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No. 90932-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

ANA LOPEZ DEMETRIO and FRANCISCO EUGENIO PAZ,
individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

SAKUMA BROTHERS FARMS, INC.,

Respondent/Defendant.

***AMICUS CURIAE* BRIEF OF UNITED FARM WORKERS OF
AMERICA IN SUPPORT OF PETITIONERS/PLAINTIFFS LOPEZ
AND EUGENIO**

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Interest Of Amicus Curiae United Farm Workers Of America

Amicus Curiae United Farm Workers of America (“UFW”) represents thousands of migrant and seasonal farm workers in various agricultural occupations throughout the country, including Washington state. UFW seeks to improve the lives, wages, and working conditions of farm workers and their families through collective bargaining, cooperation with employers, worker education, state and federal legislation, impact litigation, and through public campaigns.

Introduction And Summary Of Argument

Many federal laws specifically exclude agricultural workers from their protections, and many states fail to afford farm workers the same rights and protections afforded to other workers. For example, the federal Fair Labor Standards Act (“FLSA”) exempts agricultural workers from its overtime provisions (29 U.S.C. § 213(b)(12)), and the National Labor Relations Act (“NLRA”) excludes agricultural employees from the right to join or form a labor union. 29 U.S.C. § 152(3). Less than half of directly hired farm workers and only about one quarter of farm workers hired through farm labor contractors have access to unemployment insurance. See “Inventory of Farmworker Issues and Protections In The United States,” *Bon Appétit Management Company Foundation, United Farm*

Workers, Oxfam America (March 2011), at p. iv.¹ Less than one half of U.S. farm workers are covered by workers' compensation insurance through their employers, and occupational safety standards are frequently not applicable to farms and farm workers. *Id.* at p. v. As a result, it is generally left to the individual states to determine what protections agricultural workers will enjoy.

Most farm workers in Washington (and other states) continue to be recent immigrants from Mexico, often from indigenous groups, with little formal education, and with limited to no knowledge of English. Because of limited education, language barriers, historical exclusion, and remote living locations, these workers often lack access to legal representation for enforcement of what few rights they have. Moreover, as found by the district court, workers paid by piece rate "are often more vulnerable to [the] grueling demands" of farm work. Dkt. 42 at 4 ("Certification Order").

While estimates of farm workers employed in Washington vary, the 2012 Agricultural Census by the U.S. Department of Agriculture found that Washington state employed 256,036 farm workers for that year.² Therefore, this Court's decision on whether piece rate workers are entitled to paid rest breaks will have a tremendous impact on Washington farm workers.

¹ Available at: <<http://www.bamco.com/timeline/farmworker-inventory/>>

² 2012 Census of Agriculture - State Data USDA, National Agricultural Statistics Service, p. U.S. 307, available at: <http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_007_007.pdf>

The issues before this Court are: (1) whether Washington agricultural employers have an obligation under WAC 296-131-020(2) and/or the Washington Minimum Wage Act to separately pay piece rate workers for the rest breaks to which they are entitled; and (2) if the answer is "yes," how must Washington employers calculate the rate of pay for the rest break time? Dkt. 44. UFW urges this Court to find that agricultural employers must pay piece rate workers for the rest breaks to which they are entitled and that they must calculate the rate of pay for the rest periods based on the average hourly worker earnings.

As will be discussed herein, Washington law requires agricultural employers to separately pay for piece rate rest periods because the language of WAC 296-131-020 is clear on its face and requires such payment. Concluding that agricultural employers must pay piece rate workers with separate paid rest periods will ensure that Washington continues to be a "pioneer" in the protection of employee rights.

Argument

I. Washington Law Requires Agricultural Employers To Separately Account For And Pay Agricultural Workers For Rest Periods When They Are Employed On A Piece Rate Basis

Sakuma Brothers Farms, Inc.'s ("Sakuma" or "Respondent") Responsive Brief³ asks this Court to look beyond the plain language of the rest break regulation (RB at 5-16) to find that separate payment for piece rate rest periods is not required. However, the agricultural rest break regulation is clear on its face and does not require interpretation. Because rest breaks for agricultural workers are required "on the employer's time," and because Washington courts have already determined that "on the employer's time" means the employer has to pay for such breaks, separate payment for piece rate rest periods is required.

