II ARGUMENT

The Court should rule that Labor Code section 226 applies to wage statements employers provide California residents who were paid in California. Under the circumstances presented to the Court, there is no need to determine whether section 226 applies to conduct outside of California, because the conduct at issue (producing wage statements) occurred within the state. If, however, the Court addresses the issue of whether the Labor Code can apply to workers performing work principally outside California, the Amici ask the Court to affirm that the situs of the work is not the sole factor used to decide the issue.

A. SECTION 226 FURTHERS THE STATE'S INTEREST IN ENSURING FULL AND PROMPT PAYMENT OF EMPLOYEES' WAGES

The main purpose of Labor Code section 226 is to allow employees to make sure they are being paid what they are owed. (*See Morgan v. United Retail, Inc.* (2010) 186 Cal.App.4th 1136, 1149.) Labor Code section 226 plays an important role in vindicating the public policy favoring full and prompt payment of an employee's earned wages. (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 390.)

As the Plaintiffs noted in their opening brief, Labor Code section 226's wage statement requirements do not depend on whether California's wage and hour laws apply extraterritorially. It merely states what information

must be included in wage statements distributed in California. For example, Labor Code section 226(a) requires a wage statement to show the applicable hourly rates in effect during the pay period, and the corresponding number of hours the employee worked at each hourly rate. This provision does not state what the hourly rate must be, or state that the employer must pay one and a half times the employee's regular rate for overtime. It merely requires the employer to show what hourly rate the employer actually paid for the employee's work. This serves the law's purpose to allow employees to see whether he or she is being paid fully – regardless of what state's substantive wage and hour laws apply.

B. LABOR CODE SECTION 226 APPLIES TO A WAGE STATEMENT PRODUCED IN CALIFORNIA, EVEN IF REFLECTS PAY FOR OUT OF STATE WORK

As the Plaintiffs note in their opening brief, the fact that pilots and flight attendants work in other states does not mean Labor Code section 226 is being applied extraterritorially. (Plaintiffs' Opening Brief, p. 25 (filed September 10, 2018.)) The relevant question for whether a law is being applied extraterritorially is where the conduct that gives rise to liability occurs in California. (*See Diamond. Multimedia Sys. Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1059.)

The work employees performed is not the conduct giving rise to liability under Labor Code section 226. Rather, the relevant conduct is the employer's production of wage statements. Thus, the Court does not need to

determine whether Labor Code section 226 should be applied extraterritorially. The conduct giving rise to liability in this case occurred in California. Labor Code section 226 applies.

C. THE SITUS TEST IS NOT DISPOSITIVE WHEN DETERMINING THE APPLICABILITY OF CALIFORNIA'S LABOR LAWS

The Court should expressly reject the blanket assertion by the district court that "California's labor laws" do not apply to employees primarily working outside California. (*See Ward v. United Airlines, Inc.* (2016) 2016 WL 3906077, *5.) In the summary judgment ruling underlying the appeal that gave rise to this proceeding, the district court implied that California's labor laws applied only to employees who worked principally in California. This position lacks merit. The fact that the Plaintiffs in *Ward* performed much of their work outside California does not, on its own, exempt them from all of California's labor laws.

To be sure, the issue of where the conduct giving rise to liability occurred may be relevant in determining whether the Labor Code applies. (*See Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1059.) When work principally occurs in California, the state's labor laws apply. But the inverse is not necessarily true.

The location of the work, on its own, is not dispositive. As Judge Chhabria astutely noted in *Goldthorpe*, "it is wrong to assume, as a categorical matter, that California's wage and hour laws may only protect

employees who do the large majority of their work in California.”
(*Goldthorpe v. Cathay Pacific Airways Ltd.* (2018) 279 F.Supp.3d 1001.)
Indeed, the fact that an employee did not spend most of his time working in California becomes less important where out-of-state travel is an inherent part of the employee’s job duties. (*Bernstein v. Virgin America, Inc.* (2017) 227 F.Supp.3d 1049, 1060.) The same may be true where the employee would not be protected by any state’s overtime laws absent extraterritorial application. (*See Bostain v. Food Express, Inc.* (2007) 159 Wash.2d 700, 710-11.)

