

THE HONORABLE AVERIL ROTHROCK
JUDGE
SUPERIOR COURT
FOR KING COUNTY

SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR KING COUNTY

NAOMI BENNETT, an individual; and JANET
HUGHES, an individual, on behalf of
themselves and others similarly situated,

Plaintiffs,

v.

PROVIDENCE HEALTH & SERVICES, a
Washington Nonprofit Corporation,

Defendant.

CLASS ACTION

NO. 21-2-13058-1 SEA

**ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
AND DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on multiple motions.¹ The Court heard oral argument of counsel regarding the parties' motions for summary judgment on December 22, 2024 in Courtroom 4J of the MRJC.

The Court considered Plaintiffs' Motion for Partial Summary Judgment. The Named Plaintiffs, Naomi Bennett and Janet Hughes, bring this action individually and on behalf of the certified classes they represent. Plaintiffs have moved for partial summary judgment on liability with respect to their claims for unlawful time clock rounding, missed second meal periods, and willfulness. The Court considered the following documents:

- Plaintiffs' Motion for Partial Summary Judgment;

¹ The Court considered numerous motions at the same time, including Plaintiffs' Motion for Partial Summary Judgment, Defendant's Motion for Summary Judgment, Defendant's Motion to Decertify the Class, Plaintiffs' Motion to Exclude Defendant's Expert Witness and Plaintiffs' Motion for Relief in Light of Misleading Ex-Parte Communications with Class Members.

- 1 • Declaration of Peter Stutheit in Support of Plaintiffs’ Motion for Partial Summary
2 Judgment and exhibits attached thereto;
- 3 • Declaration of Brian Kriegler, Ph.D. in Support of Plaintiffs’ Motion for Summary
4 Judgment and exhibits attached thereto;
- 5 • Defendant’s Opposition to Plaintiffs’ Motion for Partial Summary Judgment;
- 6 • Supplemental Declaration of Kylene Taylor in Support of Defendant’s Opposition to
7 Plaintiffs’ Motion for Partial Summary Judgment and exhibits attached thereto;²
- 8 • Supplemental Declaration of Melissa Mordy in Support of Defendant’s Opposition to
9 Plaintiffs’ Motion for Partial Summary Judgment and exhibits attached thereto;
- 10 • Plaintiffs’ Reply in Support of Motion for Partial Summary Judgment; and
- 11 • Declaration of Peter D. Stutheit in Support of Plaintiffs’ (1) Opposition To
12 Defendant’s Motion To Decertify The Second Meal Period And Rounding Class and
13 (2) Reply In Support Of Motion For Partial Summary Judgment and exhibits
14 attached thereto.

15 The Court considered Defendant’s Motion for Summary Judgment seeking dismissal of
16 Plaintiffs’ claims, including the rounding claim and second meal break claim. In considering
17 Defendant’s Motion for Summary Judgment, the Court considered the following documents:

- 18 • Defendant’s Motion for Summary Judgment;
- 19 • Declaration of Kylene Taylor in Support of Defendant’s Motion for Summary
20 Judgment and exhibits attached thereto;
- 21 • Declaration of Deepak Goel in Support of Defendant’s Motion for Summary
22 Judgment;
- 23 • Declaration of Heidi Hansen in Support of Defendant’s Motion for Summary
24 Judgment and exhibits attached thereto;
- 25
- 26

27

² The Supplemental Declaration of Kylene Taylor includes at Exhibit 25 the Declaration of Robert Crandall that is the subject of a Motion to Strike. The Court considered the declaration.

- 1 • Declaration of Sandra Klug in Support of Defendant’s Motion for Summary
2 Judgment and exhibit attached thereto;
- 3 • Declaration of Nina Boshart in Support of Defendant’s Motion for Summary
4 Judgment;
- 5 • Declaration of Melissa Mordy in Support of Defendant’s Motion for Summary
6 Judgment and exhibit attached thereto;
- 7 • Plaintiffs’ Opposition to Defendant’s Motion for Summary Judgment;
- 8 • Declaration of Peter D. Stutheit in Support of Plaintiffs’ Opposition to Defendant’s
9 Motion for Summary Judgment and exhibits attached thereto;
- 10 • Declaration of Brian Kriegler, Ph.D in Support of Plaintiffs’ Opposition to
11 Defendant’s Motion for Summary Judgment;
- 12 • Defendant’s Reply in Support of Motion for Summary Judgment;
- 13 • The files and records herein.

14 The Court reviewed the parties’ submitted evidence and briefs, the records and files in
15 this case, and the applicable law, and applied the law to the facts before it.

