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Split Calif. High Court Rules Against 'On-Call' Rest Breaks

By **Melissa Daniels**

Law360, Los Angeles (December 22, 2016, 8:50 PM EST) -- A split California Supreme Court reinstated a \$89.7 million judgment for a class of security guards on Thursday when it ruled that ABM Security Services unlawfully had guards carry radios and stay "on-call" during required rest breaks.

Jennifer Augustus filed the suit back in 2005 alleging that ABM's policy requiring the guards to carry radios during breaks violated the state's Labor Code because an employee that is on call is not on a break. A lower court awarded a class of more than 14,000 guards \$89.7 million in damages, but the Court of Appeal later reversed the decision, saying that being on-call didn't violate the requirement to have a rest break.

The guards took the case to the Supreme Court. The majority opinion from Justice Mariano-Florentino Cuéllar agreed with the guards that state law and the Industrial Welfare Commission's Wage Order 4 prohibit on-duty and on-call rest periods, and the trial court correctly interpreted the law.

"California law requires employers to relieve their employees of all work-related duties and employer control during 10-minute rest periods," the court said. "A rest period, in short, must be a period of rest."

Four justices concurred with Justice Cuellar's opinion. Justice Leonard Kruger wrote a concurring and dissenting opinion that said while he agreed employers must provide off-duty rest periods, on-call rest periods may be reconciled with the law. The court should reverse and remand for further consideration about the specific on-call policy, the court said.

"Thus, while I agree with the majority that an employer must relieve employees of their duties during rest breaks, I see no adequate basis for upholding a \$90 million judgment that was premised on the incorrect assumption that a person who is 'on call' — that is, who has been required to carry a radio, pager, or phone, or to otherwise remain reachable in case of emergency — is necessarily also 'on duty,'" Justice Kruger said.

Justice Carol Corrigan concurred in Justice Kruger's dissent.

The class of current and former security guards won the nearly \$90 million judgment back in **July 2012** on summary judgment.

ABM appealed, arguing in its opening appeal brief that the lower court judge's "unprecedented" ruling "defies law and reason" and would cripple California companies without providing any real benefit to employees. If upheld, ABM argued, the ruling would require companies to force employees to take their rest breaks off their work sites, without their personal cellphones.

The appeals court in **December 2014** vacated the award, saying that being on call does not constitute performing work in violation of the rest break law. The three-judge panel said the state's Industrial Welfare Commission wage order covering rest breaks does not include the requirement that an employee be "relieved of all duty," as opposed to the section covering meal

breaks.

The state Supreme Court agreed to review the case **in May**. Thursday's majority decision found that the state's labor code and Wage Order 4 require "employers relinquish any control over how employees spend their break time, and relieve their employees of all duties -- including the obligation that an employee remain on call."

Even though state law and regulations don't mention on-call time, "one cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods," the majority said.

Michael Adreani of Roxborough Pomerance & Nye LLP told Law360 that the decision properly applies the "relieved of all duty" standard that has existed for state-mandated meal breaks.

"This has been the law, it's always been the law," he said, adding that the court's opinion "clarifies things and makes things easier for employers in California to comply."

Scott Cole of Cole & Associates who also represented the plaintiffs told Law360 that the decision will have widespread implications, and is one of the most employee-protective decision to come out of the Supreme Court.

"ABM's policy requiring guards, without pay, to remain vigilant and watchful at all times runs counter to California laws permitting 10-minute, duty-free rest breaks," Cole said. "It's just wrong to prejudice workers with low pay, and then deprive them of their breaks too."

ABM is considering its next steps, according to attorney Theodore J. Boutrous of Gibson Dunn & Crutcher LLP.

"We are incredibly disappointed in the Court's decision related to ABM's former Security division, and we are considering our options for seeking further review and relief," Boutrous said in a statement. "ABM has always been committed to providing its employees rest breaks consistent with the letter and spirit of the law."

The plaintiffs are represented by Michael Breen Adreani, Drew E. Pomerance and Marina N. Vitek of Roxborough Pomerance & Nye LLP, Jeffrey Isaac Ehrlich of The Ehrlich Law Firm, Monica Balderrama and G. Arthur Meneses of the Initiative Legal Group LLP, Scott Edward Cole and Matthew R. Bainer of Cole & Associates and Alvin L. Pittman.

ABM Security Services Inc. is represented by Keith A. Jacoby and Dominic J. Messiha of Littler Mendelson and Theodore J. Boutrous, Bradley Joseph Hamburger, Andrew G. Pappas and Theane Evangelis of Gibson Dunn & Crutcher LLP.

The case is Jennifer Augustus et al. v. ABM Security Services Inc., case number S224853 in the Supreme Court of California.

—Additional reporting by Daniel Siegal. Editing by Joe Phalon.