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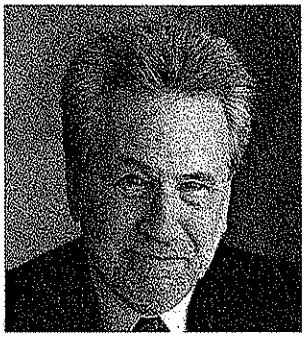

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City of Ontario v. Quon: Evolution of a Narrowly-Decided Landmark Ruling

By Kent L. Richland

Of the cases on the United States Supreme Court's 2009–2010 docket, the employment law community most eagerly awaited the decision in *City of Ontario v. Quon*.[1] The issue it presented—privacy rights in employees' personal communications on employer-provided digital devices—was of broad interest in this age of ubiquitous employer-provided computers, cell phones, and similar devices. And interest was keen even though there was general awareness that the eventual ruling would be of limited direct applicability, since the case arose in a government employment setting where (unlike in private employment) the Fourth Amendment governed.

So when the Court announced in the *Quon* opinion that it would not determine the key issue of whether an employee has a "reasonable expectation of privacy" in personal text messages using an employer-issued pager, there was widespread disappointment. One commentator went so far as to label the Court "irresponsible" for having "wasted the opportunity to provide much-needed guidance to the lower courts."[2]

This article will explore how the opinion ended up as a self-described narrow application of settled legal principles rather than the broad, watershed decision that most observers anticipated. It will also explain my view that despite its limitations, the opinion nonetheless will be a landmark ruling that will have significant impact, both because of what it *did* and what it *did not* decide.

THE FACTS OF *QUON*

Jeffrey Quon was a sergeant and Special Weapons and Tactics (SWAT) team leader in the Ontario, California, police department (OPD). Since 1999, the OPD had a written policy concerning "City-owned computers and all associated equipment." The employer reserved "the right to monitor and log all network activity including e-mail and Internet use," informed employees that they "should have no expectation of privacy" when using these resources, and reminded them that e-mail was "subject to 'access and disclosure' in the legal system and the media."[3]

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Wage and Hour Update

By Michael Singer

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No Private Right of Action for Labor Code § 351 Tip Pooling Allegations

Lu v. Hawaiian Gardens Casino, Inc., 50 Cal. 4th 592 (2010)

A former card dealer brought a putative class action challenging the casino's tip pooling policy requiring dealers to give away 15 or 20 percent of their tips to other casino service personnel. He asserted causes of action under Cal. Lab. Code §§ 221 (prohibiting wage kickbacks by the employer), 351 (prohibiting the employer from taking, collecting, or receiving employees' gratuities, which are "the sole property of the employee or employees to whom it was paid, given or left for"), 450 (prohibiting the employer from compelling employees to patronize the employer), 1197 (prohibiting payment of less than minimum wage), and 2802 (indemnifying the employee for necessary expenditures). The complaint also alleged that these statutory provisions established predicate illegality for an unfair business practices claim under California's Unfair Competition Law (UCL) (Cal. Bus. & Prof. Code §§ 17200–17210).

The trial court found there was no private right to sue under §§ 351 and 450 for tip pooling violations and granted judgment on the pleadings as to these causes of action. It subsequently granted summary judgment on the remaining causes of action.

The court of appeal affirmed the absence of a private right of action under the Labor Code to sue for tip pooling violations, but reversed summary judgment on the UCL cause of action, finding that Cal. Lab. Code § 351 may constitute a predicate violation.

The California Supreme Court found that whether a party has a right to sue depends on whether the Legislature has "manifested an intent to create such a private cause of action" under the statute. (*Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 305 (1988) [no legislative intent that Cal. Ins. Code §§ 790.03 and 790.09 create private cause of action against insurer for bad faith refusal to settle claim]; *Crusader Ins. Co. v. Scottsdale Ins. Co.*, 54 Cal. App. 4th 121, 131 (1997) [no legislative intent that Cal. Ins. Code § 1763 gave admitted insurers private right to sue surplus line brokers].) Because § 351 does not explicitly contain language concerning a private cause of action, the court examined the legislative history of the statute and found that the Legislature had not intended to include a private right to sue in the law.

The court found that the Legislature's ultimate goal was to prevent an employer from taking any part of an employee's gratuity by crediting tips against wages. It did not reflect a legislative intent to give employees a new statutory remedy to recover any misappropriated gratuities.

Ultimately, the decision has little practical effect on employees' ability to sue for tip pooling violations. The court noted that employees had other available remedies to redress unlawful tip pooling allegations, including an action for conversion. Implicitly, this language confirms that allegations under § 351 would also establish predicate UCL violations.

