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LITIGATION

High Court's tortured logic in *Kirby*

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From the outset, *Kirby v. Immoos Fire Protection Inc.* (2012) Case No. S185827, presented a dilemma for the California Supreme Court. If it followed its holding in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, employers that successfully defended against suits for meal-and-rest-break violations under Labor Code Section 226.7 could obtain attorney fees under Section 218.5. This would potentially deter such claims, which often are brought as class actions. Apparently unwilling to allow such a result, the Court's April 30 opinion in *Kirby* evaded *Murphy* with an interpretation of Section 218.5 that defies logic.

In *Murphy*, the Court settled a long-standing dispute about whether the one-hour payment owed to employees who do not receive meal and rest breaks under Section 226.7 was a "penalty" or a "wage." It unambiguously held that the payment "constitutes a wage or premium pay," giving plaintiffs a tremendous victory. Because the Court held Section 226.7 payments are "wages," a three-year statute of limitations period applies to such claims, not the one-year statute of limitations for actions seeking a penalty.

Murphy, however, opened the door to litigation about Section 218.5, which authorizes an award of attorney fees in "any action brought for nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions" if either party requests fees at the initiation of the action. Importantly, unlike many other employment statutes, which allow only a prevailing employee to recover fees, Section 218.5 is a fee-shifting statute that allows both prevailing employees and employers to recover attorney fees.

Seizing on *Murphy*'s plain statement that the remedy for meal-and-rest-break violations is a "wage," employers argued that Section 218.5 applied to such claims and required unsuccessful employees to pay the employers' attorney fees. The plaintiffs' bar objected, particularly because this might deter employees from serving as representative plaintiffs in Section 226.7 class actions. But that was the logical consequence of *Murphy*, and plaintiffs should not have had it both ways — if Section 226.7 payments are "wages" for statute of limitations purposes, they should also be "wages" for purposes of Section 218.5 fee shifting.

Despite the obvious implications of *Murphy*, the Supreme Court held otherwise in *Kirby*. The Court reasoned that, when Section 218.5 uses the phrase

"action brought for," it does not mean the same thing that phrase means "when it is coupled with a particular remedy (e.g., 'action brought for damages' or 'action brought for injunctive relief')." Where an "'action brought for damages' is an action brought [to obtain] damages," the Supreme Court held that an action seeking the wage owed under Section 226.7 is not an action to obtain that wage, but, instead, an action predicated on a violation of the statute. In other words, for purposes of Section 218.5, the focus is on the "legal basis for a lawsuit," not the "remedy sought." The Court then justified this conclusion by comparing the claim to a "typical lawsuit that alleges unlawful injury and seeks compensatory damages," describing that as an action predicated on a legal violation and not an action "for nonpayment of damages."

The obvious flaw in this reasoning is that every lawsuit that seeks damages has a "legal basis" for the claim. A claim for damages in a negligence case is predicated on an underlying "legal basis" — the defendant's acts of negligence. In a claim for damages for breach of contract, the breach is the "legal basis" for the action. Just as the maxim states "for every wrong there is a remedy," the converse is equally true: there can be no remedy without a wrong.

In reaching its conclusion, the Court did not point to anything in the text of Section 218.5 to justify parsing the statutory language in this fashion and left open the question of which "wage claims" will be subject to Section 218.5 after *Kirby*. Claims for "wages" under Section 218.5 are typically brought by individual litigants for breach of contract, such as an agreement to employ an employee for a specified duration or to pay a certain wage. For instance, in *On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, the Court of Appeal applied Section 218.5 to a salaried executive's claim that he was paid less than what he was promised in his contract. In *Kempf v. Barrett Business Services, Inc.* (9th Cir. 2009) 336 Fed.Appx. 658, the 9th Circuit Court of Appeals held that Section 218.5 authorized attorney fees to an employee who sued for an unpaid bonus due under his employer's bonus plan. And several unpublished Court of Appeal decisions concluded or assume without analysis that Section 218.5 applies when wages are the measure of damages for wrongful termination of a contract for employment. These cases logically held that actions where wages were sought as a remedy fell within the scope of Section 218.5, even though the "legal basis" in each case was

breach of a contract.

Likewise, what are "fringe benefits, or health and welfare or pension fund contributions" in Section 218.5 other than products of contract or statute? Any action brought for nonpayment of those benefits or contributions would be founded on an underlying breach of contract or statutory violation — legal bases that, under *Kirby*, would appear to preclude application of Section 218.5.

Kirby tries to overcome this logical flaw by suggesting that these cases are different from meal-and-rest-break claims because they involve an "obligation" to pay wages, while Section 226.7 involves an obligation to furnish breaks, with the wage payment a "remedy" for the violation of that obligation. This implies some kind of "directness" test, i.e., Section 218.5 applies only if a contract or statute directly obligates payment of wages or benefits. But other than justifying the result, *Kirby* offers no principled basis for this distinction. It remains for the lower courts to struggle with applying this unprincipled test in future cases involving claims for wrongful termination and matters such as reporting time pay, late payment of wages and other subjects that, until now, most courts would have found to fall within the scope of Section 218.5 without question.

The end result may hurt not only employers. Employers and employees both will lose the ability to seek fee shifting under Section 218.5 in meal-and-rest-break claims, and employees could lose the ability to claim fees in these and other claims. Thus, in twisting logic to circumvent the obvious implication of *Murphy*, the Court's opinion in *Kirby* protects employees in unsuccessful class actions, but may hurt employees in other cases.



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