16 I. DECISION

17 A. Rounding Class Claims

18 Regarding the claims of the Rounding Class for the period in question, the evidence—in
19 the form of exhibits and testimony—is undisputed that Providence requires caregivers to record
20 their hours of work by clocking in to begin their shift, clocking out and in for meal breaks, and
21 clocking out to end their shift. Providence requires caregivers to attest that they accurately
22 recorded their time worked via Kronos through their time punches. Providence gives caregivers
23 the ability to, and requires caregivers, to edit their Kronos timecard to be sure that the Kronos
24 records accurately report hours worked. Providence professionals responsible for payroll
25 testified that timecards showing clock in and clock out times are the best record of actual worked
26 hours, and that Providence pays caregivers based upon the Kronos records.

1 The time between when a caregiver clocks in and when a caregiver clocks out is “on
2 duty” time as a matter of law pursuant to WAC 296-126-002(8) on this record. Such a
3 conclusion is not negated by minimal evidence (which Providence refers to as “individual
4 employee variances”) argued by Providence to create an issue of fact whether clock-in and
5 clock-out times reflect “on duty” time. Providence suggests that its specific directions and duty
6 assignments within certain jobs or departments that class members follow once clocked in shows
7 that caregivers are not productive immediately upon clocking in. For example, some caregivers
8 are obliged to attend a team meeting (“huddle”) before doing other work and must wait for the
9 huddle to begin; some must care for a first patient whose appointment time Providence schedules
10 to start a short period of time into the shift. Some newly clocked-in caregivers must wait for a
11 work station as caregivers ending their shifts depart. However, this minimal evidence suggesting
12 variances in how Providence organizes the workplace, schedules patient assignments and
13 provides caregivers access to work stations does not support Providence’s position. These facts
14 further demonstrate Providence’s control of its caregivers and the reality that the caregivers do
15 whatever Providence *requires of them* after clocking in. *Providence*—not the caregivers—
16 directs what happens after clocking in.³ The evidence supports only one conclusion: clocked-in
17 caregivers are on duty.

18 Regarding this on-duty time, Providence is obligated by Washington law to keep records
19 of hours worked. See RCW 49.12.050; WAC 296-126-050. Providence offers no evidence that
20 it recorded the hours worked and paid caregivers according to records *other than* Kronos time
21 punches. For example, Providence offers no evidence that it utilized written time cards or any
22 other method of recording hours worked to contradict or augment the Kronos records. Thus, as a
23

24 ³ For example, Keegan Fisher testified that regarding patient handoffs between outgoing and oncoming 12-
25 hour shifts, the “process for patient handoff might look different unit to unit or department to department, depending
26 on their protocols for transfer of care.” *Suppl. Decl. of Melissa Mordy in Support of Providence’s Response In*
27 *Opposition to Plaintiffs’ Motion for Partial Summary Judgment* at 210 (Exhibit 12). The evidence shows that
Providence establishes the protocols, not the employees. Providence, for example, required a huddle and handoff
practice for Ms. Bennett’s CNA role, but Providence could have required something different of Ms. Bennett—the
actual assignments and workflow are up to Providence so long as the employee is onsite and able to be directed, like
Ms. Bennett was. Providence offers evidence that for Ms. Hughes Providence did not have a patient appointment
assigned to her immediately upon her clock-in, but this does not negate her on-duty status.

1 matter of law no alternative record or calculations exists. Regarding this on-duty time,
2 Providence is obligated by Washington law to keep records of hours worked. See RCW
3 49.12.050; WAC 296-126-050. Department of Labor and Industries requires that Providence
4 “allow” an employee “to punch in at the time they are required to report for work” and to punch
5 out “when they are finished performing tasks at the end of their shift.” ES.D.1 ¶ 11.1. Here, it is
6 undisputed that Providence met its obligations, according to its own policies, by recording hours
7 worked through Kronos time punches.

8 Therefore, Dr. Kriedler’s testimony based upon the Kronos records is relevant and
9 reliable and not based on improper assumptions. Dr. Kriedler utilized the very records that
10 Providence maintains for the purpose of tracking hours worked.