A. Washington Administrative Code 296-131-020 Is Clear On Its Face And Requires Payment For All Rest Periods

The agricultural rest break regulation, Washington Administrative Code 296-131-020, provides that: "Every employee shall be allowed a rest period of at least ten minutes, *on the employer's time*, in each four-hour period of employment." Washington Administrative Code 296-131-020(2) ("WAC") (emphasis added). Sakuma does not dispute the validity of the regulation in its brief, which in any case has the force and effect of law. *See, e.g., Manor v. Nestle Food Co.*, 131 Wash. 2d 439, 445, 932 P.2d 628 (1997). The operative words of the WAC regulation are that employees

³ Sakuma's Responsive Brief will hereafter be referred to as "RB."

"shall be allowed" a rest period "on the employer's time." Neither set of words is ambiguous or requires resort to extrinsic aids for interpretation.

When used in statutes or regulations, the word "shall" is unambiguous and "creates an imperative obligation." *See, e.g., Clark v. Washington Horse Racing Comm'n.*, 106 Wash.2d 84, 91, 720 P.2d 831 (1986); *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wash. 2d 439, 446, 842 P.2d 956 (1993) (When used in a statute, "shall" generally imposes a mandatory duty.); *Pellino v. Brinks, Inc.*, 164 Wash. App. 668, 688, 267 P.3d 383 (2011) (analogous WAC 296-126-092 language that employees "shall be allowed" a rest break "on the employer's time" "impose[s] a mandatory obligation on the employer"). Therefore, under the rest break regulation, employers have a *mandatory obligation* to allow piece rate employee rest periods.

While Sakuma argues that the meaning of "on the employer's time" is ambiguous or supports not separately paying for piece rate rest periods, this argument is unpersuasive in light of the fact that Washington courts have previously determined that "on the employer's time" means that *rest periods must be paid by employers*.

In *Pellino v. Brinks, Inc.*, the employer challenged its obligations under the rest period regulation that is applicable to non-agricultural workers, WAC 296-126-092. The *non-agricultural* rest period regulation employs analogous language to the agricultural rest period regulation, and states in part: "(4) Employees *shall be allowed a rest period* of not less than ten minutes, *on the employer's time*, for each four hours of working

time." WAC 296-126-092(4) (emphasis added). There is minimal difference between this language and the language of the agricultural rest period regulation. See WAC 296-131-020.

In rejecting the employer's claims, the Court of Appeals held that non-agricultural regulation "impose[s] a mandatory obligation on the employer" that employees "shall be allowed" a rest break "on the employer's time." *Pellino, Id.* at 688. In construing the meaning of "on the employer's time," the court concluded that this language "is considered to mean that the employer is responsible for *paying the employee for the time spent on a rest period.*" *Pellino, Id.* at 689(emphasis added). Indeed, the court ruled that under Washington law, an employer "must provide breaks that comply with the requirement of 'relief from work or exertion,'" and construed this to mean that "*paid breaks* must provide relief from work or exertion." *Pellino, Id.* at 691-692 (emphasis added), *citing White v. Salvation Army*, 118 Wash. App. 272, 75 P.3d 990 (2003).

Concluding that piece rate workers must be separately paid for rest periods is consistent with other decisions from the Washington courts. *See, e.g., White v. Salvation Army, supra*, 118 Wash. App. at 283 ("meal and rest periods are treated substantially the same [under the law]... *employers are required to pay workers for both of these periods.*") (emphasis added); *Wash. State Nurses Ass'n. v. Sacred Heart Medical Ctr.*, 175 Wash. 2d 822, 831, 287 P.3d 516 (2012) (holding that "employees may not waive their right to a rest period" and that "*compensable time of rest periods* may not be offset against other working time.") (emphasis added).

Because the WAC language is clear, there is no need to resort external aids to construe its meaning. "Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is unambiguous." *Berger v. Sonneland*, 144 Wash. 2d 91, 105, 26 P.3d 257 (2001).

While Sakuma argues that the meaning of the regulation is ambiguous and requires the Court to resort to extrinsic sources like "DLI interpretation and guidance" (RB at 10-16), the regulatory language is clear and a finding of ambiguity is not supported by Sakuma's tortured reading of the language. By law, a statute is only ambiguous "if it can *reasonably* be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. The courts are not 'obliged to discern an ambiguity by imagining a variety of alternative interpretations.'" *Berger v. Sonneland, Id.* at 105 (emphasis added); *Armstrong v. Safeco Ins. Co.*, 111 Wash.2d 784, 791, 765 P.2d 276 (1988) (ambiguity is not found "solely upon each party's ability to argue a distinct interpretation of the statute"); *State v. Taplin*, 55 Wash.App. 668, 670, 779 P.2d 1151 (1989) ("The parties' ability to argue two interpretations of a statute does not necessarily render the statute ambiguous.").

