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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

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MICHAEL BRADY,

Plaintiff-Appellant,

v.

AUTOZONE STORES, INC., and AUTOZONERS, LLC

Defendants-Appellees.

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AUTOZONE STORES, INC.'S ANSWER TO AMICUS BRIEF  
FILED BY THE DEPARTMENT OF LABOR & INDUSTRIES

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## I. INTRODUCTION

The amicus brief of the Department of Labor & Industries (“DLI”) reflects a fundamental misunderstanding of this case and Judge Jones’s decision. Judge Jones did not rule on the merits of Brady’s claims and certainly did not rule that all missed meal breaks are implied waivers. Instead, Judge Jones held that Brady failed to provide any evidence of systemic meal period violations and, thus, denied Brady’s motion for class certification.<sup>1</sup> In his decision, Judge Jones articulated a clear standard for assessing meal period claims and violations that is consistent with the language of WAC 296-126-092, relevant court decisions, and DLI’s guidance, and fully protects the meal period rights of employees.

Ironically, DLI supports AutoZone’s position (and Judge Jones’s interpretation) on the majority of issues. And, on the few issues where DLI disagrees with AutoZone, DLI’s position is contradictory and unsupported by past interpretations and relevant court decisions. DLI’s position is also one-dimensional in that it focuses on low-wage workers and ignores both the many other types of workers subject to meal period requirements and other employee rights, like Washington’s focus on workplace flexibility.

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<sup>1</sup> The lack of systemic evidence in this case is in stark contrast to cases like *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 50 P.3d 256 (2002) (CBA dictated non-compliant rest break times), *Wash. St. Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012) (“WSNA”) (meal periods admittedly missed due to work demands), *Pellino v. Brink’s Inc.*, 164 Wn.App. 668, 267 P.3d 383 (2011) (need for constant vigilance prevented any meaningful breaks), and *Demetrio v. Sakuma Bros. Farms*, 183 Wn.2d 649, 355 P.3d 258 (2016) (piece rate created financial incentive to skip breaks).

Ultimately, in relation to the certified questions, DLI admits that there is no strict liability and that employees have an initial burden to prove meal period violations. However, DLI may disagree with Judge Jones's standard for violations. If so, DLI is mistaken.

## **II. ARGUMENT**

### **A. DLI and AutoZone agree that rest breaks are not at issue here**

Despite prior statements to the contrary, Brady (at 23-24) claims that “what the Court decides here will apply equally to rest breaks.” Not true. In contrast, DLI properly concluded (at 2 n.2) and AutoZone agrees that “rest break violations are not at issue” in this case. As DLI explains (at 6-7), rest and meal periods are fundamentally different:

The Department has long held the view that the employee under certain circumstances may waive a meal break, but may not waive a rest break. Policy ES.C.6 at 4; *Pellino*, 164 Wn.App. at 697. This distinction is shown in the rule language...that rest breaks “shall be scheduled as near as possible to the midpoint of the work period.” WAC 296-126-092(4). This “shall be scheduled” language makes it so the employee cannot waive a rest break. *See Demetrio*, 183 Wn.2d at 658. Additionally, meal breaks may be unpaid, while rest breaks are paid. From that, it makes sense for the Department to allow waiver of the meal break for an employee to forego unpaid, non-working time.

### **B. DLI and AutoZone agree on the basic meal period rules**

The DLI Brief confirms basic meal period rules that are also set forth in DLI Administrative Policy ES.C.6, including:

- (at 7-8) Employers must provide employees with an uninterrupted meal period of at least 30 minutes. Undisputed testimony shows AutoZone generally scheduled one-hour meal breaks, Dkt 46 at 6

(¶13), and there is no allegation that meal breaks were interrupted.

