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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

MICHAEL BRADY,

Plaintiff,

v.

AUTOZONE STORES, INC., and AUTOZONERS, LLC,

Defendants.

OPENING BRIEF OF APPELLANT MICHAEL BRADY (*Plaintiff*)

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I. INTRODUCTION

Both this Court and the court of appeals have repeatedly held that Washington employers must provide their employees with the meal and rest breaks that WAC 296-126-092 requires *when* that regulation requires. *See Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015); *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012); *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002); *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011).

Plaintiff Michael Brady filed this class action asserting that on a state-wide basis defendant AutoZone had breached its affirmative duty to ensure employees take the meal periods that WAC 296-126-092(1)-(3) mandates. AutoZone's payroll records, spanning a period of less than three and one-half years, documented over 150,000 instances when its employees failed to receive meal breaks when the regulation provides. The violations existed for every store in Washington for which there was data.

The United States District Court for the Western District of Washington denied Brady's motion for class certification based on its conclusion that WAC 296-126-092 imposes no duty upon employers to make sure that employees who have *not* waived their right to a meal period actually take timely meals breaks. The district court instead held

that Washington law only requires employers to provide “a meaningful opportunity” for employees to take meal breaks if they so choose. The district court further held that whether AutoZone had breached that duty had to be determined on an individual rather than a class-wide basis.

Demetrio directly rejects the district court’s interpretation of WAC 296-126-092. This Court made clear that it “is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses.” 183 Wn.2d at 658. In answer to the district court’s certified questions, this Court should reaffirm that WAC 296-126-092 imposes an affirmative duty upon employers to ensure that their employees take the breaks that the regulation requires when that regulation requires. A contrary ruling would defeat the health and safety purposes of the regulation and erode the ability of Washington employees to enforce their rights to the breaks that the law provides.

II. STATEMENT OF THE CASE

A. Factual Background

1. AutoZone’s Business in Washington.

AutoZone’s Washington stores are part of a four-state region comprising Washington, Alaska, Oregon, and Idaho. Tim Goddard is the regional manager, and has been since 2009. Deposition of Timothy

Goddard (June 27, 2014) ("Goddard Dep.") at 8:22-9:4.¹ Laureen Iannucci has been the Regional HR Manager in Seattle since 2008. Deposition of Laureen Iannucci (July 25, 2014) ("Iannucci Dep.") at 7:17-8:1. Employees are hourly-paid except for the store managers, who are salaried. Iannucci Dep. at 79:8-16; Goddard Dep. at 47:2-5.

2. AutoZone's Washington Meal Break Policies

AutoZone's meal break policy was the same for all stores in Washington. Iannucci Dep. at 139:1-5. All employees are supposed to get meal breaks. Dep. Exs. 73, 74, and 2, Attachments I, J, and B to Frank Dec. Beginning in 2009 AutoZone's general meal break policy (1) provided for unpaid meal breaks, (2) required that meal breaks be taken, and (3) required that employees clock-out for meals and then clock back in after the end of the meal break. Dep. Ex. 60, pp. 1, 3, 5-8, Attachment G to Frank Dec. AutoZone's meal break policy repeatedly stated: "Management schedules breaks with consideration for work demands." *Id.* at pp. 4, 5, 6, 7 & 8.

Until March 2014 AutoZone's Washington meal break policy provided (1) an unpaid meal break of at least 30 minutes to employees who work more than five consecutive hours per day, and (2) a second

¹ Citations to depositions are in the form [name of deponent] [page: line nos.] All deposition excerpts relied on by plaintiff are in Attachment P to the Amended Declaration of Steven B. Frank (Oct. 10, 2014) ("Frank Dec."), Dkt. Nos. 34, 40.

meal break to employees *only* after they worked more than 11 consecutive hours in a single day.² Dep. Exs. 61, 73, & 74, Attachments H, I, and J to Frank Dec.; Deposition of Laureen Iannucci (Aug. 15, 2014) at 4:24-5:24; 6:2-7:24. In or around March 2014, AutoZone revised its meal break policy to make it consistent with requirements for non-agricultural employees. Beginning in March 2014 AutoZone's meal break policy provided that employees who work more than five hours following a first meal break are entitled to second meal break. Dep. Ex. 2, Attachment B to Frank Dec.; Iannucci Dep. at 76:19-77:24; Declaration of Michael Brady (Sept. 24, 2014) ("Brady Dec.") ¶ 9, Dkt. No. 24.

AutoZone's Washington stores were supposed to display a meal break poster. Iannucci Dep. at 66:9-25; 67:7-68:9; Dep. Ex. 30, Attachment E to Frank Dec. Before March 2014 the poster advised *inter alia* that it was "[the employee's] responsibility" to take a 30-minute meal break between the second and fifth hours if the employee worked more than five hours, and to take another meal break if the employee worked 11 hours or more. Dep. Ex. 1, Attachment A to Frank Dec. The poster was also available to AutoZone's employees through the Company's internal computer system. Iannucci Dep. at 71:24-72:8. District managers were

² WAC 296-131-020(1) requires that *agricultural* employees receive a second meal break only after the employees work more than 11 hours in a day. Non-agricultural workers are entitled to a second meal break five hours after their first break. *See infra*.

supposed to make sure the poster was visible. Iannucci Dep. at 67:21-68:9. The AutoZone posters reflecting the second meal break requirements applicable to *agricultural* employees were removed only in March 2014. Brady Dec. ¶¶ 9-10; Iannucci Dep. at 68:10-69:18.

3. The Data AutoZone Produced in Discovery Show 150,000 Instances Where Employees Did Not Receive Timely Meal Breaks.

a. AutoZone's Meal Break Recordkeeping System.

At all times material to this case, AutoZone recorded employees' hours of work. Iannucci Dep. at 17:25-18:11; 18:23-19:22; 91:18-93:12. All employees logged on the computer when they started work; logged out for meal breaks; logged back in at the end of the meal breaks; and logged out at the end of the day. AutoZone uses these time records to pay its employees. Deposition of Mark Dessem (Aug. 20, 2014) at 21:9-11; 35:5-11. District managers were supposed to review the weekly schedules of the employees in their stores. Iannucci Dep. at 154:9-155:12; Deposition of Ivon Bailey (June 25, 2014) at 81:18-82:19; 82:24-83:6. Regional HR Manager Iannucci and Regional Manager Goddard reminded AutoZone's district managers to review their employees' time records. Dep. Ex. 24, p. 1, Attachment C to Frank Dec.; Goddard Dep. 52:1-3, 15-19; 52:23-53:8; 53:20-54:11; Deposition of Paul Caldwell (July 30, 2014) at 88:9-15.

As Regional HR Manager, Ms. Iannucci had the ability to look at the time records on a store by store basis. Dep. Ex. 26, Attachment D to Frank Dec.; Iannucci Dep. at 155:13-18; 157:9-17. Ms. Iannucci frequently reviewed time records “looking for particular times that people did things” Iannucci Dep. at 21:14-23:2. She reviewed meal break data. *Id.* at 33:4-34:17. She “more than once” received questions about employee meal breaks. *Id.* at 34:10. She reviewed employee time records showing more than five hours between clocking in and clocking out. *Id.* at 39:6-11. Ms. Iannucci did not take any action when she learned that an employee had worked more than five hours without a meal break. *Id.* at 44:21-45:3.

b. The Meal Break Data Analysis Process

In response to plaintiff’s discovery requests, in April 2014 AutoZone provided time records from December 6, 2009, through August 26, 2012, in the form of weekly “SMS Time Historical Financial Reports” accessible only via an IBM OnDemand32 database. Declaration of Christie J. Fix (Oct. 9, 2014) (“Fix Dec.”) ¶ 2, Dkt. No. 31, & Attachment A thereto (example SMS record). In addition, AutoZone provided time records from August 26, 2012, through approximately April 6, 2013, in the form of weekly zTasc reports in text, .TIF, and .PDF formats. *Id.* ¶ 4 & Attachment B thereto (example zTasc record). Both the SMS and zTasc

reports identify the employee; the store at which the employee worked; the time the employee clocked in for work; the times the employee clocked in and out for meal breaks (if any); and the time the employee clocked out at the end of his or her shift. *Id.* ¶ 6.