Because the WAC language is clear, this Court should find that the WAC language "means exactly what it says:" that agricultural employees "shall be allowed" to take rest periods while working on a piece rate basis

and that these rest periods have to be paid by the employer because they are required to take place "on the employer's time."

B. Even If The Court Deems The WAC Language Ambiguous, Washington's Long History Of Protecting Employee Rights, Existing Authority, And Other Factors Compel A Finding That Rest Periods Must Be Separately Paid To Piece Rate Workers

While UFW maintains that the language contained in WAC 296-131-020 is clear, even if the Court deems the WAC language ambiguous, numerous factors compel requiring that Washington employers pay for piece rate rest periods.

1. Washington's long history of protecting employee rights requires the broadest interpretation of laws to ensure agricultural workers receive and are compensated for piece rate rest periods

Washington has "a long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash. 2d 291, 300, 996 P.2d 582 (2000). Indeed, Washington's laws contain "emphatic language" regarding protecting employee welfare: "The welfare of the state of Washington demands that *all employees* be protected from conditions of labor which have a pernicious effect on their health." RCW 49.12.010 (emphasis added); *see also, Wingert v. Yellow*

Freight Systems, supra, 146 Wash. 2d at 852. The state of Washington also makes it unlawful “to employ any person in any industry or occupation within the state of Washington under conditions of labor detrimental to their health; and it shall be unlawful to employ workers in any industry within the state of Washington at wages which are not adequate for their maintenance.” RCW 49.12.020 (emphasis added); *Wingert, supra*, 146 Wash. 2d at 852.

As recognized by this Court, Washington’s statutory language, which covers “all employees” and “any industry or occupation within the state,” “evidences a strong legislative intent that employees be afforded healthy working conditions and adequate wages.” *Wingert, supra*, 146 Wash. 2d at 852. The importance of protecting all employees in Washington is so paramount that “Washington’s manifest policy of protecting the health and welfare of [] employees by requiring periodic rest periods *may not be abrogated...*”. *Id.*, (emphasis added), quoting *Wingert, supra*, 104 Wash. App. at 596.

Given Washington’s long history of protecting employee rights, any ambiguity in the rest period regulation should be resolved in favor of protecting employee rights. See *Int’l Assoc. of Fire Fighters, Local 46 v. City of Everett*, 146 Wash. 2d 29, 35, 42 P.3d 1265 (2002) (“remedial statutes ‘should be liberally construed to advance the Legislature’s intent to protect employee wages and assure payment.’”). A liberal construction of the regulation “requires that the coverage of the [regulation’s] provisions ‘be liberally construed [in favor of the employee] and that its

exceptions be narrowly confined.” *Pellino v. Brinks, Inc., supra*, 164 Wash. App. at 685.

2. Ensuring that farm workers receive paid piece work rest periods is the best way to protect farmworker health and safety

As discussed, Washington’s concern for the welfare of employees who work in the state is clearly expressed in its statutes. RCW 49.12.010 (demanding that “all employees be protected from conditions of labor which have a pernicious effect on their health.”) In *White v. Salvation Army*, this Court held that employers are required to pay employees for rest periods and that the “underlying purpose” for rest periods is “to provide relief to employees from ‘work or exertion.’” *White v. Salvation Army, supra*, 118 Wash. App. at 283; *Pellino, supra*, 164 Wash. App. at 691-92; *see also, Wingert, supra*, 146 Wash. 2d at 847 (holding that chapter 296-126 of WAC “contain labor standards for the protection of employees’ safety, health, and welfare”). Any attempt to curtail employee rights to rest periods has been frowned upon by the courts because “rest periods are mandatory and promote employee efficiency,” while ensuring employee health and welfare. *Sacred Heart, supra*, 175 Wash. 2d at 832; *Pellino, supra*, 164 Wash App. at 691-92.

The importance of separately paid rest periods for agricultural workers is all the more important because of the grueling conditions under which they work (Dkt. 44 at 4), the low pay they suffer, and their

historical lack of bargaining power with employers. Most often, agricultural harvest periods occur in the hot summer months, when piece rate systems are mostly used. During this time, agricultural workers are at high risk for heat stress, heat illness, and death.