- (at 7) WAC 296-126-092(1) requires “that the employer provide the meal break between the second and fifth working hour.” It is undisputed that AutoZone policy provides meal breaks between the second and fifth hour and no employee is asked or required to work over five hours without a break. Dkt 46 at 6 (¶12), 13 (¶23).
- (at 7) “[N]othing in WAC 296-126-092(1) requires that the employer schedule a meal break for a specific time.” Nevertheless, stores scheduled compliant meal breaks. Dkt 46 at 7-8 (¶14-17).
- (at 7, 10) “Employees may choose to waive the meal period requirements” and “can waive the timing” of a meal period. The record includes over 500 written waivers. Dkt 46-5 to Dkt 46-18.
- (at 14, 19) Waivers do not have to be in writing; employers “may show waiver through credible testimony.” The record includes extensive testimony about verbal waivers. Dkt 46 at 11-13 (¶22).
- (at 7) “[A]lthough the employees can waive the timing of a meal break, he or she cannot waive the right to the time worked during the skipped break: if he or she does not take a lunch, then the employee must leave early (or other permutation).” It is undisputed that AutoZone tracked and paid for all time worked, including any meal periods employees chose to skip. Dkt 46 at 15 (¶26).
- (at 13) “Although flexibility is a side-benefit of the Department’s policy because it allows employees to work through lunch so that they may leave early (or other permutations), it still does not change that the default is to have a meal break.” This is AutoZone policy and practice: the default is a timely meal period unless an employee wants something different. Dkt 46 at 7-8 (¶14-17).

When crafting its response to Judge Jones’s questions, this Court should assure that these long-recognized rules are clearly maintained.

**C. DLI and AutoZone agree there is no strict liability**

The “strict liability” concept discussed by Judge Jones is Brady’s proposed use of time records as the sole evidence to prove his case on a class basis: “[t]he policing function proposed by Brady is very specific—if

an employee punches out five hours and one minute after the start of his shift, Brady believes this court should hold the employer strictly liable for that meal break ‘violation.’” Dkt 62 at 5. DLI agrees (at 3) that: “WAC 296-126-092 [d]oes [n]ot [i]mpose a [s]trict [l]iability [r]ule;” the answer to “Is an employer automatically liable if a meal break is missed?” is “no;” and the answer to the first certified question should be “no.”<sup>2</sup>

**D. Judge Jones identified the appropriate liability standard for violations of WAC 296-126-092’s meal period requirements**

Judge Jones reached the same conclusion on strict liability as DLI: “Brady’s interpretation of the law is simply wrong: Washington has not adopted a strict liability approach to the taking of meal breaks.” Dkt 62 at 9. He then articulated the relevant meal period liability standard:

[A]n employer’s obligation is to relieve its employees of all duty, relinquish control over their activities and permit them a reasonable opportunity to take an uninterrupted break. The employer’s ‘affirmative obligation’ is to ensure that this opportunity is meaningful and free from coercion or other impediment.

*Id.* This standard was derived from the regulatory language and relevant case law (*e.g.*, *Demetrio, Pellino*), and is consistent with the California Supreme Court’s interpretation of a similar rule.<sup>3</sup> Dkt 62 at 9-10 (citing

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<sup>2</sup> Indeed, Brady and amici agree the answer to the first certified question should be “no.”

<sup>3</sup> In *Brinker*, the Court held that an employer’s “obligation to provide a meal period” is satisfied “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, and does not impede or discourage them from doing so.” *Brinker*, 53 Cal.4th at 1040. The Court also held that, under “to provide” language, “the employer is not obligated to police meal breaks and ensure no work thereafter is performed.” *Id.*

*Brinker Restaurant Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1034-41 (2012)).