The inquiry does not end when a court determines an employee’s work occurred primarily outside of California. While there is a presumption that statutes do not apply extraterritorially, this presumption is not irrefutable. The language of the law, its subject-matter, purpose, or history can show the legislature intended for it to apply to work performed outside California’s boundaries. (*See N. Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal.1, 4.) As the Ninth Circuit recognized when certifying questions to the Court in this case, the reach of the different Labor Code provisions can differ because the provisions regulate different conduct and implicate different state interests.

This Court has repeatedly declined invitations to create a bright line rule limiting California’s wage and hour rules to work performed in the state. (*See, e.g., Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1208.) For

example, in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, this Court declined to state whether the Industrial Welfare Commission's Wage Orders applied only to employment in California. (*Id.* at 14 Cal.4th at 578.) Other courts have followed suit. For example, in *Wright v. Adventures Rolling Cross Country, Inc.* (N.D. Cal. 2013) 2013 WL 1758815, the court found that the Labor Code's overtime requirements applied to every workweek where an employee performed *any* work in California, even if the rest of the work was performed outside of the state. (*Id.* at 10.)

When an employer chooses to locate its base of operations in California, it subjects itself to many of California's labor laws – even for employees who may spend large amounts of time working for the employer out of state. For example, an employer who hires an employee in California is required to act in accordance with California's workers' compensation laws if the employee is injured out of state. (Labor Code § 3600.5.) Likewise, the employer must ensure its supervisory employees complete sexual harassment training, as mandated by Government Code section 12950.1(a) – even if those supervisory employees frequently work out of state. Indeed, Cathay required the Amici to complete this training – evidencing an understanding that California's labor laws apply even when employees spend time each work week traveling out of the state.

The Amici respectfully ask the Court to affirm its longstanding position that California's wage and hour laws may apply to work performed outside the borders of the state. Such an affirmation is needed to correct the district court's assertion that California's labor laws cannot apply when an employee works principally outside of the state.

III CONCLUSION

For the foregoing reasons, the Amici respectfully ask this Court to declare that Labor Code section 226 applies to wage statements an employer distributes to its employees in California, regardless of where they performed the work reflected on those statements. Additionally, the Amici ask the Court to affirm that the fact that an employee works principally outside California does not necessarily preclude the employee from asserting the protections of California's labor laws.

Respectfully submitted,

Dated: February 1, 2019


MASTAGNI HOLSTEDT, APC

DAVID E. MASTAGNI
ISAAC S. STEVENS
Attorneys for the Amici Curiae

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief consists of 3,037 words, as counted by the computer program used to generate the document.

Dated: February 1, 2019


MASTAGNI HOLSTEDT, APC

DAVIDE MASTAGNI
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PROOF OF SERVICE

SHORT TITLE OF CASE: *Ward, et al. v. United Airlines*
SUPREME COURT CASE NO.: S248702

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is 1912 I Street, Sacramento, California 95811-3151. On the date below, I served the following document(s):

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANTS, CHARLES E. WARD, ET AL.

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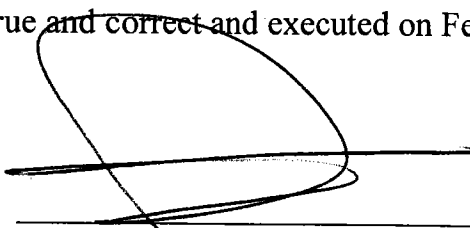
X BY ELECTRONIC SERVICE: I certify that all participants in the case are registered TRUEFILING users and that service will be provided this date by TRUEFILING to parties' attorneys of record;

And,

Molly Dwyer, Clerk of the Court UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT The James R. Browning Courthouse 95 7th Street San Francisco, CA 94103 <i>Appellate Court</i>	Magistrate Judge William Alsup UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA San Francisco Courthouse Courtroom 12 – 19th Floor 450 Golden Gate Avenue San Francisco, CA 94102 <i>Trial Court</i>
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X BY U.S. MAIL. By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing today, following ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the United States Mail, with postage thereon fully prepaid at Sacramento, California in the ordinary course of business.

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct and executed on February 1, 2019, at Sacramento, California.



PATRICK R. BARBIERI