A recent study found that from 1992 through 2006, 68 workers employed in crop production and related services died from heat-related illness, and that agricultural workers died from heat-related occupational illness at a rate 20 times higher than the national average for workers. See “Preventing Heat-Related Illness Among Agricultural Workers,” *Journal of Agromedicine*, 15:200–215, Larry L. Jackson and Howard R. Rosenberg (2010), at 200, 202.⁴ The study also found that many of the agricultural workers who died were foreign-born workers with limited English language skills. *Id.*; see also, “A real heat shield for farm workers,” L.A. Times, Aug. 2, 2008, Michael Marsh and Dorothy Johnson (discussing risk of heat deaths to farm workers, and the importance of rest breaks to prevent them).⁵

For this reason in 2005, in response to a series of agricultural worker heat deaths and illnesses, California enacted emergency heat regulations to provide agricultural workers with rights to increased rest breaks (“cool down breaks”), cool water, shade, and emergency procedures for heat illnesses. See 8 Cal. Code Regs. § 3395. The regulation became permanent in 2006 and was the first agricultural heat

⁴ Available at <ucanr.edu/files/114235.pdf>.

⁵ Available at <<http://articles.latimes.com/2008/aug/02/opinion/oe-marsh2>>.

law in the country. See “Preventing Heat-Related Illness Among Agricultural Workers,” *supra*, at 210.

Shortly thereafter, Washington followed California’s lead and issued emergency heat illness prevention regulations in 2006 and 2007, and a permanent rule in 2008, which offers similar protections to its agricultural workers. See WAC 296-62-095 et seq.⁶ These Washington regulations require employers to ensure that “a sufficient quantity of drinking water is readily accessible to employees at all times; and... that all employees have the opportunity to drink at least one quart of drinking water per hour.” WAC 296-62-09540. In addition, the regulations require “[e]mployees showing signs or demonstrating symptoms of heat-related illness [to] *be relieved from duty* and provided with a sufficient means to reduce body temperature.” WAC 296-62-09550(1) (emphasis added).

If Sakuma’s argument that agricultural employees should not be separately paid for rest breaks is adopted, this would result in increased risk of heat stress, heat illness, and other injuries to Washington farm workers during the hot harvest months. Not only would the plain language of WAC 296-131-020 be entirely disregarded, but Washington’s heat prevention regulations would be meaningless, as workers would be denied the “relief from work or exertion” that the Court in *White* deemed so important to worker health and safety.

⁶ Unlike California’s law which applies year round, Washington’s law only applies from May 1 through September 30 of each year. WAC 296-62-09510(2).

Moreover, because farm workers are generally among the lowest paid employees, acceptance of Sakuma's argument that the payment for rest periods is "already included" in the piece rate (RB at 5, 7) would cause farm workers to forego rest breaks to earn more money.⁷ This is especially true under piece rate schemes where employers often establish hourly or daily quotas for workers that, if not met, result in worker discipline or discharge. Even if employers do not set piece rate quotas enforced by discipline, if workers do not get paid separately for piece rate work, they will have no economic incentive to rest because they will not be earning any money while they do so. At the same time, if employers are not required to pay workers separately for rest periods, they will have no incentive to provide the rest periods because they will perceive them to interfere with daily production goals.

In addition to increasing risk of injury or death to farm workers, such a scheme would turn on its head this Court's ruling that "employees may not waive their right to a rest period." *Sacred Heart, supra*, 175 Wash. 2d at 831. Further, acceptance of Sakuma's argument would result in agricultural workers being the only Washington employees to be excluded from Washington's rest period protections. Yet, Sakuma offers

⁷ Sakuma's claim that compensation for piece rate rest periods is "already included" in the piece rate is belied by its own officer who was designated as the "person most knowledgeable" about its pay practices under Fed. R. Civ. Pro. 30(b)(6). Dkt. 33, Ex. A (Deposition Upon Oral Examination of Rhonda Brown). In that deposition, Sakuma's official testified as follows: (1) there is no payment to piece rate pickers for time spent in rest breaks under Sakuma's compensation policy (Dkt. 33, Ex. A at 48: 4-9); (2) if a piece rate picker is not picking during time spent on rest breaks, the picker is not earning any money (*Id.* at 48: 10-12); (3) Sakuma has never processed separate pay for piece rate pickers who have missed a rest break (*Id.* at 49: 7-10).

no explanation for supporting such blatant discrimination of a historically disadvantaged group of employees, and Washington's laws do not support such discrimination. *See, e.g.*, RCW 49.12.010 ; RCW 49.12.020 (both statutes providing protections to all employees).

3. Accepting Sakuma's argument would result in rest periods being unlawfully "offset" by time spent working

If this Court does not require employers to separately pay for piece rate rest periods, the resulting pay structure will create an illegal "offset" against piece rate worker time. A review of Sakuma's 30(b)(6) testimony and recent authority from this Court in the *Sacred Heart* case demonstrate that any scheme which does not separately pay piece rate employees for rest periods is illegal under Washington law.