At times, DLI appears to argue for a different liability standard.<sup>4</sup>

But DLI's discussion ignores the district court's findings and the evidence in the record. Such generalities do not assist this Court in answering the certified questions in this case. Indeed, this Court has repeatedly stated that it "consider[s] the legal issues not in the abstract but based on the certified record provided by the federal court." *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). Fact finding is "properly before the trial court." *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 222, 193 P.3d 128 (2008). Thus, the certified questions must be answered in the context of Judge Jones's findings of fact:

- AutoZone's policies required meal periods between the second and fifth hour and complied with the regulation. Dkt 62 at 13-14.
- Brady "produced no evidence to show that [any written] policy resulted in a uniform practice that violated the WAC meal period provision." *Id.* at 14.
- Brady presented no "evidence of an unwritten policy or practice of coercion by AutoZone supervisors encouraging or incentivizing employees to skip breaks." *Id.* at 11.
- "Brady did not offer punch records that were consistent with his theory of meal break violations" and offered nothing "more than conjecture or conclusion."<sup>5</sup> Dkt 73 at 4.

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<sup>4</sup> DLI states different standards at different points in its Brief. For example, it references an obligation "to provide...meaningful break time" (at 3), "to provide a meal break" (at 4), "to require employees to take timely meal breaks" (at 8), for employees to "receive a timely meal break" (at 19), and to "affirmatively promote meal breaks" (at 20).

<sup>5</sup> Judge Jones found that (1) the time records did not show actual violations, but only showed when "an employee clocked out one or two minutes after the five hour mark," and (2) evidence demonstrated "the myriad possible reasons" why a time punch might

The certified record shows that Brady offered only the flawed time punch records and his own testimony as evidence of violations, and he did not testify that he was told to take meal periods late. Dkt 46-19 at 54-57, 64-66, 81-82. Instead, he testified that his manager reminded employees of meal breaks and took over helping customers if necessary to get them to lunch on time. *Id.* at 3-4, 15-16. AutoZone introduced 54 declarations of hourly employees and managers who testified employees were provided timely meal breaks and AutoZone’s culture encouraged taking breaks.<sup>6</sup>

Judge Jones identified a liability standard for meal break violations that allowed him to address these undisputed facts. As AutoZone’s Answering Brief explains, this Court should confirm that standard.

**E. Employees must initially prove a WAC 296-126-092 violation**

Judge Jones’s second question asks whether employees have the initial burden to prove violations. DLI asserts two conflicting positions in its brief. Early in the brief, DLI argues (at 3) that the regulation “places the obligation on the employer to...prove that it provided...meaningful meal

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occur after the five-hour mark, including “employees forget to punch in or out or cannot do so because the system is down;” managers allow flexible schedules; paid meal periods; and employees waive meal breaks “in writing and verbally.” Dkt 62 at 11-12.

<sup>6</sup> This is not a case involving agricultural workers working in the hot sun (*Demetrio*), or chicken processing workers who are on a production line and must remove equipment in order to eat a meal (*Alvarez*). These are relaxed retail stores where undisputed testimony, including Brady’s testimony, shows that employees took frequent breaks to rest, smoke, and eat on the clock, in addition to hour-long unpaid meal breaks. Brady testified that in his own store, several employees took half-hour meal breaks on the clock, in addition to taking full unpaid meal breaks. Indeed, he filed numerous complaints against his co-workers for taking too many breaks on the clock. Dkt 46-19 at 41-47, 105-109.

break time.” Later in its brief, however, DLI contradicts itself and concedes (at 19) that employees must present a “prima facie case” before the burden shifts to employers to prove the affirmative defense of waiver.<sup>7</sup>

**1. WAC 296-126-092 does not impose the burden on employers to prove they did not violate the regulation**

DLI’s suggestion that employers bear the burden to prove that they did not violate WAC 296-126-092 would be a substantial change to existing law in Washington. This Court has held that to establish liability a plaintiff must prove a violation of WAC 296-126-092. *Wingert*, 146 Wn.2d at 850; *see also Bennett v. Hardy*, 113 Wn.2d 912, 923, 784 P.2d 1258 (1990). Washington courts have uniformly imposed the burden of proving a violation of WAC 296-126-092 on employees, and no court has imposed the burden on defendants to disprove a violation.<sup>8</sup>

A switch in the burden of proof would violate the basic legal tenet that a “plaintiff has the burden of pleading and proving every essential fact and element of his or her cause of action.”<sup>9</sup> 29 Am.Jur.2d, Evidence § 174 (2d ed. 2017); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d

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<sup>7</sup> DLI asserts (at 19) that “an employee must only provide evidence that he or she did not receive a timely meal break,” but offers no guidance as to what this evidence would be.