Because neither the SMS reports nor the zTasc reports could be imported directly into Microsoft Excel or any other readily available data analysis tool, plaintiff's counsel, Frank Freed Subit & Thomas ("FFST"), retained computer consultant Mark Williams to develop software that would convert AutoZone's time records into a format that could be imported into Excel. *See* Fix Dec. ¶¶ 7-8; Declaration of Mark Williams (Sept. 26, 2014) ("Williams Dec"), Dkt. No. 28, ¶¶ 4-18 (describing the processes used to convert the SMS and zTasc data into Excel). These tools were designed to produce results that were under-inclusive, rather than over-inclusive, in order to reduce the risk that subsequent analysis would over-report potential meal-break violations. Fix Dec. ¶ 11.

In consultation with expert economist Fred DeKay, Ph.D., FFST developed processes to verify the accuracy of the conversion from the original data formats provided by AutoZone to Excel. *See* Declaration of Fred DeKay, Ph.D., (Sep. 10, 2014) ("DeKay Dec."), Dkt. No. 27, ¶¶ 3-15; Fix Dec. ¶¶ 12-15. FFST retained two interns to verify the data according to these processes. *See* Fix Dec. ¶¶ 14-17; Second Declaration

of Marielle Trumbauer (Sep. 5, 2014), Dkt. No. 30, ¶¶ 2-10 & Attachments A, B, & C thereto; Declaration of Thomas Jamlozik (Aug. 22, 2014), Dkt. No. 26, ¶¶ 2-6 & Attachments A & B thereto. Because no errors were found during the data verification process, Dr. DeKay's concluded with a 99 percent level of statistical confidence that the error rate in the Excel records is less than 1%. DeKay Dec. ¶¶ 6-14.

c. The Meal Break Data Analysis Shows Systemic Violations of WAC 296-126-092.

An analysis of the time records provided by AutoZone revealed pervasive violations of WAC 296-126-092. Employees worked more than five hours without receiving a meal break on at least 150,444 occasions between December 6, 2009, and April 6, 2013. Fix Dec. ¶¶ 20-22 & Attachments E-1, E-2 thereto. At least 1,679 employees experienced one or more meal break violations between December 6, 2009, and April 6, 2013. *Id.* ¶¶ 23-24 & Attachment E-3 thereto. Meal-break violations occurred at every store in Washington for which AutoZone provided time records. *Id.* ¶ 25.

A substantial number of these violations were second meal-break violations: days when an employee received a timely first meal break but then worked for more than five hours without receiving a second meal break. Because a visual inspection of the data is required to identify

second meal break violations, plaintiff did not determine a precise breakdown of the number of first meal break violations and second meal break violations among the 150,444 total violations. Fix Dec. ¶ 36.

However, an analysis of three non-consecutive months of SMS data identified approximately 4,704 second meal break violations involving 829 different employees. *Id.* ¶¶ 29-32 & Attachments E-4, E-5 thereto. Second meal break violations occurred during the three months sampled at all but two stores in Washington for which AutoZone provided time records. *Id.* ¶ 33. At a rate of approximately 1,568 second meal break violations per month (that is, 4,704 divided by three months), plaintiff estimates that there were approximately 62,670 second meal break violations and 87,770 first meal break violations during the 40 months for which AutoZone provided records.

B. Procedural Background

On December 12, 2012, Brady filed a class action complaint in King County Superior Court. Declaration of Michael C. Subit (Oct. 9, 2014) (“Subit Dec.”) ¶ 3, Dkt. No. 25, & Attachment thereto (“Original Complaint”). Plaintiff’s Original Complaint alleged AutoZone had implemented an illegal statewide policy of providing a second meal break to its employees only after they had performed 11 hours of work instead of no later than five hours from the conclusion of the employees’ first meal

break. Original Complaint ¶¶ 4.1-4.6. Plaintiff alleged violations of WAC 296-126-092, RCW 49.46, RCW 49.52, and the Washington Consumer Protection Act, RCW 19.86.090. *Id.* ¶¶ 6.3, 6.6, 6.14.

On September 25, 2013, plaintiff filed an Amended Complaint in state court alleging that AutoZone had also failed to provide its employees with meal breaks within five hours of the start of their shifts. Amended Complaint, Attached to Notice of Removal (Dkt. No. 1). AutoZone removed this case to federal court on October 15, 2013, on the basis of the Class Action Fairness Act, 28 U.S.C. § 1333(d). AutoZone claimed the expansion of plaintiff's allegations beyond the denial of timely second meal breaks pushed the damages in this action beyond the \$5 million threshold for federal jurisdiction. Notice of Removal at pp. 4-6.

On October 10, 2014, plaintiff filed a motion to certify a statewide class action comprising the following two subclasses: (1) all former and current hourly-paid AutoZone store employees who worked more than five hours in a day but did not receive a meal break within five hours of the start of their shifts, for the period of September 25, 2010, to the date of the Class Notice; and (2) all former and current hourly-paid AutoZone store employees who worked more than five hours after the conclusion of a meal break but did not receive a second meal break within five hours after the conclusion of the first meal break, for the period of December 12,

2009, to the date of the Class Notice, Dkt. No. 23. The potential Class included at least 1,680 present and former AutoZone employees.

AutoZone filed its opposition to class certification on November 7, 2014. Dkt. No. 45. Brady filed his reply on November 21, 2014. Dkt. No. 49. On July 16, 2015, Brady submitted *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015), as supplemental authority supporting class certification. Dkt. No. 61.

On September 30, 2015, the Hon. Richard Jones denied Brady's motion for class certification. Class Cert. Ord. (Sep. 30, 2015), Dkt. No. 62. The district court correctly recognized that Brady's wage claims under RCW 49.46 and RCW 49.52 depended on his ability to prove a violation of the Washington meal break regulation. *Id.* at 4. The court considered only whether plaintiff had satisfied the predominance and superiority requirements of a Rule 23(b)(3) class action. *Id.* at 3-4. The district court found that plaintiff could not meet those requirements in light of the court's interpretation of substantive Washington meal break law.

The district court rejected Brady's contention that *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), and *Demetrio* impose upon employers an affirmative duty to ensure their employees take their 30-minute meal breaks at the times set by Washington law. The district court instead held that Washington does not "require employers to

police employees who fail to take a break; rather, employers need only make meal breaks available to employees who choose to take those breaks.” Class Cert. Ord. at 6. In the district court’s view, Washington law limits the “employer’s ‘affirmative obligation’ . . . to ensur[ing] that this opportunity is meaningful and free from coercion or any other impediment.” *Id.* at 10.