In *Sacred Heart*, this Court determined that "rest periods must be counted as hours worked" and "may not be offset against other working time." *Sacred Heart, supra*, 175 Wash. 2d at 829 (citing the Code of Federal Regulations). There, the employer had agreed that hospital nurses who worked through a rest period would be compensated at "straight time" rates for both the missed rest period and the time they spent working. The nurses contended that because they worked through a rest period that, if taken, would have extended their work day into overtime (past 8 hours), they were entitled to be compensated an extra amount for having missed such rest periods. The employer disputed this because it did

not require the nurses to remain past the end of their 8-hour shift to “make up” the missed rest period; the employer therefore maintained that the missed rest period should not be counted as hours worked. *Sacred Heart, Id.* at 825-29.

The Court framed the question as follows: “whether the 15 minutes nurses spent working through their breaks *should be added to or substituted* for the 15 minutes they would have spent at rest.” *Sacred Heart, Id.* at 826 (emphasis added). The Court held “that both the *missed opportunity to rest and the additional labor* nurses provide constitute ‘hours worked’.” *Id.* (emphasis added).

The Court arrived at this result by concluding that: (1) missed rest periods must be considered “hours worked;” (*id.* at 826, 829, 831) (2) rest periods may not be offset by time spent working (*id.* at 829, 832); (3) working through a missed rest period constitutes “additional labor” provided to an employer (*id.* at 831); and (4) policy concerns require that employers provide rest periods or pay for missed rest periods (*id.* at 832). Indeed, the Court clearly said that an employer cannot “avoid its obligation to provide 10 minutes of ‘hours worked’ for *rest...*” *Id.* at 831 (emphasis added); *see also, Pellino, supra*, 164 Wash. App. at 692-93 (work time during a break “does not count towards the break”). The *Sacred Heart* Court also said that a failure to treat missed rest periods as hours worked would result in employers being incentivized to employ fewer workers, relying on a smaller number of workers to “bear a heavy

burden” in work, and denying workers the necessary rest needed under Washington law. *Id.* at 832.

In its Rule 30(b)(6) deposition, Sakuma’s official testified that: (1) there is no payment to piece rate pickers for time spent in rest breaks under Sakuma’s compensation policy (Dkt. 33, Ex. A at 48: 4-9); (2) if a piece rate picker is not picking during time spent on rest breaks, the picker is not earning any money (*Id.* at 48: 10-12); (3) Sakuma has never processed separate pay for piece rate pickers who have missed a rest break (*Id.* at 49: 7-10).

In light of the Court’s decision in *Sacred Heart*, Sakuma’s piece rate scheme is unlawful because it does not treat missed rest periods as hours worked; it offsets rest periods against time worked; it ignores the “additional labor” provided by workers who work through their rest periods; and it would promote a policy of piece rate workers missing legally required rest periods and bearing the heavy burden of meeting Sakuma’s production goals.

4. California cases interpreting similar rest period language support finding that Washington employers should separately pay piece rate workers for rest periods

In cases of first impression, Washington courts may “review of decisions of other jurisdictions” to assist in consideration of the issues before them. *In re Parentage of L.B.*, 155 Wn.2d 679, 702, 122 P.3d 161

(2005). Numerous California courts have interpreted regulatory language on rest periods that is similar to Washington's language and have concluded that piece rate rest periods and other "nonproductive" work must be separately paid.

Under California's Industrial Welfare Commission ("IWC") Wage Orders, employers are required to "authorize and permit all employees to take rest periods" of at least ten minutes for every four hours worked. *See, e.g.* IWC Wage Order 1-2001, ¶ 12 (8 Cal. Code Regs. § 11010(12)).⁸ Moreover, "[a]uthorized rest periods shall be counted as hours worked for which there shall be no deduction from wages." *Id.* This language is similar to Washington's rest break regulation at issue here: "Every employee shall be allowed a rest period of at least ten minutes, *on the employer's time*, in each four-hour period of employment." WAC 296-131-020.