<sup>8</sup> *E.g.*, *Iverson v. Snohomish Cy.*, 117 Wn.App. 618, 622-23, 72 P.3d 772 (2003); *White v. Salvation Army*, 118 Wn.App. 272, 280-81, 75 P.3d 990 (2003), *rev. den.* 151 Wn.2d 1028 (2004); *Frese v. Snohomish Cy.*, 129 Wn.App. 659, 670, 120 P.3d 89 (2005).

<sup>9</sup> *See also* 29 Am.Jur.2d, Evidence § 174 (“The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who, therefore, naturally should be expected to bear the risk of failure of proof or persuasion.”) (*citing Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005)).

127, 135, 769 P.2d 298 (1989) (“general burden of proof rules requir[e] the plaintiff to prove all elements of the cause of action”).

A determination of the burden of proof under WAC 296-126-092 starts with the regulatory language. *Schaffer*, 546 U.S. at 56 (“the touchstone of our [burden] inquiry is, of course, the statute”). If, as in this case, “[t]he plain text of [the regulation] is silent on the allocation of the burden of persuasion,” a court should “begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” *Id.*<sup>10</sup> “Thus, [courts] have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims.” *Id.* at 57. Assigning the burden to a defendant is “extremely rare:”

Decisions that place the entire burden of persuasion on the opposing party at the outset of a proceeding...are extremely rare. Absent some reason to believe that [the legislature] intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

*Id.* at 57-58. To warrant reversing the usual burden of proof, DLI must point to substantial evidence in the regulation justifying such a change.

Here, DLI points to no language in WAC 296-126-092 that would shift the burden of proof. Instead, it recycles Brady’s erroneous arguments

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<sup>10</sup> *Citing* 2 Strong, McCormick on Evidence § 337 (5th ed. 1999) (“The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion”); C. Mueller & L. Kirkpatrick, Evidence § 3.1 (3d ed. 2003) (“Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims”).

regarding the obligation of employers to “ensure” meal breaks are taken.<sup>11</sup> For example, DLI states that AutoZone “is simply wrong in asserting that WAC 296-126-092 does not mandate employers to require employees to take timely meal breaks absent an express waiver.”<sup>12</sup> DLI supports this assertion with Brady’s arguments about *Pellino* and *Demetrio*, already rejected by Judge Jones and dealt with in detail in AutoZone’s Answering Brief (at 32-35). DLI makes a number of additional conclusory statements, supported only by the same citations to *Pellino* and *Demetrio*. For example, it states (at 15) that “responsibility for ensuring that meal breaks occur ultimately rests with the employer.” It offers no explanation for how a regulation that mandates that employers “allow” a meal break means that they must “ensure” that it is taken. Put simply, WAC 296-126-092 does not state that employers “must ensure” that meal periods are taken. If DLI

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<sup>11</sup> DLI also mischaracterizes AutoZone’s arguments. It claims (at 8) that AutoZone argues “that the rule requires only that an employer not actively interfere with an employee’s ability to take a meal break.” Not true. DLI also claims (at 9) that AutoZone argues that the rule is “‘permissive’ as to employers” and a “voluntary rule.” Again, not true. Instead, AutoZone recognizes (at 24) there is a mandatory duty on employers to allow meal periods, but this mandate does not limit the freedom of employees. AutoZone otherwise merely defends (at 49-50) Judge Jones’s liability standard, which is far from simply “not actively interfering,” and urges this Court to adopt it.

