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No. 65077-7

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

BRINK'S, INCORPORATED,

Appellant,

v.

MEGAN PELLINO, ON BEHALF OF
HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

**REPLY BRIEF OF APPELLANT
BRINK'S, INCORPORATED**

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I. Introduction

Upon reading Plaintiff's response brief,¹ it would be understandable if one surmised that the matters before the Court were numerous and complicated. In reality, Plaintiff's brief is merely a distraction from the single question that matters: Is reminding employees to be vigilant for their own safety during break periods "work," and, if so, is it so much "work" that the reminder destroys a paid meal or rest period?

Vigilance is not "work." "Work" is defined as activity that inures primarily to the benefit of the employer. Looking out for one's own safety does not inure primarily to the benefit of the employer, but to the employee, and is therefore not compensable as a matter of law. True, Defendant Brink's, Incorporated ("Brink's") chooses to pay its Messengers and Drivers during meal periods. But it also chooses to pay more than the minimum wage. Brink's chooses to offer paid meal periods not because remaining vigilant qualifies as "work," but to maintain consistency with the broad field discretion granted under the Start System of operations. Vigilance—exercising common sense—is advice primarily for the benefit of the employee, not a "work" activity in and of itself. Thus, both the meal and rest period claims must fail as a matter of law.

Even though vigilance is not "work," the Court need not resolve that issue to reverse the trial court. There are equally powerful

¹ Appellant Brink's, Incorporated notes that, contrary to Plaintiff's assertions, all exhibits cited in Brink's Appendix were designated on appeal. To the extent there is any confusion, Brink's Exhibit No. 21 was designated as Sub No. 237, "Appendix /spt Plf Proposed Ffcol" per the trial court's docket.

independent grounds for reversal. Under Washington Administrative Code § 296-126-092 (“Code”), meal periods can be either paid and “on duty” or unpaid. The notion that there may be *some* limit to the “work” an employer may assign during a paid “on-duty” meal period does not mean that employer requests are forbidden *altogether*. Even if a bar must be set somewhere regarding what an employer may ask of its employees, assuming vigilance is “work,” it should not and *can* not be set below vigilance for the simple reason that there is no lesser duty an employee could be asked to perform.

The lower court’s decision on rest periods is flawed independent of its misunderstanding of “work.” Rest periods under the Code are always paid, and employers may not force employees to “work” during such periods. What Brink’s contests is the lower court’s conclusion that intermittent rest periods—specifically authorized by the Code—are somehow “inapplicable.” Washington codified the concept of intermittent rest periods for the very situation presented here: where fully uninterrupted rest periods are not practicable given the nature of the job.

We must also consider the broad discretion provided to and exercised by Messengers and Drivers under the Start System, coupled with the fact that an employer must only “allow” breaks under the Code, not police, enforce, or require them. Both of these concepts were ignored by the trial court. Under the Start System, Messengers and Drivers choose when, where, and how to take their breaks. Their workday does not have a fixed end time. By definition, they are “allowed” to take meal and rest

breaks to the full extent described by the Code. The only thing that Brink's asks of its Messengers and Drivers is that, for their own safety, they remain alert to the potential dangers that surround them while on allowed breaks. If some employees chose to skip or take shorter breaks, or even longer breaks, that is their choice, not some decision foisted upon them by Brink's.

II. Argument

A. The Lower Court's Conclusion Regarding Vigilance Is Flawed As A Matter of Law

1. Plaintiff Mischaracterizes The Lower Court's Holding

By selectively quoting from the Findings of Fact and Conclusions of Law, Plaintiff distorts the lower court's holding concerning the concept called "vigilance." Although the court held that Messengers and Drivers maintaining vigilance "were always engaged in active work duties," Ex. 20, ¶ 16, p. 20, the court clarified that these "work duties" were simply "to remain alert to their surroundings," Ex. 20, ¶ 25, p. 11, and to "maintain[] a lookout," Ex. 20, ¶ 20, p. 9. In other words, and as Brink's explained in its opening brief, App. Br. at 17-20, vigilance is simply exercising common sense in light of the prevailing circumstances. It is not, as Plaintiff suggests, some overwhelming, sweat-inducing work requirement. *See* Resp. Br. at 31.

2. Vigilance Is Not "Work"

As Plaintiff implies, the term "work" is not defined by Washington statute or regulation. *See* Resp. Br. at 23-24. The most relevant state

authority is found at WAC 296-126-002(8), which defines “hours worked” as “all hours during which the employee is authorized or required by the employer to be on duty on the employer’s premises or at a prescribed work place.” However, as Plaintiff tacitly concedes with her citation to *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005), the federal definition of “work” under the Fair Labor Standards Act (“FLSA”) is instructive to fill in the gap. *See* Resp. Br. at 24.