In *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864 (2013) a class of Safeway truck drivers alleged that Safeway did not pay them for rest periods because Safeway's compensation system was based on piece rate payment system for "miles driven and the performance of specific tasks." *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864, 157 Cal. Rptr. 3d 212 (2013). Like Sakuma here, Safeway contended that its piece

⁸ California has 17 different wage orders, each applicable to a different "industry." IWC Wage Orders 1 – 17, 8 Cal. Code Regs. §§ 11010 – 11170; 8 Cal. Code Regs. § 11140 (IWC Wage Order 14-2001, Agricultural Occupations). However, paragraph 12 of each of the first 16 wage orders concerns rest periods and each of the first 16 wage orders contains virtually identical language concerning provision of rest periods. IWC Wage Order 14 applies to agricultural workers and mandates the same rest periods to piece rate workers that are to be given to other workers. 8 Cal. Code. Regs. §11140(12).

rate system was legal because “pay for rest periods is considered part of the overall piece-rate system” and because the mileage rates paid to its truck drivers “included paid time for rest periods.” *Id.* at 871; *cf.* Dkt. 33, Ex A at 48: 4-12; RB at 5, 7 (arguing that compensation for rest breaks “is included in the piece-rate”).

The *Bluford* Court rejected Safeway’s arguments and held that because “[r]est periods are considered hours worked,” they “must be separately compensated in a piece rate system.” *Id.* at 872. The Court found that there was no dispute that Safeway’s system “did not separately compensate drivers for their rest periods” and specifically rejected Safeway’s claim that “the system’s mileage rates and the activity rates were designed to include payment for expected rest periods.” *Id.* at 872.

Just like the California courts, Washington courts treat rest breaks as “hours worked” that must be compensated. *See, e.g., Sacred Heart, supra*, 175 Wash. 2d at 829 (“rest periods must be counted as hours worked” and “may not be offset against other working time.”)⁹ The similarity in the regulatory language of both states compels the same result in this case.

Moreover, contrary to Sakuma’s argument (RB at 19), *Bluford* is not the only California authority on this issue, as numerous California state and federal courts have reached the same conclusion. *See, e.g.,*

⁹ Washington law is arguably stronger on the issue of protecting employee rights to rest breaks because under Washington law, “employees may not waive their right to a rest period” (*Sacred Heart*, 175 Wash. 2d at 831) while under California law, employees may do so. *See, e.g., Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1033 (2012) (noting that rest breaks that are authorized to an employee may be waived).

Cardenas v. McLane Food Services, 796 F. Supp. 2d 1246, 1252 (C.D. Cal. 2011) (piece rate system that did not separately pay truck drivers for non-driving duties and rest periods violates California law requiring payment for rest periods as “hours worked”); *Reinhardt v. Gemini Motor Transport*, 869 F. Supp. 2d 1158, 1168 (E.D. Cal. 2012) (piece rate pay system that did not separately pay truck drivers for non-driving duties violates California law requiring payment for all hours worked); *Gonzalez v. Downtown L.A. Motors, LP*, 215 Cal. App. 4th 36, 49, 155 Cal. Rptr. 3d 18 (2013) (concluding that piece rate system that failed to compensate mechanics for “non-productive” work time, even if piece rate payments averaged at least minimum wage, still violation of California law); *Carrillo v. Schneider Logistics, Inc.*, 823 F. Supp. 2d 1040, 1044 (C.D. Cal. 2011) (“Where employees are purportedly paid by the piece, the employer must separately compensate employees for all hours spent performing non-piece rate work.”).

This California authority, which interprets language similar to the language contained in the WAC at issue here, is persuasive and should be followed by this Court.

Sakuma attacks the *Bluford* decision on the basis that California minimum wage law is distinct from the FLSA, and provides broader protections than FLSA. See RB at 19-25. According to Sakuma, FLSA authorities permitting weekly averaging of wages should be relied on to conclude that Sakuma’s piece rate system is lawful. *Id.* This argument is unpersuasive for three reasons: first, Washington law, like California law

provides broader protections than the FLSA and while Washington's MWA and FLSA are similar, they are not identical; second, the 9th Circuit has concluded that Washington law requires payment for "each hour worked," and that FLSA weekly averaging is improper; third, authorities cited by Sakuma in its own brief support the conclusion that Washington requires minimum wage payment for *each hour* worked.

RCW 49.46.120 recognizes that Washington will apply the highest applicable standard in the enforcement of wages and working conditions. RCW 49.46.120 ("[a]ny standards relating to wages, hours, or other working conditions...which are more favorable to employees than the minimum standards applicable under this chapter...shall be in full force and effect..."). Therefore, any employment standard that is above the FLSA "floor" will prevail. Sakuma's argument that the FLSA permits employers to avoid paying for rest periods would contravene this statute and conflict with other authority rejecting such an argument. See *Sacred Heart, supra*, 175 Wash. 2d at 831 (employer cannot "avoid its obligation to provide 10 minutes of 'hours worked' for rest..."); *Wingert, supra*, 146 Wash. 2d at 849 (an employee who missed a 10 minute break while working for two hours "*in effect worked for two hours and 10 minutes.*").