<sup>12</sup> DLI notes (at 8 n.5) that it has substituted the word “require” for “ensure” or “force.” But “require” means the same thing and it is no more supportable from the plain language of the regulation than “ensure” or “force.” The use of the word “require” provides an opportunity for a comparison between how “require” could have been used in the regulation and how it is used. The regulation states that “employees shall be allowed” and that “no employee shall be required.” The regulation uses “required” when it intends that meaning, that employees not be required to do something. If the regulation had intended that employers require meal breaks, it could easily have said that “employees shall be required to take meal periods” or “employers shall require employees to take meal breaks” within the five-hour time frame, but it did not do so. It used “allow” instead.

wants such a requirement, it can certainly modify the regulation to add it, but such a requirement is not currently in the regulation.

DLI's reliance (at 17) on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), is misplaced. *Anderson* posits a method of proving damages when an employer has not kept time records required under federal law. This rationale does not apply here because Washington employers are not required to maintain records of meal periods. See RCW 49.46.070; WAC 296-128-010.<sup>13</sup> Regardless, even if it applied, *Anderson* still places an initial burden of proof on plaintiffs. 328 U.S. at 686-87 (“An employee...has the burden of proving that he performed work for which he was not properly compensated.”).

This is made even clearer by *MacSuga v. County of Spokane*, 97 Wn.App. 435, 983 P.2d 1167 (1999), which DLI cites. There, the plaintiff “wanted the court to instruct the jury that, if the employer does not

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<sup>13</sup> RCW 49.46.070 details the types of records employers must maintain, including name, address, occupation, rate of pay, amount paid each pay period, “the hours worked each day and each workweek,” and other information prescribed by regulation. WAC 296-126-050 requires employers to maintain a “record of the name, address, and occupation of each employee, dates of employment, rate or rates of pay, amount paid each pay period to each such employee and the hours worked.” See DLI Admin. Policy ES.D.1 (detailing recordkeeping requirements). WAC 296-128-010 contains an even more detailed list of the records that must be maintained, including 12 detailed subparts and items such as deductions from wages, date of payment, and covered pay period. See also WAC 296-128-011 to -012 (special recordkeeping requirements for truck and bus drivers). Notably, despite all the detailed requirements, the regulations do not require employers to maintain records of meal periods. In cases like *White*, 118 Wn.App. at 275, there were no records of when meal periods were taken, just evidence that unsupervised employees were free to take meal breaks whenever they wanted. The court did not shift the burden of proof, and found no liability despite *White*'s claims of violation. *Id.* at 287. Of interest, *Brinker* did not shift the burden of proof even though California requires meal period records.

maintain a record of the hours worked by an employee, the employer has the burden of showing that the employee has not worked...the number of hours claimed.” *Id.* at 445. The court stated, plaintiff “misreads the law:”

If the employer fails to keep records, the burden is on the employer to prove the claimed hours were not worked. **However, the employee must first show by reasonable inference the number of hours worked to shift the burden onto the employer to prove otherwise.** (emphasis added)

*Id.* (citing *Anderson*, 328 U.S. at 687-88).

Applying this doctrine to meal periods, plaintiffs would be required to show that employers failed to “allow” or “provide” compliant meal breaks. This is precisely what Judge Jones’s standard does. DLI’s proposal that an employee can make no showing or provide mere conjecture before shifting the burden to the employer is contrary to the rule enunciated in *Anderson* and as applied by Washington courts.

**2. DLI ultimately agrees that employees must present a prima facie case establishing meal period violations**

At the end of its brief (at 19), DLI states that an employee must make a prima facie case under WAC 296-126-092, apparently abandoning its previous argument for a full shifting of the burden of proof:

But to meet his or her prima facie case, an employee must only provide evidence that he or she did not receive a timely meal break. The burden then shifts to the employer to rebut this by showing waiver.

DLI thereby concedes that the answer to the second certified question

should actually be “yes,” and the only disagreement between DLI and Judge Jones is limited to the showing an employee must make.<sup>14</sup>

DLI’s proposed standard requires an employee to “provide evidence that he or she did not receive a timely meal break.” It is unclear what this means. Can an employee rely on ambiguous time records absent more? What if meal periods are paid or employees merely record total hours worked in the day, and there are no time punches? Are meal periods received if they are properly scheduled? Or, do employees need to show that their employer did not make a meaningful meal break available because of a policy, practice, compensation system, or some other pressure to skip meal periods? Regardless, as Judge Jones ruled, Brady’s time punch evidence in this case does not show that employees did not receive timely meal breaks. Dkt. 62 at 11.