Lu does not address whether tip pooling itself is lawful, referring instead to the court of appeal decisions addressing that issue. See *Etheridge v. Reins Int'l Cal., Inc.*, 172 Cal. App. 4th 908, 921-22 (2009); *Budrow v. Dave & Buster's of Cal., Inc.*, 171 Cal. App. 4th 875, 878-84 (2009); *Jameson v. Five Feet Restaurant, Inc.*, 107 Cal. App. 4th 138, 143 (2003); *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062, 1067 (1990); (not mentioned: *Chau v. Starbucks Corp.*, 174 Cal. App. 4th 688 (2009)).

Error to Determine Class Sufficiency at Pleading Stage

Gutierrez v. California Commerce Club, Inc., 187 Cal. App. 4th 969 (2010)

Card club employees working in bus boy, bartender, and cook positions filed a putative class action complaint on behalf of all non-exempt employees for rest period, meal period, Labor Code Private Attorneys General Act (PAGA), and UCL violations. Defendants interposed successive demurrers to class allegations on the basis that the class definition was too broad to establish an ascertainable class or that the class representatives were similarly situated to other non-exempt employees in different job positions. The trial court granted leave to amend three times in an effort to require plaintiffs to plead

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more specific facts to refine the class, commenting along the way that it considered the class effort "bottom feeding," with "the scooping effect of a swiner or drag net" to "grab and catch anyone who is still alive and kicking." (Slip Op., 3-4.) Ultimately, the trial court remained unsatisfied with the breadth of the proposed class and sustained defendant's demurrer to the class allegations without leave to amend. The court of appeal reversed.

The court cited established case law for the guiding proposition that sustaining demurrers to class actions without leave is disfavored. It reiterated the edict that class allegations should be stricken only if it is clear "there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact," and that the court should defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation.

The case provides a simple standard for overcoming challenges to class allegations at the pleading stage: "As long as the lead plaintiff alleges institutional practices that affected all of the members of the potential class in the same manner, and it appears from the complaint that all liability issues can be determined on a class-wide basis, no more is required at the pleading stage." In this case, plaintiffs had adequately alleged that pursuant to defendant's "policy or practice," they had been denied rest and meal periods. Based on these allegations, the court found class liability could be determined by reviewing a set of facts common to all.

Fees Awarded in Favor of Dismissed Defendant Under Labor Code Section 218.5 on Rest Period Claims

Kirby v. Immoos Fire Protection, Inc., 186 Cal. App. 4th 1361 (2010)

Employees of a fire protection company brought a putative class action under the UCL and a number of Labor Code provisions for non-payment of wages, overtime, wages at discharge, secret payment of lower wages, wage statement violations, failure to maintain accurate records, reimbursement of expenses for tools, safety equipment, and use of employee vehicles, rest period violations, and contracting with an entity known to have insufficient funds to pay the employees. After settlements were reached with certain defendants, plaintiffs dismissed Immoos after the court denied class certification. The court awarded attorney's fees to Immoos on the first (UCL), sixth (rest period) and seventh (underfunded contracts) causes of action.

The court of appeal reversed the fee awards on the first and seventh causes of action, but affirmed the award of fees under Cal. Lab. Code § 218.5 to the defendant as the prevailing party on the dismissed rest period claim. Plaintiffs' sixth cause of action alleged that they were owed an additional one hour of wages per day per missed rest

period. According to the court, as a claim seeking additional wages, the sixth cause of action was subject to § 218.5's provision of attorney's fees for "any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions. . . ." The court rejected plaintiffs' argument that any "action" that includes a claim arising under Cal. Lab. Code § 1194 is limited to one-way attorney's fees to prevailing plaintiffs.

The court harmonized §§ 218.5 and 1194 by holding that § 218.5 applies to causes of action alleging nonpayment of wages, fringe benefits, or contributions to health, welfare, and pension funds. If, in the same case, a plaintiff adds a cause of action for nonpayment of minimum wages or overtime, a defendant cannot recover attorney's fees for work in defending against the minimum wage or overtime claims. Nonetheless, the addition of a claim for unpaid minimum wages or overtime does not preclude recovery by a prevailing defendant for a cause of action unrelated to the minimum wage or overtime claim, so long as a statute or contract provides for fee shifting in favor of the defendant.

Because plaintiffs' rest period claim was not based on a failure to pay minimum wage but was for the additional hour of pay at a contracted rate of compensation, the court ruled the claim did not fall under § 1194. The opinion is silent on whether either party requested fees under § 218.5 at the inception of the action, a requirement for such fee awards. Discussion is also absent on whether a dismissed defendant constitutes a "prevailing party" for purposes of the statute.