Under the FLSA, an activity constitutes “work” if it involves “physical or mental exertion” that is “*controlled or required* by the employer and *pursued . . . primarily for the benefit of the employer . . .*” *Reich v. New York City*, 45 F.3d 646, 651 (2d Cir. 1995) (emphasis added). Here, the evidence shows that vigilance is *not* primarily for the benefit of Brink’s, but rather for the benefit of the employees themselves. Nor can it be “controlled or required,” if for no other reason than that, as a state of mind, it is incapable of measurement.

The Handbook for Brink’s Personnel (“Handbook”) demonstrates that vigilance is encouraged to enhance employee safety. *See* Ex. 2, at 4. As the Handbook explains, “it is absolutely necessary that all employees be alert and use good judgment” because “of the nature of our work and the fact that we are handling firearms[.]” *Id.* Although there is no evidence that any employee of the Seattle or Tacoma Branches was attacked during the class period, it is the potential for attacks that drives Brink’s to foster employee vigilance in the first place, whether transporting valuables or sitting still on a paid break. As Plaintiff herself

admitted, crew members “were always told that . . . [the] main thing is making sure that everybody is safe.” RP 11/12/09 at 24.

As Brink’s pointed out in its opening brief, App. Br. at 33-34, no Washington court has held that vigilance is “work” and federal courts have been equally skeptical. *See Jonites v. Exelon Corp.*, 522 F.3d 721, 724 (7th Cir. 2008); *Summers v. Howard Univ.*, 127 F. Supp. 2d 27, 34-35 (D.D.C. 2000); *Bobo v. United States*, 37 Fed. Cl. 690 (1997).

The *Bobo* decision is particularly instructive. There, border agents sued the government for failing to compensate them for time spent commuting to and from work. *Id.* at 690. They contended that throughout their commutes they had to “listen[] to and sign[] on and off their vehicle radios, observ[e] traffic, and look[] out for suspicious activity.” *Id.* at 699. Like Plaintiff here, the agents argued that this “constant state of vigilance” was compensable “work” in and of itself. The court was not convinced:

In an effort to render the entire duration of their commutes compensable, plaintiffs assert that they perform these activities [i.e., listening to and signing on and off their vehicle radios, observing traffic, and looking out for suspicious activity] throughout their commutes. ***Plaintiffs argue that their constant state of vigilance while commuting converts their commutes into compensable work. In short, plaintiffs are contending that they are required to drive with their eyes and ears open. This goes too far.*** Plaintiffs will not close their eyes to an immigration infraction merely because they are not on the clock. This constant state of vigilance leads to the prevention of immigration infractions, for which plaintiffs receive recognition, promotions, and awards. Plaintiffs do not, however, receive compensation 24 hours a day for maintaining this heightened state of vigilance, so ***FLSA pay is not warranted for commuting while maintaining a***

sharp look-out for suspicious activity and the like.

Id. at 699-700 (emphasis added) (footnote omitted).

Bobo is directly on point. Just as border agents do not “work” when they keep “a sharp look-out for suspicious activity” during commutes, *id.* at 700, neither do Brink’s employees “work” while being alert or vigilant during a paid break. Indeed, that conclusion is even stronger here because, unlike the border agents in *Bobo*, Messengers and Drivers are not “essentially ‘on-duty’ 24 hours a day” and they are not asked to approach and investigate third parties. *Id.* Rather, they are simply asked to keep an eye out for potential dangers during their normal workday. Further, in terms of who the vigilance benefits, it can be said with much less confidence that a border agent who looks out for “suspicious activity” during a commute does so for his own good. *See* RP 11/19/09 at 31 (explaining that crew members are “target[s]”). Whether we resort to common sense or apply the test under the FLSA, the result is the same: Vigilance during meal and rest breaks is not “work.”

Think of the practical consequences of concluding otherwise. As *Bobo* suggests, if vigilance were “work,” there would be many fields where breaks could not be allowed due to the nature of the job. Shall a construction worker on an active site remove her hard hat every time she takes a lunch break, oblivious to the hazards that surround her? Should we ask police officers in uniform to ignore the criminal element every time they stop for a cup of coffee during a paid meal or rest break? Or should corrections officers within prison walls turn a blind eye to violent

criminals because staying attuned to that danger is “work” and they are not to “work” during a break? If “work” includes such basic personal safety practices, many employees, particularly in danger-prone industries such as fishing and shipping, could never be allowed a meal or rest period. The lower court’s holding would thus mean that huge numbers of employers would be incapable of allowing breaks and complying with the Code.²

The evidence at trial showed that the advice to be relaxed but alert—to maintain “vigilance”—is just a reminder to exercise common sense for one’s wellbeing given the circumstances of the armored-vehicle industry, circumstances that Messengers and Drivers were well aware of when they applied. *See, e.g.*, RP 11/12/09 pp. 97-98; RP 11/16/09 p. 17. As a matter of law, this is not “work” on behalf of Brink’s.