**F. DLI and AutoZone agree that written and verbal waivers are allowed, but DLI is mistaken in relation to implied waivers**

The district court did not certify a waiver question to this Court. The issue is only relevant here because waiver is inconsistent with strict liability. DLI confirms (at 10) that employees can waive meal breaks or “other meal break requirements.”<sup>15</sup> Thus, strict liability is not possible.

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<sup>14</sup> Despite this concession, DLI still argues the answer to the second certified question should be “no,” “because a positive answer would shift the burden on to the employee to explain the employer’s noncompliance.” Not true. It would keep the burden on the employee to make a prima facie case, just as traditionally required by this Court.

There is no need to otherwise address the scope of waiver in order to answer the certified questions; however, DLI discusses them. DLI confirms (at 19) that waivers do not have to be in writing. It also states (at 12) that it “expects the request to occur before the meal break, and the employer must decide whether to agree to that request.” AutoZone does not argue otherwise. Beyond this, DLI does not assert that there are any additional requirements for an effective waiver. Employees asking if they can switch lunch breaks just before that break could evidence a waiver. Likewise, employees asking for early or late lunches so they can attend a meeting or appointment could evidence a valid waiver. So could employees asking for ongoing permission to finish work and go home rather than taking second meal periods. Granting these types of requests would show as a “violation” under Brady’s theory.

DLI also states (at 12) that the right to waive is unilateral and “solely benefits the worker.” AutoZone does not argue otherwise. The undisputed evidence shows that managers at AutoZone accommodated the requests of employees, not the other way around. No witness testified to being asked or told to waive a meal period for AutoZone’s purposes.<sup>16</sup>

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<sup>15</sup> AutoZone does not dispute that a party raising an affirmative defense, such as waiver, bears the burden to prove that defense. But plaintiffs must first meet their burden to establish a prima facie case.

<sup>16</sup> On the contrary, almost 500 employees signed written waivers and many testified to the personal motivation for doing so. Dkt 46 at 11-13 (¶22); Dkt 46-3 at 9 (¶10).

DLI (at 12) quotes ES.C.6 (at 4), stating that waivers can be rescinded at any time: “[i]f an employee wishes to receive a meal period, any agreement would no longer be in effect.” AutoZone does not dispute that waivers can be cancelled or modified at any time by an employee.<sup>17</sup> But DLI ignores the beginning of that sentence, which reads: “If, at some later date,…” This language shows that, under ES.C.6, waivers can be ongoing in nature and do not have to be entered for each separate meal period, which directly contradicts Brady’s and other amici’s arguments.

DLI mischaracterizes (at 13) Judge Jones’s holding when it claims that Judge Jones concluded “that when an employee does not take a meal break, this means the employee impliedly waived the requirement.” Judge Jones did not conclude this. In fact, Judge Jones does not discuss implied waiver in either of his orders. And, no one is arguing that every employee who misses a break impliedly waived the break.

There are, however, circumstances where implied waiver is warranted. This Court articulated the doctrine of waiver over 60 years ago:

**The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled.** A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. **It may result from an express agreement or be inferred from circumstances indicating an intent to waive.** It is a

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<sup>17</sup> Employees understood this as well. Dkt 46-1 at 73 (“I can withdraw my waiver any time, but do not plan to do so.”); at 101 (“waiver was voluntary;” “I can withdraw it at any time”); at 152 (“I can withdraw my waiver any time, but I have no plans to do so.”).

voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. (emphasis added)

*Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954).<sup>18</sup> As this Court held in *Bowman*, implied waiver is not a separate type of waiver, but simply one method of waiving. *Id.* If waiver can be “inferred from circumstances indicating an intent to waive,” *id.* at 670, there is a waiver just as certainly as if there is an express agreement to waive:

An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it...A *waiver is unilateral* and arises by the intentional relinquishment of a right, or by a neglect to insist upon it...