Given these legal determinations, the district court held that plaintiff could not satisfy the predominance requirement of Fed. R. Civ. P. 23(b)(3):

Because AutoZone was required only to ensure that its employees received a meaningful opportunity to take a meal break, Brady and the putative classes can prevail only if they demonstrate that they were deprived of such an opportunity. Any such showing will require substantial individualized fact finding because the court will need to inquire into the reasons for any missed meal breaks.

Class Cert. Ord. at 10. The district court held that the AutoZone time card records showing 150,000 instances of untimely meal breaks were not dispositive of violations because they cannot show why the employee did not receive a timely meal break. *Id.* at 11. “[T]he time card data alone does not establish that AutoZone failed to provide its employees with a meaningful opportunity to take meal breaks, nor does it establish that AutoZone coerced or incentivized missing breaks.” *Id.* at 12.

For the same reason, the court found that a class action was not superior to individual suits for resolving this dispute. The court reasoned that a “class action would be unmanageable given the predominance of the individual issues necessary to establish AutoZone’s liability.” *Id.* at 15.

On October 14, 2015, pursuant to Fed. R. Civ. P. 23(f), Brady filed with the United States Court of Appeals for the Ninth Circuit a Petition for Permission to Appeal the Denial of the Motion for Class Certification. AutoZone filed its opposition on October 26, 2015. The Ninth Circuit denied Brady’s petition on January 25, 2016. Dkt. No. 67.

On February 18, 2016, Brady filed in the district court a Motion to Certify Two Questions of State Law to the Washington Supreme Court Pursuant to RCW 2.60. Dkt. No. 68. He proposed certification to this Court of the following questions: (1) whether a plaintiff must show *why* he did not receive a timely meal break in order to prove a violation of WAC 296-126-092; and (2) to what extent are monetary damages available if an employer unlawfully fails to provide a meal break *when* WAC 296-126-092 requires. *Id.* at 1-2. AutoZone filed its opposition to certification on February 29, 2016. Dkt. No. 69. Brady filed his reply in support of certification on March 4, 2016. Dkt. No. 71.

On September 6, 2016, the district court granted in part Brady’s motion to certify and denied it in part. Dkt. No. 73. The district court

granted certification with respect to the first requested issue and certified two questions:

1. Is an employer strictly liable under WAC 296-126-092?
2. If an employer is not strictly liable under RCW 296-126-092, does the employee carry the burden to prove that his employer did not permit the employee an opportunity to take a meaningful break as required by WAC 292-126-092?

Certification Ord. at 5. The district court denied certification of the question regarding the availability of monetary damages for the denial of meal breaks when WAC 296-126-092 requires as “premature.” The district court was not “convinced it requires the assistance of the state supreme court to dispose of the issue.” *Id.* at 4.

III. ARGUMENT

Certified questions are matters of law reviewed *de novo* and in light of the record certified by the federal court. *Saucedo v. John Hancock Life & Health Ins. Co.*, 185 Wn.2d 171, 178, 369 P.3d 150 (2016). This Court may reformulate the questions. *Travelers Cas. & Sur. Co. v. Wash. Trust Bank*, --- Wn.2d ---, --- P.3d ---, Slip Op. at 7 (Nov. 3, 2016).

A. Overview of Washington Meal & Rest Break Law

Washington State has a “long and proud history of being a pioneer in the protection of employee rights.” *Int’l Ass’n of Fire Fighters v. City of*

Everett, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (quoting *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)). The legislature has determined that “[t]he welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health. The state of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.” RCW 49.12.010. “This statutory language evidences a strong legislative intent that employees be afforded healthy working conditions” *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002). “Conditions of labor” includes meal and rest periods. RCW 49.12.005(5). RCW 49.12 is a remedial statute designed to ensure the health of Washington workers. *Wingert*, 146 Wn.2d at 849-50.

The Washington Department of Labor and Industries (“L&I”) is charged with administering and enforcing all laws relating to conditions of labor. *Id.* at 847. (citing RCW 43.22.270(4)). L&I “enacted [the] regulations in chapter 296-126 WAC to protect employee health, safety and welfare as authorized under RCW 49.12.” *Pellino*, 164 Wn. App. at 685; *see also Wingert*, 146 Wn.2d at 847. The regulations in chapter 296-126 “contain labor standards for the protection of employees’ safety.” *Pellino*, 164 Wn. App. at 685.

WAC 296-126-092 sets forth meal and rest breaks requirements for non-agricultural employees. Subsections (1)-(3) concern meal breaks while subsections (4)-(5) concern rest breaks. Sections (1)-(3) provide:

- (1) Employees shall be allowed a meal period of at least 30 minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.
- (2) No employee shall be required to work more than five consecutive hours without a meal period.
- (3) Employees working three or more hours longer than a normal work day shall be allowed at least one 30-minute meal period prior to or during the overtime period.

WAC 296-126-092(1)-(3). L&I interprets this regulation to require employers to provide employees with a second meal break within five hours from the end of the employees' first meal period. *Meal and Rest Periods for Nonagricultural Workers Age 18 and Over*, Administrative Policy ES.C.6 § 5, at 3 (2005) (attached as an appendix) (hereinafter "ES.C.6"). L&I's interpretations of WAC 296-126-092 are entitled to administrative deference. *Pellino*, 164 Wn. App. at 688, 691.

With regard to rest breaks, WAC 296-126-092 provides:

- (4) Employees shall be allowed a rest period of not less than 10 minutes, on the employer's time, for each 4 hours of working time. Rest periods shall be scheduled

as near as possible to midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

- (5) Where the nature of the work allows employees to take intermitted rest periods equivalent to 10 minutes for each 4 hours worked, scheduled rest periods are not required.

WAC 296-126-092(4)-(5).

Employees have an implied cause of action for violations of WAC 296-126-092 in order to protect them from experiencing “conditions of labor which have a pernicious effect on their health.” *Wingert*, 146 Wn.2d at 850 (quoting RCW 49.12.010); *see also Pellino*, 164 Wn. App. at 690. In *Wingert*, this Court held that employees who do not receive a rest break when WAC 296-126-092 requires may recover unpaid wages and, for willful violations, double damages under RCW 49.52. 146 Wn.2d at 848-49. In *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr. (“WSNA”)*, 175 Wn.2d 822, 830-32, 287 P.3d 516 (2012), this Court held that employees who do not receive a rest break when WAC 296-126-092 requires may obtain lost wages at the overtime rate.

Employees may not waive the rest break requirements of WAC 296-126-092, *WSNA*, 175 Wn.2d at 831 (citing ES.C.6 § 9, at 4), but may waive its meal break requirements. ES.C.6 §8, at 4. Waiver is an affirmative defense to a violation of WAC 296-126-092 upon which the

employer bears the burden of proof. *Pellino*, 164 Wn. App. at 696-97. L&I recommends that employers obtain written agreements in advance from employees who choose to waive their meal periods. ES.C.6 § 8, at 4.

B. WAC 296-126-092 Requires Washington Employers To Provide Their Employees with the Breaks The Regulation Requires *When* The Regulation Requires.

1. *Pellino* Holds Employers Have an Affirmative Duty to Ensure Their Employees Take Meal and Rest Breaks.

