

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 10 2025

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

CODY FLAHERTY, individually and on behalf of all others similarly situated; JERRY ROSS; KEGAN FLAHERTY, individually and on behalf of all others similarly situated,

Plaintiffs - Appellants,

and

MATHY BARROGA, JOHN BAUMAN, ELIZABETH PATTON, BRYAN BARLAHAN,

Plaintiffs,

v.

KANAWAY SEAFOODS, INC., dba Alaska General Seafoods,

Defendant - Appellee.

No. 23-4223

D.C. No.

3:22-cv-00155-SLG

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Sharon L. Gleason, Chief District Judge, Presiding

Argued and Submitted December 3, 2024
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: COLLINS, VANDYKE, and MENDOZA, Circuit Judges.

Plaintiffs-Appellants (“Plaintiffs”) appeal the summary judgment entered by the district court in favor of Defendant Alaska General Seafoods (AGS) on their claims for overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, and the Alaska Wage and Hour Act (AWHA), Alaska Stat. § 23.10.050 *et seq.* See *Flaherty v. Kanaway Seafoods, Inc.*, No. 3:22-cv-00155-SLG, 2023 WL 7671516 (D. Alaska Nov. 15, 2023). We have jurisdiction under 28 U.S.C. § 1291, we review *de novo*, *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004), and we affirm.

The district court properly granted summary judgment to AGS on Plaintiffs’ claims for overtime pay under the FLSA. First, the court correctly concluded that Plaintiffs were not entitled to compensation for their on-call time. Although Plaintiffs resided on their employer’s premises and were confined to company property due to the COVID-19 pandemic, the undisputed evidence shows that Plaintiffs were called in to work infrequently and were able to engage in a range of personal activities while on call. See *Owens v. Loc. No. 169, Ass’n of W. Pulp & Paper Workers*, 971 F.2d 347, 350–51 (9th Cir. 1992) (setting forth relevant factors to be considered). It also shows that the parties agreed, through both their collective bargaining agreements and their conduct, that Plaintiffs would be compensated “for actual call-in work, but not for other off-duty time.” *Id.* at 355.

Second, the district court properly concluded that Plaintiffs were not entitled to compensation for their sleep time. Plaintiffs' reliance on 29 C.F.R. § 785.22 is misplaced. That regulation applies to employees "required to be on duty for 24 hours or more," 29 C.F.R. § 785.22(a), while Plaintiffs typically worked 11- or 18-hour shifts. Furthermore, this court has held that 29 C.F.R. § 785.23, rather than § 785.22, governs where, as here, employees are required to reside on their employer's premises. *See Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 940–41 n.17 (9th Cir. 2004) ("We think it apparent that the more specific regulation should control over the more general, and thus we are persuaded that § 785.23 provides the most pertinent regulatory guidance."). Section 785.23 forecloses Plaintiffs' sleep time claims because the parties reasonably agreed that Plaintiffs would be compensated "for actual call-in work, but not for other off-duty time." *Owens*, 971 F.2d at 355; *see* 29 C.F.R. § 785.23 ("[A]ny reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted."). In any event, the undisputed evidence shows that Plaintiffs were called in to work infrequently and did not have their sleep regularly interrupted.

The district court also properly granted summary judgment on Plaintiffs' claims for overtime under the AWhA. As Plaintiffs acknowledge, their AWhA claims are governed by the same legal principles as their FLSA claims. *See Moody*

v. Lodge, 433 P.3d 1173, 1179 (Alaska 2018) (citing *Hutka v. Sisters of Providence in Wash.*, 102 P.3d 947, 959 (Alaska 2004)). Thus, Plaintiffs’ AWAHA claims fail for the same reasons as their FLSA claims.

Plaintiffs have not shown that the district court misapplied the summary judgment standard. The facts as to what Plaintiffs could and could not do under the closed campus policy, drawn from Plaintiffs’ deposition testimony, are undisputed. Plaintiffs’ contention that they “were effectively confined to their rooms while off shift” and “not allowed to associate with other employees” is contradicted by undisputed evidence. *See Pac. Gulf Shipping Co. v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 897 (9th Cir. 2021) (noting nonmovant’s burden to identify “specific facts showing that there is a genuine issue for trial” once movant has met its initial burden of production (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986))). There is no genuine dispute of fact as to the parties’ agreements; through both conduct and collective bargaining agreements, the parties agreed that Plaintiffs would be compensated for on-call work but not otherwise for on-call or sleep time. The ultimate issue before the district court—whether Plaintiffs’ off-duty time constituted compensable overtime—is a question of law. *See Berry v. County of Sonoma*, 30 F.3d 1174, 1180 (9th Cir. 1994) (“[W]hether the limitations on the employees’ personal activities while on-call are such that on-call waiting time would be considered compensable overtime under

the FLSA is a question of law.”). Finally, the district court’s observation at the summary judgment hearing that it was “on the fence” about the motion does not show that summary judgment was improper.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel’s judgment, one or more of the situations described in the “purpose” section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel’s decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

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The Clerk is requested to award costs to *(party name(s))*:

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