3. This Court Need Not Address The Issue of “Work” To Determine That The Lower Court Misinterpreted The Code

Though Brink’s firmly believes that vigilance is not “work,” reversal does not depend on that. Indeed, the Court need not even address the proper definition of “work” because there are separate, equally compelling grounds for reversal under the Code. Independent of the issue of “work,” Brink’s must prevail because (1) it paid its employees the

² The positions requiring on-duty vigilance are numerous and far-ranging, from police officers, *Payne v. Commonwealth*, 14 Va. App. 86, 90 (1992) (noting “the perils related to law enforcement and recogniz[ing] that police officers must always be vigilant”), to security guards, *Selvagio v. Burris*, 2004 WL 2563536, *2 (N.J. Sup. Ct. App. Div. Mar. 19, 2004) (“security officers should always be vigilant”), to airplane pilots, *Wojciechowicz v. United States*, 576 F. Supp. 2d 241, 253 (D. Puerto Rico 2008) (pilots “are compelled to use the vigilance required to see and avoid terrain”).

whole day through, and (2) the Code plainly authorizes the minimal advice represented by vigilance.

The cases addressing alleged paid meal-break violations all *presume* that a general need to remain alert or vigilant is permissible during breaks and does not undermine their validity. In *Iverson*, a corrections officer sued on the claim that, even though he was paid during his meal period, the duties he had to perform during that period were too onerous. *Iverson v. Snohomish County*, 117 Wn. App. 618, 620, 622-23 (2003). Iverson alleged that his obligation to continue supervising inmates during lunch and to “respond to emergency situations” was active work and, therefore, impermissible. *Id.* at 620-21. This Court rejected the claim. The Court did *not* determine that Iverson’s general duty to remain alert (a significant duty because Iverson was a prison guard surrounded by hostile inmates) was “work” or that it interfered with the “allowed” breaks. Instead, the Court noted that, while Iverson was always “on call” to respond to emergency situations, the active work he had to perform in responding to such situations did “not take up more than 10 percent of the lunch period.” *Id.* at 622. The Court understood that the mere duty to be careful around inmates, for Iverson’s own safety as much as anything else, could not convert an “allowed” meal period into a denied meal period. *Id.*; *see also id.* at 623. If that were not the case, it would have been much easier for the Court to end the inquiry right there—on the theory that Plaintiff offered below (i.e., that a request to remain vigilant during a break effectively denies the break).

In fact, the reasoning of *Iverson* applies with even greater force to the present case because the plaintiff in *Iverson* had to do *more* than just remain vigilant. Whereas Plaintiff here failed to introduce any evidence that Messengers and Drivers had to take action in response to perceived threats while on breaks, the corrections officer in *Iverson* had to “respond to emergency situations” and perform actual work because the threats were clear and present. *Id.* at 620. If there was no violation in *Iverson*, there can be no violation here.

The Court employed the same presumption—that remaining alert is permissible under the Code—in *Frese v. Snohomish County*, 129 Wn. App. 659 (2005). That case also involved corrections officers suing for compensation above what they already received for paid “on-duty” meal periods. *Id.* at 661-62. Though the Court suggested that the employees *might* have a claim if they “conclusively proved that they never ha[d] time to eat,” *id.* at 670, it again understood that the mere duty to remain alert was not sufficient, *see id.* at 664. Indeed, the Court’s discussion of the pertinent facts demonstrates that it was concerned only with *actual* work, not a need to stay alert independent of such tasks. *See id.* (considering need to respond to “inmate disturbances,” “requests to open doors,” and “telephone calls”). As in *Iverson*, it would have been much easier for the Court to simply end the analysis with the observation that the employees undisputedly had a duty to remain vigilant and that therefore the break was not “allowed.” But the Court did not analyze the case that way because it

recognized that a continuing duty to look out for one's own safety does not nullify a break. *See id.* at 664-65.