In *Pellino v. Brink's Inc.*, the court of appeals directly answered whether an employer must ensure its employees take their meal breaks at the times mandated by WAC 296-126-092. *Pellino* alleged that Brink's had systematically denied employees their meal and rest breaks. The trial court certified the case as a class action under Rule 23(b)(3). On appeal, the employer argued that the class should not have been certified because under WAC 296-126-092 the employees "had the discretion to decide when to take breaks." 164 Wn. App. at 683. Brink's urged the court of appeals to reject the trial court's conclusion that "the employer does have an affirmative obligation to make sure [rest and meal periods] are provided *and taken*." *Id.* at 685 (emphasis supplied). Brink's asserted "an employer does not have a duty to 'provide' meal and rest breaks but is required only to allow employees to take meal and rest breaks by not 'stand[ing] in the way of employees who choose to take breaks.'" *Id.* at

685, 687 (alteration in original). Brink's also contended "that an employer does not have a duty to ensure employees take meal breaks and rest breaks under WAC 296-126-092." *Id.* at 687.

The court of appeals rejected all of the employer's arguments. It held that the superior court "did not err in ruling that Brink's had a duty to provide the [employees] with meal periods and break times." *Id.* at 690. The court of appeals reasoned "the plain language of WAC 296-126-092 imposes a mandatory obligation on the employer." *Id.* at 688. *Pellino* ruled that such an obligation means "employers have a duty to provide meal and rest breaks and to ensure the breaks comply with the requirements of WAC 296-126-092." *Id.* *Pellino* squarely holds that the regulation requires an employer to ensure its employees take the 30-minute meal breaks the law provides. Therefore, under *Pellino*, a violation of WAC 296-126-092 occurs when an employee who has not waived his or her entitlement to a meal period does not receive a meal period when the regulation requires.

The district court accepted AutoZone's argument that *Pellino* does not really mean what it says. The district court dismissed the passages from *Pellino* cited in the foregoing paragraphs as "selective quotes" that "do not support [plaintiff's] interpretation" of the case and Brady's claim that under Washington law an employer has a duty to provide meal and

rest breaks. Class Cert. Ord. at 7. The district court held that the “mandatory obligation” that WAC 292-126-092 imposes means *only* that

employers must ensure that employees are given a meaningful *opportunity* to take breaks (*i.e.*, free from coercion by a supervisor to “eat on the go” and free from a culture that encourages skipping breaks) and to ensure that those breaks comply with the statute (*i.e.*, no active work can be performed and the employees must be able to engage in personal activities and rest during those breaks).

Id. at 8 (emphasis in original). The district court’s reading of *Pellino* is untenable. Brink’s advanced and the court of appeals disapproved the very interpretation of WAC 296-126-092 that the district court adopted in this case. *See* 164 Wn. App. at 687-88.

If the language of the *Pellino* opinion were not clear enough, the court of appeals’ affirmance of the superior court’s decision to certify the case as a class action under Rule 23(b)(3) provides added proof. The district court declined to certify *this* case as a class action under Rule 23(b)(3) because, under its substantive interpretation of WAC 296-126-092, whether AutoZone provided its employees with a meaningful opportunity to take meal breaks is not susceptible to resolution on a class-wide basis. Had *Pellino* interpreted WAC 296-126-092 in the manner the district court claims the court of appeals did, the appellate tribunal would have overturned the superior court’s grant of class of class certification for the same reasons that the district court rejected class certification in this

case. The *Pellino* court, however, affirmed the trial court's Rule 23(b)(3) class certification over Brink's objection that whether the company violated WAC 296-126-092 was not susceptible to a class-wide determination. 164 Wn. App. at 683. Unless the *Pellino* judges did not understand the requirements of Rule 23, its affirmance of class certification further shows they did *not* interpret WAC 296-126-092 to require only that employers must provide a "meaningful opportunity" to take meal and rest breaks.

In sum, contrary to what the district court concluded, *Pellino* holds that employers have an affirmative duty to ensure their employees take the meal and rest breaks WAC 296-126-092 requires.

2. The Text of WAC 296-126-092 and L&I Policy Statements Show the Regulation Requires Employers to Provide Meal and Rest Breaks to Their Employees.

This Court should reaffirm that *Pellino* correctly interpreted Washington law. A court interprets administrative regulations as if they were statutes. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003); *Wash. Cedar & Supply Co. v. State Dep't of Labor & Indus.*, 137 Wn. App. 592, 598, 154 P.3d 287 (2007); *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005). The court's review is de novo but it gives substantial weight to the agency's interpretation of statutes and regulations within its areas of expertise.

Wash. Cedar & Supply Co., 137 Wn. App. at 598; *Roller*, 128 Wn. App. at 926-27. Therefore, a court will uphold an agency's interpretation of its own regulation if it reflects a plausible construction of the statutory language and is not contrary to the legislature's intent and purpose. *Id.*

Courts must liberally interpret L&I regulations "to achieve their purpose of providing safe working conditions for every worker in Washington." *Wash. Cedar & Supply Co.*, 137 Wn. App. at 600 (interpreting WISHA regulation). "A liberal construction requires that the coverage of the [enactment's] provisions be liberally construed in favor of the employee and that its exceptions be narrowly confined." *Int'l Ass'n of Fire Fighters v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002) (internal quotations omitted). A "liberal construction . . . necessitates that all doubts be resolved in favor of coverage." *Dep't of Labor & Indus. of State v. Lyons Enterp., Inc.*, 185 Wn.2d 721, 734, 374 P.3d 1097 (2016). That is because a restrictive reading of a remedial employment standard "would be inconsistent with protecting workers" *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007).

Construction of any statute or regulation begins with the text. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). The court must give the words used their plain and ordinary meaning unless the enactment shows otherwise. *Erection Co. v. Dep't of Labor & Indus.*, 121

Wn.2d 513, 518, 852 P.3d 288 (1993). A court considers the regulation as a whole and any closely related enactments to determine the meaning of the text in dispute. See *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002). The court must give meaning to every word and avoid creating conflicts among different provisions. *ITT Raynoier, Inc., v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993); *Wash. Cedar & Supply Co.*, 137 Wn. App. at 599-600. When the same words are used in different parts of the same regulation, it is presumed that the words are intended to have the same meaning. *Medcalf v. State, Dep't of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997).

WAC 296-126-092 contains these mandates among others:

- (1) *Employees shall be allowed* a meal period of at least 30 minutes which commences no less than two hours nor more than five hours from the beginning of the shift.
- (2) *No employee shall be required* to work more than five consecutive hours without a meal period.
- (3) *Employees shall be allowed* a rest period of not less than 10 minutes on the employer's time, for each 4 hours of working time.
- (4) *No employee shall be required* to work more than three hours without a rest period.

WAC 296-126-092(1), (2), & (4) (emphasis supplied). The issue before the Court in this case is the meaning of the italicized language. Although this case nominally involves only meal breaks, what the Court decides

here will apply equally to rest breaks, as the language of the district court's certified questions makes clear.

"[T]he plain language of WAC 296-126-092 imposes a mandatory obligation on the employer" to ensure that their employees take the meal and rest breaks set forth in the regulation. *Pellino*, 164 Wn. App. at 688-89. WAC 296-126-092 repeatedly uses the word "shall." "It is well-settled that the word 'shall' . . . is presumptively imperative and operates to create a duty. The word 'shall' . . . thus imposes a mandatory requirement unless a contrary legislative intent is apparent." *Erection Co.*, 121 Wn.2d at 518; *see also Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011). None exists here. Where an enactment provides something "shall be allowed" to a person, "it is too plain for argument" that he or she is "entitled" to it. *Noble v. Whitten*, 38 Wash. 262, 265, 80 P. 451 (1905). *See also Harris v. Harris*, 10 Wash. 555, 557, 39 P. 148 (1895) ("shall be allowed" is "mandatory, and cannot be disregarded by the courts").