11 Moving to the issue of the neutrality of Providence’s rounding policy, Providence paid
12 members of the class during the class period based on a rounding system that systematically
13 favors Providence and results in underpayment of class members. The system is not neutral.
14 Department of Labor and Industries requires that compensation through a rounding system must,
15 over a period time, compensate for all time actually worked. See ES.D.1. ¶ 11.2. According to
16 the testimony of Dr. Brian Kriegler, the employee group as a whole was disadvantaged by
17 rounding in terms of both hours and dollars as follows: approximately 65.1 percent of pay
18 periods, 70.2 percent in terms of hours worked, and 70.8 percent of wages. *Decl. of Kriegler in*
19 *Support of Plaintiff’s MPSJ*, ¶ 26. Calculating hours lost by rounding after allowing for an offset
20 of time gained by rounding resulted in a net loss of 176,926.03 hours, or 6.46 hours per class
21 member. *Id.* Accordingly, this resulted in a net loss of \$7,181,813.73 in earnings, or \$262.36
22 per class member. *Id.* For the class representatives, Ms. Bennett lost \$157.40 due to rounding,
23 and Ms. Hughes lost \$487.99 due to rounding. *Id.* at ¶¶ 24, 25. This is true even in light of
24 evidence regarding some of their individual early clock-outs and late clock-ins. Moreover, to
25 prevail on liability in a class claim such as this, the class representative need not individually fall
26 on either side of the neutrality analysis; the scrutiny applies to whether the system is shown to be
27 neutral (or not neutral) overall. Even Providence’s expert Deepak Goel testified that, when

1 analyzed per shift, caregivers gained time in 25.3% of the shifts, were neutrally effected in only
2 34.5% of the shifts, and lost time to their employer in 40.1% of the shifts. The expert testimony
3 taken together establishes, over time, a failure to even out that benefits Providence. Dr.
4 Crandall’s testimony does not support an alternative conclusion. Thus, Providence utilizes an
5 unlawful rounding system because the rounding system does not average out over a period of
6 time. *See Cox v. Kroger*, 2 Wn. App. 2d 395, 402 (2018). ES.D.1 ¶ 11.2 (“The rounding
7 practice must work both ways so that sometimes it is rounded up and sometimes it is rounded
8 down. Presumably, this arrangement averages out so that the employees are fairly compensated
9 for all the time they actually work. For enforcement purposes, the department will accept this
10 practice of computing working time provided that it is used in such a manner that it will not
11 result, over a period of time, in failure to compensate the employees property for all the time
12 they have actually worked.”). *See also Decl. of Kriegler in Support of Plaintiff’s MPSJ*, ¶ 28.
13 As a matter of law, the class was not fully compensated for time worked in violation of RCW
14 49.46.020, RCW 49.46.090 and RCW 49.52.050.

15 Providence asserts in its own motion for summary judgment that some class members
16 agreed to rounding in their CBAs and, therefore, that claims on their behalf cannot succeed based
17 on preemption of the National Labor Relations Act. *Defendant’s MSJ* 13-14. Providence’s legal
18 briefing for this potentially important argument is very thin. Preemption is an affirmative defense
19 whose proponent bears the burden of establishing it. *See Hill v. Garda CL Northwest, Inc.*, 198
20 Wash. App. 326, 343 (2017). Providence does not provide citation to the CBAs or excerpts of
21 the alleged waivers, does not cite authority recognizing such preemption in similar circumstances
22 and offers no legal tests or analysis in order to support a preemption finding. This is inadequate
23 for consideration, and the defense is rejected on this basis. If the defense were to be considered,
24 *Filo Foods LLC v. SeaTac*, 183 Wn.2d 770 (2015), counsels against finding preemption in these
25 circumstances. The Court also rejects Providence’s argument that its caregivers knowingly
26 submitted to rounding, including in their CBAs or “through their employee policies.”
27 Providence provides insufficient evidence to support a conclusion of knowing submission.

1 The Court grants Plaintiffs’ motion and finds no genuine issue of material fact to support
2 anything other than a judgment of liability on the class and individual rounding claims as alleged
3 in Plaintiff’s First Cause of Action. Providence’s cross motion is denied.

4 **B. Second Meal Break Class Claims**

5 Washington places a broad obligation on its employers to not merely provide a duty-free,
6 uninterrupted second meal break to employees who work more than ten hours in a shift, but to
7 promote the right. The Supreme Court counsels that “a workplace culture that encourages
8 employees to skip breaks violates WAC 296-126-092.” *Chavez v. Our Lady of Lourdes Hosp. at*
9 *Pasco*, 190 Wn.2d 507, 518, n. 1 (2018). Employers have a mandatory obligation to provide the
10 requisite meal periods and to “ensure” that the meal periods comply with the law. *Pellino v.*
11 *Brink’s Inc.*, 164 Wn. App. 668, 688 (2011). It is not sufficient for an employer to merely
12 provide an opportunity for a meal break. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 583
13 (2017).