As with *Iverson*, Plaintiff mischaracterizes *Frese*, implying that a paid "on-duty" meal period does not "contemplate" any activity whatsoever. *See Resp. Br.* at 32, 34. This would negate the entire concept of an "on-duty" meal period. If merely being on call were the limit of permissible duties during a paid, on-duty meal period, the *Frese* Court could have stopped its analysis there, as the *Frese* plaintiffs performed actual work during their meal periods. However, *Frese* comes to no such conclusion. Rather, it addresses the situation in which *no diminution in duties whatsoever* occurred during meal periods, thereby depriving the employees of the allowed meal periods, whether "on duty" and paid or not. *Frese*, 129 Wn. App at 664.

Again, this is nothing like the situation at hand. Messengers and Drivers were simply asked to remain alert to potential dangers during their breaks. This did not mean that they had to continue working—making deliveries, counting liability, etc.—just that they had to remain alert during their paid "on-duty" meal break whenever they chose to take it under the Start System. *Ex. 12* at 80-81; *RP 11/16/09* at 80. Whether technically "work" or not, *Iverson* and *Frese* clearly show that being aware of one's surroundings does not prevent the taking of a break.

4. **Plaintiff Misunderstands The Concept of “On-Call” Status**

Plaintiff defends the trial court’s conclusion that an employee taking an “on-duty” paid meal period is limited to being “on call.” *See* Resp. Br. at 30-33; Ex. 20, ¶ 10, p. 27. That conclusion makes no sense.

Under the Code, “[m]eal periods shall be on the employer’s time when the employee is required by the employer to remain *on duty*” WAC 296-126-092(1). Yet, inexplicably, the lower court concluded that “this ‘on duty’ responsibility is limited to being ‘on call.’” Ex. 20, ¶ 10, p. 27. As a result, it held that “no active work can be performed” during paid meal breaks. *Id.*; *see also*, ¶ 9, p. 27.

Brink’s agrees that time spent “on call” is sometimes compensable, *see Chelan County Deputy Sheriffs’ Ass’n v. Chelan County*, 109 Wn.2d 282, 292 (1987), but that has nothing to do with an “on-duty” paid meal break. If maintaining vigilance is, as Plaintiff contends, “more than ‘engaged to wait,’” Resp. Br. at 32, what makes it impermissible during an “*on-duty*” meal period if the time is already *paid*? An “on-duty” paid meal period implies the potential for actual work. *See Iverson*, 117 Wn. App. at 620. If it was permissible for Iverson to respond to inmate disturbances during a paid meal period, the lesser state of vigilance *must* be permissible.

B. The Lower Court's Misunderstanding Of The Law Permeates Both Its Conclusions Of Law And Its Purported Findings Of Fact

The trial court's failure to recognize that the Code permits vigilance yielded not only faulty conclusions of law, but it also infected conclusions styled as "findings of fact." Conclusions of law will be treated as such regardless of their label. *McClendon v. Calahan*, 46 Wn.2d 733 (1955). Despite Plaintiff's characterizations, Brink's does not mislead the Court by presenting context and additional information relevant to how the trial court misapplied the law. *See* App. Br. at 4-20. Rather, Brink's points out the lower court's legal errors, including the observation that the trial court frequently conflated facts and law within the same conclusions and misapplied the law in coming to those conclusions.

A pure finding of fact that Messengers and Drivers practiced vigilance during breaks would be one thing, but in many "findings of fact," the trial court took it one step further by assuming that vigilance was impermissible "work" as a matter of law. For instance, while the court could find that "drivers continuously scan the area surrounding the truck to identify potential threats" (should they choose to take their breaks within the armored vehicles), Ex. 20, ¶ 17, p. 8, concluding that drivers have "constant work responsibilities" during breaks relies on the court's assessment of what legally constitutes "work," a question on which the court consistently erred. *See* Ex. 20, ¶ 18, p. 8; ¶ 19, p. 8; ¶ 30, p. 14; ¶ 48, p. 20.

Each of the trial court's errors of law, including those underpinning supposed findings of fact, is clearly set out and discussed in Brink's opening brief. App. Br. at 3-4. Unlike pure findings of fact, conclusions of law challenged on appeal need not be stated verbatim in the brief.³ *Wygala v. Kilwein*, 42 Wn.2d 281, 283-84 (1952). But even if Brink's statements of the assignments of error and issues were somehow defective, so long as the issues are clear to the opposition and the Court, they should be considered. *State v. Olson*, 126 Wn.2d 315, 323 (1995).