This Court has already held that an employer violates WAC 296-126-092 "[w]hen the employees are not provided with their mandated rest period." *Wingert*, 146 Wn.2d at 849. In *WSNA*, this Court has held that the employer's duty to "provide" rest breaks is "mandatory." 175 Wn.2d at 832. *See also Demetrio*, 183 Wn.2d at 658 (citing *Pellino* with approval

for the proposition “that the regulation ‘imposes a mandatory obligation on the employer’ to provide a paid rest break”).

In *Alvarez v. IBP, Inc.*, the United States Court of Appeals for the Ninth Circuit ruled that an employer’s duty under WAC 296-126-092 to provide its employees with 30-minute meal periods is “unequivocal.” 339 F.3d 894, 913 (9th Cir. 2003), *aff’d*, 546 U.S. 21 (2005). The Ninth Circuit recognized that regulation “evinces a clear, bright-line standard” regarding meal breaks. *Id.* (citing L&I amicus brief). The appellate court held that WAC 296-126-092 “requires employers to provide meal breaks ‘of at least 30 minutes’” *Id.* The Ninth Circuit determined the regulation constituted a “mandatory thirty-minute duty-free directive.” *Id.* The district court’s interpretation of WAC 296-126-092 as requiring only that employers provide their employees “a meaningful opportunity” for a 30-minute meal break conflicted with binding Ninth Circuit precedent.

Furthermore, “[t]he administrative policy issued by DL&I interpreting WAC 296-126-092 supports [the] conclusion” that employers have a duty to ensure that employees take meal and rest breaks. *Pellino*, 164 Wn. App. at 688-89. L&I’s administrative policies on the regulation repeatedly describe the meal and rest break provisions of WAC 296-126-092 as “requirements.” ES.C.6 § 1, at 1; § 3, at 2; § 5, at 2; § 8, at 4; § 9, at

4; § 15, at 5. ES.C.6 leaves no doubt employers must provide their employees with the meal and rest breaks set forth in WAC 296-126-092.

According to L&I, the only exception to this requirement is when there has been a valid waiver. L&I has determined that “[e]mployees may *not waive their right* to a rest period.” ES.C.6 § 9, at 4 (emphasis supplied). *See also Wingert*, 146 Wn.2d at 850 (WAC 296-126-092 “create[s] a right to regular, periodic rest periods” (quoting *Wingert v. Yellow Freight Sys.*, 104 Wn. App. 583, 591-592, 13 P.3d 677 (2000))). But according to the district court, employees may effectively waive their right to mandatory rest periods simply by not taking advantage of the meaningful break opportunities that their employer provides them. If L&I’s interpretation of WAC 296-126-092 to require that employees *take* their rest breaks is correct, then the district court’s interpretation of the regulation is necessarily incorrect.

L&I construes WAC 296-126-092 to allow employees to waive their right to a meal period under certain circumstances. ES.C.6 § 8, at 4. The Department’s administrative policy provides: “If an employee wishes to waive that meal period, the employer may agree to it An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal break.” *Id.* In other words, L&I interprets the regulation to require an employee to take a meal break unless the

employee and the employer *agree in advance* to a waiver. Nothing in ES.C.6 permits an employee to forgo a meal break other than through the waiver process. But under the district court's interpretation of WAC 296-126-092, an employee may *unilaterally* "waive" his/her right to a meal period simply by declining to take a meal break on any given day. Thus, the district court's interpretation of WAC 296-126-092 to require only that employers provide their employees with a meaningful opportunity to breaks clashes with L&I's own interpretation of its regulation.

A similarly worded school district employee lunch break statute enacted more than ten years before L&I adopted WAC 296-126-092 confirms that the regulation requires employers to provide meal breaks to their employees. L&I filed WAC 296-126-092 in 1976. The Legislature had enacted RCW 28A.405.460 in 1965. The statute provides that "[a]ll certificated employees of school districts *shall be allowed* a reasonable lunch period of not less than thirty continuous minutes per day" (emphasis supplied). The Legislature repeatedly described the statute as "requiring lunch breaks for teachers."³ In 1995 the Legislature rejected an effort to repeal RCW 28A.405.460. The Senate Committee on Education described the existing statute as a "*requirement* that all certificated

³ House Journal, 39th Leg., Reg. Sess., at 148 (Wash. 1965) (Committee on Education and Libraries); *Id.* at 231 (second reading of bill); *Id.* at 596 (final bill passage); Senate Journal, 39th Leg. Reg. Sess., at 573 (Wash. 1965) (Committee on Education); *Id.* at 656 (final bill passage).

employees *be given* at least a 30-minute lunch period.” Senate Bill Report on SB 5169, 54th Leg., Reg. Sess. at 2 (Wash. 1995) (emphasis supplied). RCW 28A.405.460 confirms that when an enactment says that employees “shall be allowed” a meal period the enactment requires that the employees must “be given” their meal break and not just an “opportunity” to take one. The district court erred in its reading of WAC 296-126-092.

C. The District Court Misinterpreted WAC 296-126-092.

1. The District Court’s Decision Contradicts Washington Meal and Rest Break Precedent.

The district court decided that this Court’s precedents and those of the courts of appeals demonstrate that employers do not have an affirmative duty to provide their employees with the meal and rest breaks set forth in WAC 296-126-092. The district court was wrong.

The district court believed that *White v. Salvation Army*, 118 Wn. App. 272, 279, 75 P.3d 990 (2003), supported its conclusion that WAC 296-126-092 does not require employers to ensure that their employees take meal and rest breaks. Class Cert. Ord. at 6-7. Brink’s had made the same argument in *Pellino* and the court of appeals rejected it:

Brink’s reliance on *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003), to argue that an employer has no duty to ensure that employees take meal periods and rest breaks is misplaced. In *White*, we addressed the question of whether requiring employees to be on call during meal and rest breaks violated WAC 296-126-092. We held that while

an employer does not have an obligation to *schedule* meal periods or rest breaks under WAC 296-126-092, the employer must *provide* breaks that comply with the requirement of “relief from work or exertion.”

Pellino, 164 Wn. App. at 691 (emphasis supplied). As *Pellino* recognized, *White* merely rejected the plaintiffs’ contention that an employer violates WAC 296-126-092 where “no specific meal period has been scheduled.” 118 Wn. App. at 279. In *White*, the employer actually provided its employees with timely meal breaks, unlike in *Pellino* and in this case. The district court’s reliance on *White* was misplaced.⁴

The district court saw support for its reasoning in *Demetrio v. Sakuma Bros. Farms, Inc.* Class Cert. Ord. at 8-9. *Demetrio* also came to this Court though certification pursuant to RCW 2.60.030. In *Demetrio* the district court certified two unsettled questions of rest break law relating to agricultural workers who are paid by the piece. 183 Wn.2d at 652. The primary issue in *Demetrio* was the meaning of the phrase “on the employer’s time” in the administrative regulation governing rest breaks for *agricultural* workers, WAC 296-131-020(2). *Id.* at 654. This Court found guidance in how to interpret that phrase through an examination of appellate cases interpreting WAC 296-126-092. *Id.* at 656-57.

⁴ The district court also cited *Freese v. Snohomish Cty.*, 129 Wn. App. 659, 666, 120 P.3d 59 (2005), in support of its ruling. Class Cert. Ord. at 8-9. *Freese* declined to address the scope of the employer’s obligation to provide meal breaks under WAC 296-126-092. 129 Wn. App. at 670-71. It has no relevance here.