*Id.* (quoting *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948)).

There is nothing unique about meal periods that would forbid implied waiver of those requirements. DLI allows waiver, and implied waiver is merely one way to waive. Thus, *Pellino* cited *Bowman*, finding that meal periods could be impliedly waived if the evidence was sufficient. 164 Wn.App. at 696-97 (waiver “may result from an express agreement or be inferred from circumstances indicating an intent to waive”).

DLI is correct that simply missing a meal break is not sufficient to imply waiver of that right. Of course, it is also not sufficient evidence to

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<sup>18</sup> This Court has repeatedly reaffirmed this formulation of waiver. *See Central Washington Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989); *Jones v. Best*, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998); *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013).

show a violation of the right. But, there are circumstances where missing a meal break can imply waiver. For example, if a manager who is in sole charge of a store voluntarily chooses to vary her meal timing, waiver can be implied because the manager would be the person to receive and approve the waiver on behalf of the employer.<sup>19</sup>

This is precisely what happened in *Eisenhauer v. Rite Aid Hdqtrs. Corp.*, 2006 WL 1375064 (W.D.Wash. 2006). There, the plaintiff was a non-exempt manager who “was aware of the state requirements for breaks (and was in fact responsible for ensuring that the pharmacy’s operations complied with these and other regulations)” and who admitted “he was not ever told not to take these breaks.” *Id.* at \*2. The court found that plaintiff elected when to eat his lunch, choosing “not to take a lunch break at the traditional noon hour but to instead cut his day in half.” *Id.* at \*2-3. This meets *Bowman*’s definition of implied waiver: “a voluntary act which implies a choice, by the party, to dispense with something of value.” 44 Wn.2d at 669. Eisenhauer knew the right he was giving up (timing of a meal break) and knowingly gave up that right (testifying he could have taken an earlier lunch break, but instead chose to take a later lunch).<sup>20</sup>

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<sup>19</sup> Similarly, implied waiver seems warranted for an employee who telecommutes or otherwise works unsupervised and who chooses to take an early or late meal period.

<sup>20</sup> DLI argues (at 14 n.8) that *Eisenhauer* is inconsistent with *Demetrio*, *WSNA*, and *Pellino*; however, *Demetrio* and *WSNA* are rest break cases and do not discuss waiver, and *Pellino* recognized that implied waiver could apply to meal breaks but found no

Circumstances supporting implied waiver are present in this case. Brady was often in charge of the store, especially at closing when half his alleged meal period violations occurred. As the manager, he would have been the one to grant any requested waivers under the regulation and had no possible pressure or instruction not to take a meal break (because the store was closed and he was in charge). Thus, his choice to forego meal periods at that time could evidence implied waiver.

A more stark example is when Brady stayed in the store beyond closing (the end of his shift) and the five-hour meal break deadline to copy documents about other AutoZone employees (without company permission) so he could provide the documents to his counsel to further this lawsuit. Dkt 46-19 at 66-67. Brady was not performing work for AutoZone, and yet he stayed on the clock and was paid for it. He was not scheduled to stay past the five-hour meal break deadline, but he chose to stay for his own purposes and chose not to take a meal break. *Id.* This could evidence implied waiver.<sup>21</sup> Ultimately, whether an implied waiver occurred in each case should be an evidentiary issue for the trier of fact.

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evidence to support waiver. DLI suggests that the decision in *Eisenhauer* was wrong; however, DLI ignores the key finding of fact in that case: plaintiff *chose* to change the timing of his lunch break. This is the definition of implied waiver, in particular when the employee making the choice is in charge of when meal periods are taken.