The court reversed fee awards on the UCL claim and the § 2810 claim for underfunded contracts, noting that attorney's fees are not available under the UCL, and the fee provision in § 2810 is a unilateral fee-shifting statute.

No Violation of Recording Statutes to List Regular and Overtime Hours Separately Without Totaling

Morgan v. United Retail Inc., 186 Cal. App. 4th 1136 (2010)

Courts and practitioners continue to search out the threshold for violations of recording requirements under Cal. Lab. Code § 226. The statute provides compensation or penalties to employees who suffer injury as a result of knowing and intentional failure to comply with pay stub requirements.

The plaintiff brought a putative class action for various wage claims, including a cause of action alleging the employer's wage statements failed to comply with § 226(a), because they separately listed the total number of regular hours and the total number of overtime hours worked by the employee, but did not show the sum of the regular and overtime hours worked in a separate line. During her deposition, plaintiff admitted that her total hours actually worked were "reflected" in her wage statements, and that her wage statements "accurately reflect[ed]" the hours recorded in her timecards. When asked how she was injured by the employer's failure to include an additional line with the sum of hours worked, she claimed "[i]t makes it a little difficult to count how many hours I have been working."

The court granted class certification solely on the § 226 claim and summary adjudication in favor of the employer because it complied with the requirement that records show "total hours worked" as required by § 226(a)(2).

The court of appeal affirmed, noting that none of the published cases or Division of Labor Standards Enforcement (DLSE) opinion letters directly address whether the "total hours worked" component of § 226 may be satisfied by separately listing the total regular hours and the total overtime hours worked during the pay period, nor is it defined in the statute. Examining the plain and commonsense meaning of § 226 and materials published by the DLSE, including a May 17, 2002 opinion letter and a wage statement exemplar on its website, the court found the employer's wage statements in compliance by listing the precise, actual number of hours worked by the employee at each hourly rate of pay in effect during the pay period.

Note: In a brief unpublished opinion affirming denial of class certification of a § 226 claim, the Ninth Circuit, in *Villacres v. ABM Indus. Inc.*, No. 09-55864, 2010 U.S. App. Lexis 12442 (9th Cir. June 17, 2010) found that technical violations of § 226(a) in and of themselves do not constitute statutory injuries. The plaintiff conceded that he experienced no harm as a result of his employer's alleged violations of § 226(a), and that the alleged violations had no consequences on him or any member of the putative class. The court found that a statutory breach constituting "intrusion upon the legally protected right" is not sufficient injury in and of itself to state a claim under the traditional meaning of that term.

Explicit Statement of Maximum Amount Possible Not Required to Approve Class Action Settlement

Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles, 186 Cal. App. 4th 399 (2010)

In the wake of *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008) and *Clark v. American*

Residential Servs. LLC, 175 Cal. App. 4th 785 (2009), parties have been under increasing scrutiny to provide extensive evidence of the outer reaches of case valuation and to disclose legal strategies to support class action settlements, creating some tension in the settlement process. *Munoz* scales back these requirements to a manageable standard that promotes settlements and approvals.

Objectors to a $1.1 million wage and hour settlement argued that (1) the compensation awarded was "relatively low," (2) the release was overly broad by virtue of its inclusion of claims by class members in any position held within the company during the class period, (3) discovery was insufficient to assess the aggregate value of the claims and compare it to the settlement amount, (4) the notice was insufficient to allow class members to calculate what they would receive, and (5) the opt-out procedure required class members to mail their own letter rather than being provided a request for exclusion form. The objectors also claimed the settlement should not be approved because the parties had not informed the court of the total potential value of the claims being released.

The court of appeal found that *Kullar* does *not* demand an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all of its claims. Rather, it requires a trial record that allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." The court found the record before the trial court sufficient because it included the number of class members, payroll data, declarations describing hours and overtime worked, as well as variances in duties and rest and meal period experience and evidence from a related action alleging less than $5,000,000 in damages. This information constituted "an adequate basis from which to garner a reasonably adequate 'understanding of the amount that is in controversy' within the meaning of *Kullar*." As such, the trial court had more than enough information to evaluate the strengths and weaknesses of the case and compare that to the amount offered in settlement.

The court found no reason to re-examine the evidence and disturb the trial court's broad discretion in approving the settlement, and rejected the remaining objections as to the scope of the release, opt-out procedure, form of notice, and enhancement awards.