Demetrio first reviewed *Wingert*. *Demetrio* recognized that *Wingert* had held WAC 296-126-092 established a bright-line rule prohibiting employees from working three hours uninterrupted without a break, even if the employee received overtime pay for the extra work. *Demetrio*, 183 Wn.2d at 657. In *Wingert* the employees were provided rest breaks, just not at the times mandated by WAC 296-126-092. 146 Wn.2d at 845. *Demetrio* noted that *Wingert* had held that this “was not a substitute for the policy advanced by the regulation.” *Id.* *Wingert* held that the employer had violated WAC 296-126-092 by not providing its employees with rest breaks *when* the regulation requires.

The second case *Demetrio* examined was *WSNA*, where this Court again interpreted the regulation “in a way that protected workers’ rights.” 183 Wn.2d at 657. *WSNA* established the bright-line rule that when an employee works more than eight hours without receiving a rest break, the employee’s remedy is the payment of wage damages at the overtime rate. *Demetrio*, 183 Wn.2d at 657-58. *Demetrio* recognized that the reasoning behind *WSNA* was that “any other interpretation created an economic incentive for employers to encourage employees to skip breaks, a result contrary to the intent of WAC 296-126-092.” *Id.* at 658. In *Demetrio* this Court reiterated that L&I had promulgated the rest and meal break regulation based on “considerations of employee health.” *Id.* at 657

(quoting *WSNA*, 175 Wn.2d at 832). Just like *Wingert*, *WSNA* ruled that the employer had violated WAC 296-126-092 by not providing its employees with rest breaks when the regulation requires.

The third case *Demetrio* considered was *Pellino*. The Court first said this about *Pellino*: “The Court of Appeals has similarly interpreted WAC 296-126-092(4) to protect the effectiveness of rest breaks. Specifically, Division One held that the regulation ‘imposes a *mandatory obligation* on the employer’ to provide a paid rest break ‘on the employer’s time.’” 183 Wn.2d at 658 (emphasis supplied and internal quotation marks omitted). *Demetrio* further agreed with *Pellino* that it “is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time.” *Id.* *Demetrio* recognized that “a workplace culture that encourages employees to skip breaks violates WAC 296-126-092” *Id.*

Demetrio summed up *Wingert*, *WSNA*, and *Pellino* as follows: “More than establishing blanket rules, each of those courts looked to the purpose rest breaks serve in light of how rest breaks were used (or not) by the employees in context.” *Id.* at 658. The district court interpreted this passage to be a holding by this Court that Washington eschews “blanket rules” regarding the rest and meal breaks set forth in WAC 296-126-092

such as the one for which Brady advocates. Class Cert. Order at 8-9. But the far more reasonable reading of *Demetrio* is that this Court interpreted *Wingert*, *WSNA*, and *Pellino* as *not only* establishing blanket rules but also as directing courts to consider the purpose of the Washington break regulation in light of the facts of each case.

Brady disagrees with the district court that *Demetrio* demonstrates that his “interpretation of the law is simply wrong.” Class Cert. Ord. at 9. In fact, *Demetrio* rejected the district court’s interpretation of WAC 296-126-092 by making clear that it is “not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses.” 183 Wn.2d at 658. *Demetrio* reaffirmed *Wingert* and *WSNA*, both of which established blanket rules that an employer violates WAC 296-126-192 when the employer does not provide its employees with rest breaks when the regulation requires. *Demetrio* explicitly endorsed *Pellino*’s holding that WAC 296-126-192 “imposes a mandatory obligation on the employer to provide breaks.” *Id.* (internal quotation omitted). *Demetrio*’s requirement that “employers must affirmatively promote break time,” *id.*, is merely another way of saying that employers have an affirmative duty to ensure that employees take the breaks set forth in the regulation. In short, *Demetrio* demonstrates Brady’s interpretation of WAC 296-126-092 is correct.

The district court cited two unpublished cases that do support its interpretation of WAC 296-126-092: *Brown v. Golden State Foods Corp.*, 186 Wn. App. 1004 (Feb. 24, 2015),⁵ and *Eisenhauer v. Rite Aid Hdqtrs.*, 2006 WL 1375064 (W.D. Wash. 2006). Neither is persuasive.

Brown held 2-1 that an employer fulfills its statutory duty to provide rest and meal breaks “by making the breaks available if [the employee] wished to take advantage of them.” 186 Wn. App. at *8. *Brown* has no precedential value and is not binding on any court. GR 14.1(a). Moreover, this Court should accord *Brown* no “persuasive value.” *See id.* The *Brown* majority did not mention either *Wingert* or *WSNA* and ignored the operative language of *Pellino*. The *Brown* majority also made no mention of L&I Administrative Policy ES.C.6.

Judge Bjorgen dissented on the meal and rest break issue. Consistent with this Court’s opinions in *Wingert* and *WSNA*, he concluded that WAC 296-126-092 imposes “mandatory obligations on the employer.” 186 Wn. App. at *11. Citing *Pellino*, the dissent recognized that “*Wingert* applies with equal force to the requirement that on-duty

⁵ At the time of the district court’s September 2015 class certification decision, GR 14.1 prohibited the citation of all unpublished Washington court of appeals decisions. “The task of a federal court in a diversity action is to approximate state law as closely as possible to make sure that the vindication of the state right is without discrimination because of the federal forum.” *Ticknor v. Choice Hotels Int’l Inc.*, 265 F.3d 931, 939 (9th Cir. 2001). Because a Washington state court could not have considered *Brown* in determining state law, the district court’s significant reliance on *Brown* necessarily resulted in improper “discrimination because of the federal forum.”

employees 'shall be allowed' a total of 30 minutes for a meal period without engaging in work activities." *Id.* (citing *Pellino*, 164 Wn. App. at 690). The dissent sharply criticized the majority's attempt to distinguish *Pellino*. *Id.* at *12. The dissent noted that *Pellino* had given careful consideration to ES.C.6, unlike the majority. The dissent properly read *Pellino* to hold that an employer violates WAC 296-126-092 if it does not provide rest and meal breaks when the regulation requires, regardless of whether the employees "had the opportunity to take breaks . . ." *Id.*

The district court heavily relied on the unpublished *Brown* majority opinion in rejecting Brady's argument that Washington employers have a duty to ensure that their employees take the meal breaks required by law. Class Cert. Ord. at 4-5. To the degree there was any question whether *Pellino* or *Brown* represented the correct interpretation of WAC 296-126-092, this Court's decision in *Demetrio* endorsing *Pellino*'s analysis removed all doubts.

The district court also erred by relying on *Eisenhauer*. Class Cert. Ord. at 6, 9. Citing only *White v. Salvation Army*, *Eisenhauer* does hold that "Washington law does not require that breaks be taken." 2006 WL 1375064 at *3. The *Eisenhauer* court did not have the benefit of *Pellino*, which would not be decided for five years. Furthermore, *Eisenhauer* does not mention ES.C.6 which, as *Pellino* recognized, provides strong support

for the conclusion that WAC 296-126-092 requires that rest and meal breaks must be taken. *Eisenhauer* accepted the employer's argument that an employee may "implicitly waive" his right to a meal period simply "by choosing to not take breaks." *Id.* at *2. L&I's administrative guidance on waiver is to the contrary. *See supra* at 25-27.