C. Plaintiff Did Not Satisfy Her Burden Of Establishing That Any Brink's Conduct Violated The Code

A party's burden under the law is not a "mere formality." *Walker v. Mortham*, 158 F.3d 1177, 1184 (11th Cir. 1998); *Adair v. Wis. Bell, Inc.*, 2008 WL 4224360, at *3 (E.D. Wis. Sept. 11, 2008). Rather, the burden is "a procedural safeguard that serves to 'allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.'" *Islam v. Dep't of Early Learning*, 157 Wn. App. 600 (2010) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). Recognizing as much, courts in Washington have not hesitated to reverse where the plaintiff failed to carry her burden. *See, e.g., Satomi Owners Ass'n v. Satmoi, LLC*, 167 Wn.2d 781, 813-16 (2010); *In re Welfare of C.B.*, 134 Wn. App. 942, 946 (2006). Plaintiff failed to carry her burden

³ It is similarly unnecessary for Brink's to set out each minor conclusion in the assignment of errors where each contributes to the issues identified by Brink's. *See, e.g., In re Disciplinary Proceeding Against Vanderbeek*, 152 Wn.2d 63 (2004).

to establish (1) that Brink's did not "allow" meal and rest breaks, and (2) that Brink's "required" unremitting work.

1. **Employers Must "Allow" Meal and Rest Breaks; They Need Not Enforce, Police, or Require Them**

Under the Code, employers must "allow" meal and rest periods. WAC 296-126-092(1), (4). Plaintiff suggests that Brink's failed to affirmatively *require* employees to take breaks, but that is not the standard. *See* Resp. Br. at 25-28. Had the legislature meant for employers to force employees to take breaks, it could have said employers must "require" breaks, just as it said in the same section that employers must not "require" employees to work without breaks. WAC 296-126-092(2).

Conflating the word "allow"—a term of permission—with "require" makes no sense, either semantically or legally. If employers must "require" employees to take breaks, not only is all employee discretion taken away (contrary to the Code), but new problems are created: How does an employer compel an employee to take a break when the employee has no such desire? And how would an employer monitor, much less compel, breaks by employees who cannot be directly supervised (such as Messengers and Drivers under the Start System)?

Applying the common meaning of "allow" makes far more sense. "Allowing," per Merriam-Webster's Dictionary, means "to forbear or neglect." In other words, to "allow" is to not act in a way that prevents the employee from taking a break. *See White v. Salvation Army*, 118 Wn. App. 272, 279 (2003) ("The employer cannot prevent an employee from

taking their meal period, but there is no affirmative duty on the employer to schedule meal periods for a specific time.”). Although the specific focus in *White* was scheduling, the underlying principle was that the employer’s duty is *to not prevent* a break.⁴

The true meaning of “allow” was lost on the trial court, and it continues to be avoided by Plaintiff. Plaintiff states that the trial court’s holding was not “limited to its finding that class members were required to remain vigilant during breaks,” and that Brink’s has not taken issue with that. Resp. Br. at 28. That is absurd. The trial court did indeed conclude that Brink’s “fail[ed] to provide class members with sufficient rest and break minutes,” irrespective of the request to maintain vigilance. Ex. 20, ¶ 21, p. 31. What Plaintiff fails to realize, however, is that this conclusion embodies the very error of which Brink’s complains. The standard is not whether breaks were “provided,” but whether they were “allowed.” On that score, Plaintiff failed to carry her burden.

2. Brink’s Did Not “Require” Employees to Work Without Meal or Rest Breaks

Brink’s interpretation of “allow” is confirmed by the Code’s later use of the term “require.” Restating the idea that an employer may not prevent an allowed break, the Code explains that an employee cannot be “required to work more than five consecutive hours without a meal

⁴ The California Court of Appeal recently came to the same conclusion in *Hernandez v. Chipotle Mexican Grill, Inc.*, __ Cal. Rptr. 3d __, 2010 WL 4244583, *5-6 (Ct. App. Oct. 28, 2010) (slip opinion). As the court observed, “[r]equiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous or who . . . do not appear to remain in contact with the employer during the day.” *Id.*

period” or “required to work more than three hours without a rest period.” WAC 296-126-092(2), (4). Plaintiff does not explore what the law means when it says an employer may not “require” work without breaks, nor explain how Brink’s violated that condition. Plaintiff’s silence here is telling.

The field discretion inherent in the Start System is in perfect harmony with the Code’s approach to meal and rest breaks. Regardless of whether employees actually took full advantage of the paid breaks they were allowed, the evidence shows they had sufficient time to eat and rest and made use of that time at their discretion. Some crew members purchased food or beverages—for themselves alone, for their fellow crew member, or for both of them—either at an existing stop on their to-do list or at a location not appearing on that list. RP 11/10/09 at 149-52, 170; RP 11/12/09 at 13; RP 11/16/09 at 37; RP 11/17/09 at 98; RP 11/17/09 at 163; RP 11/19/09 at 17. Some stayed at that location to eat that meal; others chose to continue on the route and save the food or drinks for later. RP 11/17/09 at 182; RP 11/17/09 at 116. Some did personal shopping. RP 11/17/09 at 204. Some ate while driving or while watching the Messenger conduct her transactions; others ate in the back of the truck. RP 11/10/09 at 149-52; RP 11/16/09 at 37; RP 11/16/09 at 128-29; RP 11/17/09 at 116. Some packed a lunch to save money, time, or both. RP 11/19/09 at 15; RP 11/17/09 at 181-82. The practices varied, but the common denominator remained: Breaks were allowed and taken by crew members. *See also* Ex. 10, at 17:1-13, 33:23-35:13, 53:15-54:13.