14 Regarding the claims of the Second Meal Break Class, the Court is guided by the burden-
15 shifting framework of *Brady v. Autozone*, 188 Wn.2d 576 (2017). To meet their burden,
16 Plaintiffs again rely on Providence’s Kronos records that show Providence employees do not
17 clock out for a second meal break, even though Providence’s policy requires that caregivers
18 taking a second meal break clock out. Under Providence’s policies and pursuant to the Kronos
19 records, it is uncontested that second meals are not taken on 99.4 percent of eligible shifts.
20 Testimony in the record demonstrates that neither caregivers nor their managers are aware that
21 caregivers are entitled to two meal periods. Providence’s policies and systems are stacked
22 against the taking of second meal breaks as a practical matter, including by requiring that
23 caregivers make special arrangements with their supervisors to take a second meal break
24 (whereas a first meal break is built-in to the system); by requiring that a caregiver taking a
25 second meal break stay at work an additional half hour after their shifts ends; by hanging posters
26 about breaks that do not discuss or explain the right to **two** meal periods; and by permitting
27 employees to enter a singular meal period but not record **two** meal periods in a variety of forms

1 and when editing their Kronos records. Pursuant to *Brady and Pellino v. Brink's Inc.*, 164 Wash.
2 App. 668 (2011), this evidence is sufficient to demonstrate that, class wide, caregivers did not
3 receive second meal breaks during the class period and that Providence does not ensure second
4 meal periods that comply with the law.

5 The burden shifts to Providence to present evidence that no violation occurred, or that
6 employees waived the right to a meal period. Providence fails to meet its burden.

7 **1. Providence fails to create a genuine issue of material fact whether**
8 **violations occurred.**

9 Providence argues there was no violation because a factfinder could conclude that
10 class members took on-duty second meal breaks. Not so. A conclusion that class
11 members took on-duty second meal breaks would be speculative. Providence provides
12 testimony from Providence employees in addition to information, data analysis and
13 opinions by Dr. Robert Crandall that could support only the conclusion that *opportunities*
14 existed for some class members on various shifts to have taken on-duty meal breaks. As
15 noted, the law is not satisfied if an employer merely provides opportunities. The
16 employer must ensure that second meal breaks are taken. Providence's evidence does not
17 permit a factfinder to conclude that class members actually took on-duty second meal
18 breaks, which is Providence's burden to show.

19 **2. Providence's evidence of "coding" in its Lawson system is insufficient to**
20 **create a genuine issue of material fact regarding defenses of no violations**
21 **or waiver.**

22 Providence argues that it has submitted evidence to create an issue of fact whether
23 "thousands of other caregivers" waived their meal periods based on testimony that its
24 Lawson system shows "that on those dates spanning the class period, there were
25 thousands of caregivers who had been coded with a meal period variance, which *could*
26 *represent* that the caregiver had an on-duty meal period, agreed to a "no lunch" (or
27 "NL"), or agreed to waive one or more meal periods. *Taylor Decl. in Support of*

1 *Providence MSJ*, ¶ 7 (emphasis added). The testimony goes on to affirm that hypothetical
2 second-meal-period-only waivers or on-duty meal period agreements that may have been
3 obtained “on a local level”—and that have not been produced to Plaintiffs nor submitted
4 in evidence—are not reflected in Lawson or Kronos. *Id.* at ¶ 8. This equivocal evidence
5 as to the former and confirmation of a lack of evidence as to the latter is not sufficient to
6 create a genuine issue of material fact on the issues of actual violation or waiver. On this
7 record, Providence failed to track the information if such waivers and agreements
8 occurred, and fails to produce credible, unequivocal evidence of such events now.
9 Instead, the undisputed evidence shows wholesale failure of caregivers to punch out and
10 take second meal breaks according to Providence’s policy, and a culture of skipping the
11 second meal break.

12 **3. Providence fails to show written waivers sufficient to defeat class wide**
13 **liability.**

14 As noted in the preceding section, Providence argues that the Court should deny
15 summary judgment on the basis of waivers, but Providence has only 387 ostensible
16 waivers. Thus, Providence could potentially evidence waivers from 0.014 percent of the
17 25,914 members of the second meal period class. *See Plaintiff’s Opposition to*
18 *Defendant’s Motion for Summary Judgment* 20. This is not sufficient to prevent a finding
19 of class wide liability, and further underscores the inescapable conclusion that Providence
20 did not comply with its own policies nor meet its obligation to ensure the taking of
21 second meal breaks absent waiver. Liability having been established (as discussed
22 further below), Providence may utilize these written waivers in the damages phase of the
23 class action. Additionally, Providence has presented evidence to support waiver of the
24 second meal break by class members providing care at Providence St. Peters Hospital
25 West Olympia Clinic based on testimony unique to this ministry during the class period.
26 *See Decl. of Heidi Hansen in Support of Providence’s MSJ.* Providence also may present
27 this evidence in the damages phase of the class action.