While *Eisenhauer* is consistent with the district court's interpretation of WAC 296-126-092 in this case, both decisions contradict governing Washington precedent, L&I's own interpretation of WAC 296-126-092, and Ninth Circuit law.

2. The District Court's Reliance on California Meal Break Law to Interpret WAC 296-126-092 was Misplaced.

The district court erroneously looked to California meal break law in support of its interpretation of WAC 296-126-092 because it determined that the California meal break statute was "substantially similar" to the Washington meal and rest break regulation. Class Cert. Ord. at 9 (citing *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 139 Cal. Rptr. 3d 315, 273 P.3d 513 (2012)). The California meal break statute reads: "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes" Cal. Labor Code § 512(a).⁶

⁶ The district court actually quoted California Industrial Welfare Commission Wage Order 5 instead of Cal. Labor Code § 512(a). See Class Cert. Ord. at 9.

In *Brinker* the company contended that “an employer is obligated only to ‘make available’ meal periods, with no responsibility for whether they are taken.” 53 Cal. 4th at 1034. The employee claimed that the employer must “ensure that work stops for the required thirty minutes.” *Id.* The court held that a California employer has “an obligation to provide a meal period to its employees” but “is not obligated to police meal breaks and ensure no work thereafter is performed.” *Id.* at 1040. The court further held that an employer satisfies its obligation to provide a meal break “if it relieves its employees of all duty, relinquishes control over their activities, and permits them a reasonable opportunity to take an uninterrupted 30-minute break.” *Id.* The court reached its conclusions based on (1) the specific text of the administrative wage orders that the meal break statute had codified and (2) the history of interpretations of those wage orders by the agency that had issued them. *See id.* at 1034-1039.

Brinker agreed with the employee that, as general matter, employers violate an employment standard if they know their employees are engaging in activities prohibited by that standard. *Id.* at 1039. The court ruled, however, that general principle did not apply to the California meal break statute/wage order because their prohibitions applied *only* while employees were on duty. *Id.* at 1039-40. The court reasoned that because employees who *are* provided a meal break are not “on duty”

within the meaning of meal break statute/wage order, employers were not required to police employee meal breaks to ensure the employees perform no work during their breaks. *Id.* at 1038-39. "Indeed the obligation to ensure employees do no work may in some instances be inconsistent with a meal break: to relieve the employee of all duty and relinquish any control over the employee and how he or she spends the time." *Id.* In further support of its conclusion, the court noted the California Industrial Welfare Commission had at one time interpreted its wage orders to require employers to police meal breaks, but later reversed course. *Id.* at 1038.

A careful reading of *Brinker* shows that it involved a different issue than this case. The question in *Brinker* was whether a California employer who *provides* its employees with meal breaks must police those breaks to make sure the employees perform no work *during* their meal periods. The issue in this case is whether a Washington employer has a duty to ensure that its employees stop work and actually *take* a meal break when WAC 296-126-092 requires. AutoZone told its workers *they* had the responsibility for taking their own meal breaks. AutoZone's records show over 150,000 instances in three-plus years where employees did not receive timely meal breaks. This case has *nothing* to do with whether AutoZone had an obligation to police the off-duty conduct of employees who *received* their meal breaks to make sure they performed no work

during those breaks. *Cf.* Class. Cert. Ord. at 10 (incorrectly asserting that “Brady reads *Pellino* to impose a strict requirement to police the taking of breaks.”) To the degree *Brinker* is relevant, the case supports Brady because it recognizes that employers have an affirmative obligation to relieve employees from duty and provide them with timely meal breaks.

The district court also looked to *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 585 (C.D. Cal. 2008), a case decided four years before *Brinker*, in support of its construction of WAC 296-126-092. Class Cert. Ord. at 9-10. That *Brown* case holds that California employers need only “make breaks available” and have no duty to ensure that their employees take such breaks. 249 F.R.D. at 585-86. The district court here endorsed the reasoning of the California *Brown* judge that:

Requiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous, or who, as with Plaintiffs, do not appear to remain in contact with the employer during the day. It would also create perverse incentives, encouraging employees to violate company meal break policy to receive extra compensation under California wage and hour laws.

Id. at 585. Putting aside whether *Brown* comports with the California Supreme Court’s later decision in *Brinker*, *Brown* directly contradicts Washington law. *Demetrio* makes clear it is *not enough* that for an employer to make breaks available to its employees. 183 Wn.2d at 658.

This Court should soundly reject the district court's assertion that requiring employers to enforce the mandates of WAC 296-126-092 would create an "undue burden" or "perverse incentives." To the degree any employee might have an incentive to violate a company policy requiring that workers take timely meal breaks, the employee would have at least as strong an incentive to violate a company policy requiring employees to take timely rest breaks. Thus, the district court's reasoning would entirely eliminate employer enforcement of rest breaks. Where, as here, an employer maintains electronic records showing precisely when employees clock-out for breaks, there is no undue burden in figuring out which employees are not complying with company break policies and WAC 296-126-092. An employer can impose disciplinary sanctions up to and including termination against employees who refuse to take the rest and meal breaks required by law and/or company policy. AutoZone's enforcement of its own break policies should not be an undue burden.

Wage and hour law rejects the notion that either "perverse incentives" or the cost of enforcement should vitiate an employer's obligation to ensure that its employees fully enjoy their workplace rights. For example, the requirement that covered employees who work more than 40 hours per week must receive overtime pay could theoretically create "perverse incentives." The mandate might conceivably incentivize

some employees to violate company policies against working more than 40 hours per week in order to obtain more pay. The law does not address this situation by absolving employers of their liability for overtime pay, which would be solution under the district court's reasoning.

The law instead requires employers to make *and enforce* workplace rules consistent with their legal obligations:

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. § 785.13. In particular, the United States Department of Labor has issued administrative guidance requiring employers to compensate an employee who failed to take a meal break required by state law, even where the employee's failure to do so violated the employer's policies. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2008-7NA, at *1-2 (May 15, 2008). The U.S. Department of Labor's position is persuasive and consistent with L&I's interpretation of WAC 296-126-092.

The district court erred by relying on cases from California to interpret WAC 296-126-092. Our "long and proud history of being a pioneer in the protection of employee rights," *Int'l Ass'n of Fire Fighters v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002), should dispel

any notion that California sets the ceiling for worker protection. Consistent with *Wingert*, *WSNA*, *Demetrio*, and *Pellino*, this Court should hold that employers have a duty to provide their employees with the rest and meal breaks set forth in WAC 296-126-092 and to ensure their employees take those breaks.

D. Adoption of the District Court's Analysis Would Eviscerate the Ability of Washington Employees to Enforce Their Rights under WAC 296-126-092 through Class Actions.

Under the district court's analysis of Washington meal and rest break law, employees who bring claims under WAC 296-126-092 must demonstrate the reason *why* they did not receive timely breaks in order to show liability. Class Cert. Ord. at 10-11. "Any such showing will require substantial individualized fact-finding because the court will need to inquire into the reasons for any missed breaks." *Id.* at 10. The district court dismissed the significance of AutoZone's own records showing more than 150,000 missed meal breaks because the company's records (1) might not accurately reflect when meal breaks were taken in all cases;⁷ and (2) do not show why the employees did not receive timely meal breaks. *Id.* at 11. In its order certifying questions to this Court, the district court

⁷ The employer made this same argument in *Pellino* and the court of appeals rejected it. The court correctly reasoned that in a meal and rest break case "[d]amages need not be proven with mathematical certainty, but must be supported by evidence that provides a reasonable basis for estimating the loss and does not amount to speculation or conjecture." 164 Wn. App. at 400.

acknowledged that it had denied class certification because of the “unique fact scenarios associated with each potential violation of the meal break [regulation].” Certification Ord. at 2.