There is nothing to the argument that “time pressures” from management somehow “forced” employees to skip breaks. There is no evidence that a Driver or Messenger was ever punished for taking a break, no evidence that management told employees they should not take a break, and no expert testimony that runs were structured to deny breaks. *See* RP 11/19/09 at 71-72. To the contrary, Brink’s notified its Drivers and Messengers in various ways that they were allowed to take their breaks. For example, Michael Jaquish “explained to them that under the state law they were entitled to a 30-minute break and two 15-minute breaks.” RP 11/16/09 at 28. Brink’s further notified Drivers and Messengers of their meal and rest breaks through various postings at the Branches. Ex. 4, at 1; Ex. 5, at 1; Ex. 6, at 5; Ex. 7, at 2; Ex. 8, at 2.

D. The Brink’s Start System Reconciles Paid Breaks With Employee Safety

Plaintiff’s next attempt to preserve the judgment is similarly misguided. Plaintiff argues that the Code must be interpreted in light of the purposes of the Industrial Welfare Act (the “Act”). Resp. Br. at 21. Unfortunately for Plaintiff, considering the purpose of the Act—and related law under the Washington Industrial Safety and Health Act (“WISHA”)—only reinforces the legitimacy of Brink’s approach to meal and rest periods. As Plaintiff observes, the Act is “dedicated to the protection of the health and safety of Washington employees.” Resp. Br. at 21. Requesting vigilance while on duty is the only reasonable way to ensure that the Act serves its purpose.

1. **Brink's Duty To Take Reasonable Steps To Ensure Employee Safety Under WISHA**

The primary purpose of vigilance is to remind Brink's employees that safety at all times, even on breaks, is important. RP 11/12/09 at 24. Not only is this Brink's goal, but it is also required by Washington law. "WISHA . . . imposes on every employer a general duty to protect its own employees from recognized hazards." *Shingledecker v. Roofmaster Prods. Co.*, 93 Wn. App. 867, 871 (1999). In other words, every employer has a duty to "furnish to each of [its] employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to [its] employees." RCW § 49.17.060(1); *Shingledecker*, 93 Wn. App. at 870-71. For Messengers and Drivers, the "place of employment"—the place that Brink's must take reasonable steps to make safe—is the armored vehicle. *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 47 (2007).

The main threat to safety in the armored-vehicle industry comes from third parties. Although Brink's cannot control such individuals, Brink's can take reasonable steps to enhance employee safety. This is exactly what Brink's does by affording employees broad discretion under the Start System. Brink's also provides extensive security training, a firearm with attendant safety training, armored vehicles, an option for a protective vest and, of course, the sound advice to remain vigilant and alert to potential threats while on duty. Ex. 2, at 4, 45-46; Ex. 9, at 48; Ex. 11, at 7; Ex. 12 at 80-81; RP 11/10/09 at 64, 72-73; RP 11/16/09 at 17; RP

11/19/09 at 14; RP 11/17/09 at 129-31. It would be irresponsible for Brink's to inform employees that they should be careless, unsafe, and not vigilant during breaks.

2. Plaintiff's Proposed Alternative Of Required And Scheduled Breaks Is Inconsistent With The Code And Would Place Employees In Danger

Plaintiff does not dispute that Brink's has an exemplary safety record. Still, Plaintiff would prefer to ignore the conditions that *produce* this record: Brink's Start System and the vigilance of its employees.

The Start System provides ample opportunity for all allowed breaks and, just as importantly, keeps employees safe. *See* Ex. 2, §§ 1.060, 1.062-63 at 3, 18, 45-46; RP 11/16/09 at 168-69; RP 11/19/09 at 46, 84; RP 11/10/09 at 96; RP 11/16/09 at 28; RP 11/19/09 at 88; Ex. 4, at 1; Ex. 5, at 1; Ex. 6, at 5; Ex. 7, at 2; Ex. 8, at 2. Plaintiff offers only factually unsupported theories on how a security employer ought to operate. Plaintiff ignores two extremely important facts in the record: (1) evidence that employees took breaks; and (2) evidence that employees were neither hurt nor unduly endangered. *See* Resp. Br. at 37.