Moreover, "the MWA and FLSA are not identical and [the courts] are not bound by such authority." *Drinkwitz, supra*, 140 Wash. 2d at 298, citing *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wash.2d 282, 291, 745 P.2d 1 (1987); *Weeks v. Chief of Wash. State Patrol*, 96 Wash. 2d 893, 897, 639 P.2d 732 (1982) ("While we are free to

use federal cases which interpret FLSA provisions similar to our own, we are not bound by them."). Indeed, the 9th Circuit has construed the MWA as being distinct from the FLSA in that the MWA requires minimum wage payment *per hour, versus per workweek*. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912-13 (9th Cir. 2003). Therefore, pursuant to *Alvarez v. IBP*, the weekly averaging that Sakuma relies on is improper under Washington law and the FLSA weekly averaging authorities cited by Sakuma in its brief are inapposite.¹⁰

Sakuma argues that FLSA permits weekly averaging to avoid separate payment for piece rate rest periods, and cites to DLI Administrative Policy ES.A.3 in support of its argument. RB at 24-25. However, this Administrative Policy supports Plaintiffs' interpretation that piece rate rest periods must be separately paid to employees because it confirms that minimum wage must be paid *for every hour worked*.¹¹ The plain language of the policy demonstrates that even if it is relevant here, employers must pay minimum wage to employees under Washington law for all hours worked (i.e. per hour, not workweek). The policy states *in*

¹⁰ Sakuma fails to cite to any Washington case that holds that payment for rest periods can be avoided based on FLSA's weekly averaging method for minimum wage computation. Sakuma's brief cites only to an 8th Circuit case (*Hensley v. MacMillian Bloedel Containers, Inc.*) and an unpublished case from Oregon (*Cooper v. Thomason*) for the proposition that FLSA's weekly averaging allows an employer to avoid payment for piece rate rest periods. See RB at 22-23. But neither of these cases even discuss piece rate pay systems, and Sakuma's argument is premised on the erroneous assumption that an employer's obligation to pay for piece rate rest periods can be determined by the manner in which minimum wages are computed. See section I.C., *infra*.

¹¹ Policy ES.A.3 only deals with the issue of determining "whether an employee has been paid the statutory minimum hourly wage," not whether rest periods are compensable, so the policy is hardly relevant.

two separate places that "[e]arnings must equal minimum wage *for each hour worked.*" DLI Admin. Policy ES.A.3, at p. 2 of 3 (emphasis added).¹² Incredibly, Sakuma quotes the language just cited, but then claims -- with no explanation -- that this very language means that "Washington does not require minimum wage for 'each' hour of work." RB at 24-25. Sakuma's statement is contrary to the clear language of the policy it attempts to rely on.¹³

C. Sakuma's Argument Is Premised On The Mistaken Assumption That Calculation Of Wages Determines What Constitutes An Acceptable Rest Period

Sakuma relies heavily on administrative materials involving the computation of a "regular rate of pay" when employees are working on a piece rate basis to argue that rest periods need not be separately paid. See RB 10-15 (relying on DLI Admin. Policy ES.A.8.1, ES.A.8.2, DLI Publication "When Paid By Piece Rate Are You Earning Minimum Wage?", DLI Publication F700-125-000, and "Small Business Economic Impact Statement"). Sakuma's argument is essentially that because various

¹² This language is cited by Sakuma at page 24 and 25 of its brief. RB at 24.

¹³ Sakuma also relies on WAC 296-126-021 to argue that weekly averaging permits it to deny piece rate workers rest periods (RB at 23), but recognizes that this code "does not apply to agricultural workers." RB at 23. Sakuma's arguments are disingenuous and irrational. On the one hand, Sakuma relies on WAC 296-126-021 to argue for divesting workers of their right to paid rest periods, while at the same time arguing that the non-agricultural rest break regulation interpreted in *Pellino*, *Wingert* and *Sacred Heart* cannot support Plaintiffs' arguments because it does not apply to agricultural workers. See RB at 18. Sakuma cannot have it both ways.

Washington administrative materials which address computation of a pay rates for piece rate scenarios do not discuss payment for rest periods, this means that compensation for rest breaks must already be included in the piece rate. RB at 10-15.

But Sakuma's argument that administrative silence in these materials equals comprehensive regulation against separate payment for rest periods is unsupported by any case law. Indeed, it is ridiculous to argue that because there is silence in administrative materials, piece rate workers should be denied payment for rest periods.