Acceptance of the district court’s construction of WAC 296-126-092 would dramatically impair the ability of Washington employees to redress systemic denials of meal and rest breaks through class actions. This Court has repeatedly recognized the “strong state policy favoring aggregation of small claims [into class actions] for purposes of efficiency, deterrence, and access to justice.” *E.g.*, *Anfinson v. FedEx Ground Package Sys. Inc.*, 174 Wn.2d 851, 875, 281 P.3d 289 (2012) (quoting *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007)). The purpose of a class action “is to provide relief for large groups of people with the same claim, particularly when each individual claim may be too small to pursue.” *Moore v. Health Care Auth.*, 181 Wn.2d 299, 309, 332 P.3d 461 (2014). “It is not unusual, and probably more likely in many types of cases, that aggregate evidence of the defendant’s liability is more accurate and precise than would be so with individual proofs of loss.” *Id.* at 308 (quoting 3 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 10.2, at 479 (4th Ed. 2002)). This Court has not hesitated to reject interpretations of the Washington law that “would hinder our state policy underlying class action lawsuits.” *Id.* at 309.

Cases such as this one that allege company-wide meal and rest breaks violations epitomize the types of cases that *should be* class actions. Cases where the employer's own data show hundreds of thousands of instances state-wide where employees did not receive meal (or rest) breaks when WAC 296-126-092 requires *should be* class actions. But under the district court's interpretation of the regulation, many employees will have to prove their meal and rest break claims on an individual basis to establish employer liability for violations of the regulation. Given the relatively small amounts each employee can recover in most break cases, if such claims cannot be pursued in a class action, they won't be pursued at all. Therefore, pervasive employer violations of Washington health and safety regulations will go unremedied.

Even the existence a company-wide meal break policy that fails to comply with WAC 296-126-092 does not support a class action under the district court's reading of the regulation. From October 2008 to March 2014, AutoZone had a "facially invalid" meal break policy that required employees to work 11 consecutive hours before receiving a second meal break. Class Cert. Ord. at 14. Agricultural work must work 11 hours before receiving a second meal break. WAC 296-131-020(1). Auto-parts store workers are entitled to a second meal break if they work five additional hours after their first meal break. ES.C.6 § 5, at 3.

The district court held that despite this facially invalid meal break policy, this case could not be certified as a class action because “plaintiff has produced no evidence to show this policy resulted in *a uniform practice* that violated the WAC meal period provision.” Class Cert. Ord. at 14 (emphasis supplied). Under the district court’s view of WAC 296-126-092, the fact that “store managers had discretion to schedule meal breaks” trumped AutoZone’s own employee time card records showing that, while AutoZone’s facially invalid second meal break policy was in effect, there were more than 62,000 occasions when employees did not receive a second meal break when the law requires.

The district court’s interpretation of WAC 296-126-092 represents a radical re-write of Washington rest and meal break law. There is nothing in *Wingert*, *WSNA*, or *Demetrio* that suggests that employees must prove *why* they did not receive the breaks to which they are entitled under WAC 296-126-092 into order to establish their employer’s violation of that regulation.⁸ *Wingert* and *WSNA* hold plain and simple that an employer violates WAC 296-126-092 if it fails to provide its employees the breaks the regulation requires *when* the regulation requires. In answer to the district court’s certified questions, this Court should make clear that, absent a valid waiver, when an employee does not receive a first meal

⁸ The reason for the missed breaks might be relevant to whether the employer willfully withheld employee wages in violation of RCW 49.52. See *WSNA*, 175 Wn.2d at 834-835.

break within five hours of the start of his/her shift, and/or does not receive a second meal break within five hours of the first meal break, the employer has violated WAC 296-126-092.

IV. ORAL ARGUMENT

Brady requests oral argument pursuant RCW 2.60.030(5).

V. CONCLUSION

This Court should answer both certified questions in the negative. While WAC 296-126-092 is not a strict liability regulation, employees do not have to prove their employer deprived them of an opportunity to take a meaningful break in order to prove a violation. Consistent with precedent this Court should hold that an employer has duty to provide its employees with the meal breaks set forth in WAC 296-126-092 *when* the regulation provides a duty that includes ensuring that its employees receive those breaks in accordance with the regulation.

RESPECTFULLY SUBMITTED this 9th day of November 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2016, I emailed a copy of
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I hereby declare under the penalty of perjury of the laws of the
State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 9th day of November 2016.



Janet Francisco

APPENDIX



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE: MEAL AND REST PERIODS
FOR NONAGRICULTURAL WORKERS
AGE 18 AND OVER

NUMBER: ES.C.6

REPLACES: ES-026

CHAPTER: RCW 49.12
WAC 296-126-092

ISSUED: 1/2/2002
REVISED: 6/24/2005

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

1. Are meal and rest periods conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act?

Yes, the department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act (IWA) are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: **Minor employees** (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and WAC 296-125-0287. The regulations for agricultural employees are found in WAC 296-131-020.

2. Are both private and public employees covered by these meal and rest period regulations?

Yes. The IWA and related rules establish a minimum standard for working conditions for all covered employees working for both public sector and private sector businesses in the state, including non-profit organizations that employ workers.

3. Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?

Yes. Effective May 20, 2003, the legislature amended RCW 49.12.005 to include "the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation". Thus it brought public employees under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. See *Administrative Policy ES.C.1 Industrial Welfare Act and ES.A.6 Collective Bargaining Agreements*.

Exceptions--The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

If public employers do not meet one of the above exceptions, then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

4. May a collective bargaining agreement have different provisions for meal and rest periods for employees in construction trades?

Yes. Effective May 20, 2003, RCW 49.12.187 was amended to include a provision that the rules regarding appropriate meal and rest periods (WAC 296-126-092) for employees in the construction trades, i.e., laborers, carpenters, sheet metal, ironworkers, etc., may be superseded by a CBA negotiated under the National Labor Relations Act. The terms of the CBA covering such employees must specifically require rest and meal periods and set forth the conditions for the rest and meal periods. However, the conditions for meal and rest periods can vary from the requirements of WAC 296-126-092.

Construction trades may include, but are not necessarily limited to, employees working in construction, alteration, or repair of any type of privately, commercially, or publicly-owned building, road, or parking lot, or erecting playground or school yard equipment, or other related industries where the employees are in a recognized construction trade covered by a CBA.

This exception does not apply to employees of construction companies without a CBA.

5. When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).

- The 30-minute meal period must be provided between the second and fifth working hour.
- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.
- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).
- The second 30-minute meal period must be given within five hours from the end of the first meal period and for each five hours worked thereafter.

6. When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required; however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

7. When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing

the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.

8. May an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean that an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

9. What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

10. What is a rest period?

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

11. When must rest periods be scheduled?

The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

12. What are intermittent rest periods?

Employees need not be given a full 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work. Employees must be permitted to start intermittent rest breaks not later than the end of the third hour of their shift.

An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

13. How do rest periods apply when employees are required to remain on call during their rest breaks?

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

14. May an employer obtain a variance from required meal and rest periods?

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. See ES.C.9, Variances.

15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?

No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA. See *Administrative Policy* ES.A.6 and/or ES.C.1.

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Please file the attached Opening Brief of Appellant Michael Brady.

Thank you for your assistance.

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