Plaintiff's "alternative," unsupported in the record, would be impractical and dangerous. Requiring Brink's to schedule breaks for Drivers and Messengers would put their safety at risk. Despite the fact that (1) Messengers and Drivers testified that they were able to take breaks within their field discretion under the Start System; and (2) no class member fell victim to attack, according to Plaintiff, valid meal and rest

breaks cannot be taken during a Brink's workday because of the ever-present need to remain vigilant.

Plaintiff failed to consider the consequences of scheduling breaks away from the vehicles, the safest place in the field. A system of scheduled breaks would have the following effects: (1) If scheduled away from the Branch, it would require Brink's to dispatch relief crews to monitor the armored vehicles while the regularly-scheduled crews were on break, decreasing safety as additional personnel shift in and out of the vehicles; and (2) If scheduled at the Branch, it would require crews to make predictable stops, thereby endangering their safety by providing schedules which the criminal element could learn and exploit, not to mention greatly extending the crews' workdays by adding significant amounts of travel.

Neither required nor scheduled breaks are necessary under the Code. *See White*, 118 Wn. App. at 279 (“[T]here is no affirmative duty on the employer to schedule meal periods . . .”). As all the cases show, from *Iverson* to *Eisenhauer*, the Code grants employers the option to request duties in exchange for a paid “on-duty” meal period. *Iverson*, 117 Wn. App. at 620, 622-23; *Frese*, 129 Wn. App. at 664; *White*, 118 Wn. App. at 275; *Bell v. Addus Healthcare, Inc.*, 2007 U.S. Dist. LEXIS 13065, at *22-23 (W.D. Wash. Feb. 26, 2007); *Eisenhauer v. Rite Aid Corp.*, 2006 WL 1375064, at *3 (W.D. Wash. May 18, 2006). Although what Brink's advises Messengers and Drivers during breaks is far from significant—Brink's could ask much more under the law than simply maintaining

vigilance for one's own safety, which is not even "work"—it is critical to employee safety and compliance with WISHA.

E. The Lower Court Erred In Its Waiver Analysis

Plaintiff claims that Brink's failed to cite any evidence showing waiver of meal periods. Resp. Br. at 37. That is patently false.

Employees' testimony showed that they were aware they were allowed breaks and made conscious choices when, where, how, and whether to take those breaks. *See, e.g.*, RP 11/10/09 at 176, 178; RP 11/12/09 at 4. Plaintiff, like the court below, simply ignores these facts.

Recall that the Start System was designed to facilitate employee choice, choice that often resulted in voluntary waiver. There was no set time for employees to finish their runs; rather, they were paid until they swiped out. Ex. 2 at 11; RP 11/10/09 at 124-25. Granted, there was testimony that failing to return in time for bank-outs could have certain consequences for employees, but only in the sense that their workday could be extended by the need to remain on duty. RP 11/16/09 at 127, 142. Either way, though, they stayed on the clock earning wages.

The record shows that Drivers and Messengers often skipped breaks simply because they wanted to shorten their workdays. *Id.* The desire to make a workday shorter is quite understandable; it was the same desire that drove Eisenhower to "grab a bite here [and] grab a bite there." *Eisenhower*, 2006 WL 1375064 at *3. But just as it was for Eisenhower, it was a voluntary choice that amounted to a waiver. *Id.*

F. The Decision On Summary Judgment Is Reviewable

Plaintiff asserts that the denial of summary judgment cannot be reviewed on appeal because the denial was based on a determination that material facts were in dispute. Resp. Br. at 20. That is incorrect.

Plaintiff cites *Brothers v. Public School Employees of Washington*, 88 Wn. App. 398 (1997). That case stands for the simple proposition that appellate courts do not generally second-guess findings of fact. If a lower court denies summary judgment on the grounds that the issue is a factual one, and the fact-finder later finds in favor of the non-moving party, the issue will be insulated from appellate review absent a showing of insufficient evidence. *See id.* at 409.

Of course, this concept has no bearing where the issue was *legal* in nature. To the extent the decision on summary judgment was based on a legal issue, it is naturally subject to review on appeal. *See In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 667 (2009). Because the summary judgment decision here was largely based on the interpretation of the Code—a question of pure law—that decision is subject to review. *See Ex. 19* at 6. That contested facts were also involved does not render the legal decision off limits. *See Erickson v. Chase*, 156 Wn. App. 151, 156 (2010).