More importantly, Sakuma's argument that the method for calculating minimum wage should determine what constitutes an acceptable rest period has been rejected by the courts. For example, in *White v. Salvation Army, supra*, 118 Wash. App. 272, the court decided whether "intermittent breaks" afforded to telephone domestic violence counselors complied with Washington's rest period requirements.¹⁴ The *White* court held that "regulations [which] pertain to the question of what constitutes compensable work time" do not assist in defining "what is an acceptable rest period," and rejected resort to wage computation issues to define whether the rest period requirements had been met. *White, supra*, 118 Wash. App at 285-287.

As in *White*, Sakuma's reliance on administrative materials as to how employee wage rates should be calculated is irrelevant in defining

¹⁴ The agricultural rest break regulation (WAC 296-131-020) does not permit employers to use intermittent rest breaks to comply with the rest break obligation.

what an acceptable rest period is, and to the extent that Sakuma argues such materials evidence an attempt on the part of DLI to set out piece rate rest period requirements, that argument should be rejected.

II. Payment For Piece Rate Rest Periods Should Be Based On Average Hourly Earnings For The Work Week

The second question certified by the district court asks this Court to decide how employees are to be compensated for piece rate rest periods if it decides employers must provide such compensation. Dkt. 44. While Sakuma urges this Court to rule that employees must be paid only the minimum wage for piece rate rest periods, for the same reasons requiring payment for the rest periods in the first place, this Court should find that such rest periods must be compensated based on the average piece rate hourly earnings for the workweek.

Such a rule makes sense because it would encourage workers to take their rest periods, would prevent the illegal waiver of rest periods, would avoid illegal "offsets" against wages, and would promote worker health and safety. The rule urged by Sakuma that only minimum wage should be paid would encourage workers to work through their rest periods if they felt they could earn more money by doing so. This in turn would increase worker risk of injury, heat illness, or death. And even if such injuries do not occur, the result would be to increase the employer's

production costs because workers cannot legally waive their rest periods (*Sacred Heart*, 175 Wash. 2d at 831).

Thus, under the system urged by Sakuma, instead of paying only the minimum wage for rest periods, employers could end up increasing, not decreasing their production costs. Thus, if employers paid only the minimum wage for the rest period, many workers would decide to work through the rest period to earn more money. Sakuma would then be responsible for payment for the missed rest period. *Sacred Heart, supra*, 175 Wash. 2d at 826 (“the missed opportunity to rest and the additional labor” provided by workers “constitute ‘hours worked’” which must be compensated); *Pellino, supra*, 164 Wash. App. at 692-93 (employee work activity during break time “does not count towards the break”). In addition, working through rest periods would increase the risk of injury to workers, and so employers and the state would suffer increased costs for injuries (through increased workers’ compensation costs). Finally, by creating a system that would promoted missed rest periods and unlawful offsets, agricultural employers would be potentially liable for litigation costs if workers chose to hire attorneys to enforce their rights.

Therefore, requiring employers to pay rest periods based on average hourly earnings during piece rate work would be the easiest way to ensure workers get legally compensated and that they are afforded their right to “relief from work” that is necessary for their health and safety. Such a system would be simple, and as recognized by Sakuma in its brief, is already required. See RB at 9-14 (discussing calculation of average

hourly rate of pay when employee is working on a piece rate by adding all the earnings in a week and dividing the total number of hours worked that week); *see also*, RCW 49.46.020. Indeed, Sakuma admitted that it already uses this method to determine if it complies with minimum wage requirements, so adding this calculation would not be burdensome to employers. Dkt. 33, Ex. A at 48: 16-25.

For all these reasons, this Court should rule that piece rate rest periods should be compensated based on the average hourly rate for that week of piece rate work.

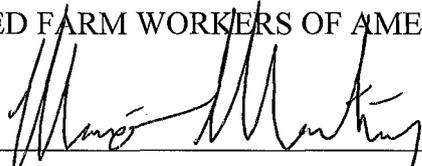
Conclusion

Washington has always been a pioneer in the provision and expansion of labor and workplace protections for employees. The questions certified by the district court have provided this Court with another opportunity to continue the tradition of “pioneering” in the advancement of employee rights for one of the state’s most disadvantaged and marginalized groups. UFW urges this Honorable Court to rule that the WAC and the MWA require agricultural employers to separately pay piece rate workers for rest periods and that these rest periods must be calculated at the average hourly rate based on weekly piece work earnings. Such a result will give needed health, safety, and wage protections to Washington’s farm workers who do some of Washington’s

hardest work, while putting food on the table of countless of families in the state of Washington and nationwide.

RESPECTFULLY SUBMITTED this 30th day of January, 2015

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