Settlement of Claims by Commissioned Salespersons Upheld in Spite of Objections

Nordstrom Comm'n Cases, 186 Cal. App. 4th 576 (2010)

The Fourth District Court of Appeal upheld over objection a settlement of nearly $9 million in a class action brought by Nordstrom's commissioned salespersons. The court found no abuse of discretion by the trial court in finding the settlement fair, reasonable, and adequate, and rejected an employee's objection to payment of $2.5 million in merchandise coupons rather than cash.

The objector essentially argued that the plaintiff's claims were stronger than the settlement gave them credit for and also that the settlement had undervalued PAGA and waiting time penalty claims. The court evaluated the strength of the commission claims and found that Nordstrom had a number of good-faith defenses to the claim that its commission plan was faulty, rejected the notion that the parties' allocation of $0 to PAGA and waiting time penalties was unreasonable, and found that claims for waiting time penalties had little chance for success, given that the pay structure challenged by the plaintiffs had been agreed to by the employees in written agreements, and approved by the court in a prior action.

The court explained that Cal. Lab. Code § 212, which prohibits paying employees in coupons or other things not redeemable for cash, does not preclude the use of such items to fund a settlement of a good faith dispute as to whether the compensation claimed by an employee is actually owed. In this particular case, the court added, the use of coupons was justified because some of the class members will receive less than $20 from the settlement and paying them in coupons will enable them to avoid tax withholding that would reduce the small amount even further.

Contract Terms Cannot Create End-Run Around California Labor Code

Narayan v. EGL, Inc., No. 07-16487, 2010 U.S. App. Lexis 14279 (9th Cir. July 30, 2010)

The employer, a transportation company headquartered in Texas, sought to avoid California wage and hour laws by classifying its work force as independent contractors, and inserting a choice of law clause into their independent contractor agreements. A putative class of delivery drivers sued for misclassification and enforcement of claims under the California Labor Code. The district court granted summary judgment in favor of the employer under Texas law based on declarations in the agreements that stated the drivers were independent contractors. The Ninth Circuit reversed.

Applying California law, the court held that there was significant evidence of an employment

relationship under California's test for independent contractor status. The court found that the Texas choice-of-law provision only related to the terms of the contract itself and did not cover the drivers' claims that they were denied overtime pay, expense reimbursements, and meal periods required by California law because those were statutory claims that "do not arise out of the contract, involve the interpretation of any contract terms, or otherwise require there to be a contract." Consequently, the determination whether individuals are properly classified as independent contractors or employees is made under the state law where the work is performed.

Because Texas law did not apply to claims outside of the contract, the court applied California's "multi-faceted test of employment" to the drivers to determine whether they were employees who could bring wage and hour claims. The court found sufficient evidence that the drivers were employees, and reversed summary judgment. The court noted that the drivers' delivery services were an essential part of the employer's regular business, that an instructional video the company provided for its drivers told them that they performed the key role in the shipping process, that a driver handbook instructed drivers how to conduct themselves, that the drivers used company forms to conduct business, and that drivers attended meetings about company policies. The court also found the employer controlled driver schedules, including vacation periods, and that drivers were subject to discipline if they showed up late for work. Further, the company required drivers to wear branded shirts and boots, and to mark their trucks or vans with the employer's logo. The work performed by the drivers did not require great skill, and a contract between the employer and a driver could be terminated by either party upon 30 days' notice.

Although the drivers had contracts expressly acknowledging that they were independent contractors, this was not dispositive under California law.

Class Certified for Rest Period, Meal Period and Off-the-Clock Claims

Dilts v. Penske Logistics, LLC, 267 F.R.D. 625 (S.D. Cal. 2010)

The wage and hour world anxiously awaits the California Supreme Court's decision in *Brinker v. Superior Court* to resolve the continuing debate over employers' obligations to provide rest and meal periods in accordance with applicable Industrial Welfare Commission wage orders. In the interim, a federal district court certified a class of appliance delivery drivers and installers claiming off-the-clock wages based on automatic deduction of meal periods, denied rest and meal period compensation, and tool expense reimbursement. Plaintiffs alleged that because the employer "expected" the plaintiffs to take their meal breaks, the company implemented a policy of automatically deducting 30 minutes of work time to account for daily meal periods, regardless of whether the employee actually received a meal period. This policy harmed workers because they were unable to undo this deduction and were thus paid less than they earned.

Although the court adopted a standard that employers must provide meal periods but employees need to take them, a point that is often pressed in opposition to certification motions as triggering predominating individual inquiries, it nevertheless found a sufficient community of interest to certify rest and meal period claims. The court specifically approved the use of statistical evidence to establish both liability and damages on these claims on a representative basis at trial