G. The Lower Court Abused Its Discretion In Maintaining This Case As A Class Action

In defending the decision to certify and maintain this matter as a class action, Plaintiff leans heavily on the supposedly deferential standard of review. *See Resp. Br.* at 20, 24-25. While the general standard of

review is “abuse of discretion,” this label is misleading. As the courts have noted, “abuse of discretion” means different things in different contexts. Here, it translates into a standard that is only *slightly* deferential.

First, to the extent a certification decision is based on legal conclusions, it is owed no deference at all. *See Champagne v. Thurston Cty.*, 163 Wn.2d 69, 76 (2008); *Archdiocese of Milwaukee v. Halliburton Co.*, 597 F.3d 330, 334 (5th Cir. 2010).

Second, even when the decision does not hinge upon legal conclusions, the abuse-of-discretion standard is far stricter in the class certification context than in most other settings. Consistent with the importance of these decisions and their susceptibility to error, “abuse of discretion can be found far more readily on appeals from the denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance.” *Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (2d Cir. 1983).

The lower court gave no basis for its decision not to decertify the class, *see* Ex. 15, so it is unclear whether the court continued to misunderstand the law as it did at many other stages of the litigation or, instead, ignored the plentiful evidence illustrating that there was no commonality in employee break practices. *See* App. Br. at 10-13, 16, 22.

If the Court actually examines the facts of how breaks were taken at the employees’ discretion, wide variations appear. For instance, although Plaintiff usually brought food and coffee from home, she occasionally purchased lunch from a restaurant, including Brink’s client

McDonald's, where she received food for free. RP 11/10/09 at 170; RP 11/12/09 at 13. She even exercised her discretion to make personal calls from the armored-vehicle workplace on her cell phone. RP 11/12/09 at 80-81. Neil McCracken routinely visited a “teriyaki joint”—away from any customer location—and placed his order ahead of time using his mobile phone. RP 11/17/09 at 117, 162-64. Carl Boyd *always* packed a lunch—not for lack of time to buy food, but “because it is too expensive to buy food every day.” RP 11/19/09 at 15.

In these few snippets alone, we find ample evidence of differences among employee break practices. The lower court should have examined this evidence more closely. Had it done so, it would have opted for decertification.

H. Drs. Abbott and Munson Were Human Calculators, Not “Expert” Witnesses

Although Plaintiff argues that Brink's provided the data relied upon by its experts, Plaintiff cunningly side-steps the fact that her counsel *gathered* and *selected* the subset of data to be analyzed. *See* Resp. Br. at 44, 46. Plaintiff further ignores the fact that the testimony of Drs. Abbott and Munson was based on Plaintiff's arguments regarding what sufficed for a “proper” meal or rest break, not on independent expert methodologies or analyses. *See, e.g.*, Resp. Br. at 48. As with all the other flaws in the trial, the fundamental misunderstanding of Washington law regarding on-duty and intermittent breaks—and how the Start System

functions within that framework—undermines the validity of the “expert” testimony.

I. Plaintiff Is Not Entitled To Fees and Expenses

Plaintiff argues she is entitled to fees and expenses under RAP 18.1 and RCW 49.46.090 and 49.48.030, but this is not so if Brink’s appeal is well taken. As Brink’s has illustrated above and in its opening brief, the lower court misconstrued Washington law at several points in the litigation, up to and including trial. Reversal on any of the above-referenced grounds will prevent Plaintiff from obtaining fees and costs.

III. Conclusion

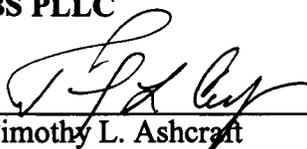
If the plain language of the Code and the spirit of Washington law are to be honored, the judgment below must be reversed. Maintaining the status quo would gut the Code of its purpose and undermine employee safety.

Dated: November 12, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen Becker, certify and declare as follows:

1. I am now and at all times herein mentioned am a citizen of the United States and resident of the state of Washington, over the age of eighteen years, not a party to the above-entitled action, and am competent to testify as a witness.

2. I am employed with the firm of Williams, Kastner & Gibbs PLLC, 1301 A Street, Suite 900, Tacoma, WA 98402.

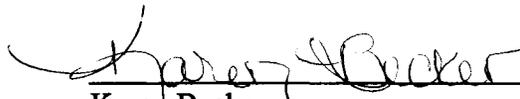
3. On the date below, I caused to be served as indicated below, a true and correct copy of the document to which this certificate is attached to counsel indicated below:

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Via ABC Legal Messengers
 Via Facsimile
 Via U.S. Mail
 Via Electronic Mail

The foregoing is a true and correct statement, is made under penalty of perjury and under the laws of the United States of America and the State of Washington.

DATED this 12th day of November, 2010.



Karen Becker

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