<sup>21</sup> Another example is an hourly employee who clocked out and left for his scheduled lunch break within the five-hour time frame, but upon reaching the parking lot saw a customer needing help with his car. Dkt 46-1 at 3 (¶8). He chose to help that customer and spent his lunch break doing this. He then returned to work and told his manager what

**G. DLI is not representing the full interests of all workers**

As DLI notes, it enforces many laws and rules and is responsible to protect employees “from conditions of labor which have a pernicious effect on their health.” DLI Brief at 1-2; RCW 49.12.010. Indeed, DLI is expected to “supervise the administration and enforcement of all laws respecting the employment and relating to the health, sanitary conditions, surroundings, hours of labor, and wages of employees employed in business and industry.” RCW 43.22.270(4). Despite these expansive obligations, DLI’s Brief focuses on meal periods and essentially ignores the public policy supporting more flexible work and meal schedules.

For example, DLI is responsible to enforce Washington’s Family Care and Family Leave Acts. In these Acts, “[t]he 1988 Legislature recognized the changing nature of the work force and the competing demands on families brought about by increasing numbers of working mothers, single-parent households, and dual-career families.” DLI Admin Policy ES.C.1 at 3 & ES.C.10.<sup>22</sup> Now, even more than in 1988 when the

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had happened. His manager compensated him for that time and insisted he immediately take a full lunch break. This would be a violation under Plaintiff’s legal theory, with which DLI seems to agree. But this is another example where an employee, despite not seeking a waiver before the meal period, evidenced a clear choice to waive the right to take lunch within a certain time frame. This waiver was done by choice and with action, rather than words, and perfectly embodies an implied waiver.

<sup>22</sup> See also RCW 49.12.270 legislative findings (“The legislature finds that the needs of families must be balanced with the demands of the workplace to promote family stability and economic security....[and] it is in the public interest for employers to accommodate employees by providing reasonable leaves from work for family reasons [in] order to

Legislature made this finding, employees need to balance their job, family demands, medical issues, and various personal issues.

DLI also is tasked to enforce the newly enacted paid sick leave law (Initiative 1433; passed in November 2016) designed “to protect public health and allow workers to care for the health of themselves and their families.” RCW 49.46.005. While this law does not impose obligations on AutoZone yet, the initiative is based on public policies that the “demands of the workplace and of families need to be balanced to promote public health, family stability, and economic security.” RCW 49.46.200.

Flexibility is an important policy embodied by this growing body of legislation, but DLI focuses only on meal periods. DLI states (at 13) that the “public policy” of “employee choice and flexibility in the meal breaks” is “a side-benefit of the Department’s policy because it allows employees to work through lunch so that they can leave early (or other permutations).” But employees who need flexibility for medical or child care issues do not see it as a mere side benefit. Flexibility is a core legal obligation and policy objective, and DLI’s narrow focus on meal periods is not in the best interest of the employees it is expected to protect.

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promote family stability, economic security, and the public interest”); WAC 296-130-010 (“in the public interest for employers to accommodate employees by providing reasonable leaves from work for family reasons”).

In this case, AutoZone allowed employees to waive their meal periods (or the related timing) to help balance life's competing demands during the workday, without requiring that employees always take a leave of absence or use paid time off for non-work obligations like doctor's appointments and school meetings. This type of flexibility should be encouraged, not condemned. Nevertheless, Plaintiff and amici (including DLI) seek to eliminate or limit such flexibility, to the great detriment of employees. To the extent DLI has abandoned its pre-existing guidance and broader responsibilities to employees in order to assist the parochial interests of a single party (or counsel), this Court should give no deference to DLI's litigation position. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992) (no deference to agency position outside of formal rule or interpretation).

### III. CONCLUSION

For the reasons above, this Court should answer the first certified question, "no," and the second certified question, "yes."

RESPECTFULLY SUBMITTED this 1st day of March, 2017.

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**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that on March 1, 2017, the above and foregoing Answer to Amicus Brief Filed by the Department of Labor & Industries of Autozone Stores, Inc. and Autozoners, Inc. was filed with the Washington Supreme Court and copies were served to the following counsel of record by the methods indicated:

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