1 **4. Proffered CBA waivers are unenforceable under the law to establish**
2 **waiver and, if they were not unenforceable, the CBAs lack express waiver**
3 **language (except in one instance).**

4 Providence additionally argues certain CBAs for certain caregivers establish
5 waiver of the right to a second meal period. This argument is rejected pursuant to *Hill v.*
6 *Garda CL Northwest, Inc.*, 198 Wash. App. 326, 352-405 (2017), rev'd on other grounds,
7 191 Wn.2d 553 (2018), citing Administrative Policy ES.C.6 Section 15. The Court of
8 Appeals in *Hill* held such waivers were not permitted under Washington law. Providence
9 is mistaken that the Washington Supreme Court subsequently “vacated” the Court of
10 Appeals’ holding rejecting waiver through a CBA. The Supreme Court declined to reach
11 the issue of whether meal periods are a negotiable right subject to being waived and
12 instead addressed the issue of willfulness and Garda’s defense of a bona fide dispute.
13 Therefore, the Court of Appeals’ determination that second meal period rights are not
14 waivable remains binding on this Court.

15 Additionally, the CBAs provided in response to Plaintiff’s Motion for Summary
16 Judgment do **not** recognize the employees’ legal right to a second unpaid meal period and
17 then purport to waive such rights. The contents of the agreements contain no
18 acknowledgment of the right and no corresponding waiver. Therefore, as a factual
19 matter, the CBAs do not contain waivers. *See, e.g., Hill v. Garda CL Northwest, Inc.*,
20 191 Wash.2d 553, 570-571 (2018) (waiver of even a negotiable state law right requires
21 clear and unmistakable language for a court to even consider whether the purported
22 waiver could be given effect). Further, one CBA presented by Providence in fact
23 *preserves* the right; the 2020-2023 Agreement with UFCW Local 21 2020-2023 provides
24 for **two** thirty-minute unpaid meal periods “or, if mutually agreeable to the Medical
25 Center and the nurse, twelve and one half consecutive hours with one thirty minute
26 unpaid meal period.” *Suppl. Decl. of Kylene Taylor in Support of Providence’s*
27 *Opposition to Plaintiff’s Motion for Partial Summary Judgment on Liability* at Exhibit C.

1 Providence does offer evidence that approximately 1,506 caregivers expressly
2 waived second meal breaks in a CBA between Sacred Heart Medical Centers and
3 Commercial Workers International Union, Local 21, 2016-2018. *Decl. of Kylene Taylor*
4 *in Support of Providence's MSJ*, Exhibit 1 P 7.7. ("This Agreement constitutes a waiver
5 of a second meal period for any shift of any length."). This single waiver is express, but,
6 again, not legally enforceable.

7 **5. Implied waivers**

8 Providence waived any implied waiver affirmative defense. *See Plaintiff's*
9 *Motion for Partial Summary Judgment* 17-19. Even if Providence had not waived this
10 defense, Providence fails to present sufficient evidence of waiver based on constructive
11 knowledge of the right to a second meal period, and this argument is rejected.

12
13 Finally, Providence argues Plaintiff can show no damages because Providence paid all
14 class members for second meal periods. *Defendant's MSJ* 15. Providence also argues that
15 Plaintiffs failed to properly plead their claims regarding missed second meal breaks to entitle
16 them to a remedy. Washington is a notice pleading state, and Plaintiffs' Amended Complaint
17 sufficiently provided Providence notice of its claim for denial of wages arising from the
18 allegations of missed second meal breaks. See Amended Complaint, ¶¶ 4.9-4.14, 5.2, 7.2.
19 Providence may not avoid damages even though it paid caregivers for time worked when, the
20 record shows, they were deprived of second meal periods in violation of Washington law. The
21 Court rejects Providence's argument that liability should be denied on the basis that Providence
22 paid caregivers for second meal periods.

23 For all of these reasons, the Court grants Plaintiffs' motion and concludes that no genuine
24 issues of material fact prevent judgment of liability on the class claims nor on Plaintiff Naomi
25 Bennett's individual claim regarding second meal breaks as alleged Plaintiff's Second Cause of
26 Action. Providence's cross motion is denied.

King County Superior Court
Judicial Electronic Signature Page

Case Number: 21-2-13058-1
Case Title: BENNETT ET ANO VS PROVIDENCE HEALTH & SERVICES
Document Title: ORDER RE SUMMARY JUDGMENT MOTIONS
Signed By: Averil Rothrock
Date: January 16, 2024



Judge: Averil Rothrock

This document is signed in accordance with the provisions in GR 30.

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