

FILED: November 14, 2019

IN THE COURT OF APPEALS OF THE STATE OF OREGON

RENEE MAZA, JODI REAL, and STEVE PRICE, individually and on behalf of all
similarly situated,
Plaintiffs-Appellants,

v.

WATERFORD OPERATIONS, LLC and COOS BAY REHABILITATION, LLC,
domestic limited liability company,
Defendants-Respondents.

Jackson County Circuit Court
14CV03147

A165030

Timothy C. Gerking, Judge.

Argued and submitted on December 10, 2018.

Lisa T. Hunt argued the cause for appellants. Also on the briefs were Law Office of Lisa T. Hunt, LLC; David A. Schuck and Schuck Law LLC.

William E. Gaar argued the cause for respondents. Also on the brief were Jillian Pollock and Buckley Law, P.C.

Noah T. Barish and McKanna Bishop Joffe, LLP, filed the brief *amicus curiae* for Oregon AFL-CIO.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Sharia Mayfield, Assistant Attorney General, filed the brief *amicus curiae* for Bureau of Labor and Industries.

Thomas W. Sondag, Paul M. Ostroff, Peter D. Hawkes, and Lane Powell PC filed the brief *amicus curiae* for Health Care Association and Oregon Business & Industry.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

TOOKEY, J.

Rulings under ORCP 32 A vacated and remanded.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellants

- No costs allowed.
 Costs allowed, payable by Respondents.
 Costs allowed, to abide the outcome on remand, payable by
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1 TOOKEY, J.

2 This putative class-action wage claim arises under ORS 653.055, providing
3 for the liability of an employer "who pays an employee less than the wages to which the
4 employee is entitled," and OAR 839-020-0050, an administrative rule of the
5 Commissioner of the Bureau of Labor and Industries (BOLI), describing when employees
6 must be paid for otherwise unpaid meal periods. Plaintiffs sought to certify a class of
7 plaintiffs who they alleged had not been paid wages for meal periods under OAR 839-
8 020-0050. The trial court declined to certify the class under ORCP 32 A. But, pursuant
9 to ORS 19.225, the trial court has allowed plaintiffs' interlocutory appeal seeking an
10 interpretation of OAR 839-020-0050. We provide that interpretation, vacate the trial
11 court's rulings under ORCP 32 A, and remand the case for further proceedings.

12 We provide the following underlying legal, factual, and procedural
13 background: ORS 653.261(1)(a) authorizes BOLI to adopt rules prescribing minimum
14 conditions of employment, including minimum meal periods, "as may be necessary for
15 the preservation of the health of employees." Pursuant to that authority, BOLI
16 promulgated OAR 839-020-0050, which provides, as relevant:

17 "(1) The purpose of this rule is to prescribe minimum meal periods
18 and rest periods for the preservation of the health of employees.

19 "(2)(a) Except as otherwise provided in this rule, every employer
20 shall provide to each employee, for each work period of not less than six or
21 more than eight hours, a meal period of not less than 30 continuous minutes
22 during which the employee is relieved of all duties.

1 (b) Except as otherwise provided in this rule, if an employee is not
2 relieved of all duties for 30 continuous minutes during the meal period, the
3 employer must pay the employee for the entire 30-minute meal period."¹

4 As applied to the issue here, the rule requires that, for each work period between six and
5 eight hours in length, an employer must provide a minimum unpaid meal period of 30
6 minutes.² If the employer does not relieve the employee of work for an unpaid meal
7 period of 30 continuous minutes, then the employer must pay the employee a penalty
8 wage for the entire 30-minute period.

9 It is undisputed that defendants have authorized their hourly employees to
10 take an unpaid 30-minute meal period. An employee handbook advises employees that,
11 "[i]n some states these lunch and meal periods are mandatory and may not be skipped
12 even with your consent." The handbook also explains the availability of a process for
13 hourly employees to report meal-period issues, and employees were required to notify a
14 manager or employer's human resources department if a meal period was not provided or
15 if the employee performed work off the clock.

16 The named plaintiffs and the putative class-action plaintiffs in this case are
17 defendants' hourly employees. As alleged by plaintiffs, defendants' records show that,
18 between certain dates, defendants' hourly employees took unpaid meal periods that were
19 shorter than 30 minutes.

20 Plaintiffs brought this wage claim under ORS 653.055, seeking certification

¹ We provide the full text of OAR 839-020-0050 as an appendix to this opinion.

² There are exemptions from the meal-period requirement that are not asserted to be applicable here. OAR 839-020-0050(3).

1 of a class consisting of defendants' hourly employees, who plaintiffs allege are entitled to
2 wages and penalty wages under OAR 839-020-0050(2)(b) for the shortened meal periods.
3 The trial court initially certified the class under ORCP 32 A. But the court then
4 reconsidered its ruling in response to the parties' arguments. Defendants argued that a
5 class action was inappropriate because the claim of each employee was fact-dependent.
6 *See* ORCP 32 A(2) (requiring that the class have common questions of law or fact). The
7 view that the claims were fact-dependent derived from defendants' understanding that,
8 under OAR 839-020-0050(2)(a) and (b), if an employer has authorized a 30-minute meal
9 period, no liability for wages or penalty wages will attach for a shortened meal period,
10 unless the employee was forced to return to work early. Thus, defendants contended,
11 each employee's claim depends on the circumstances of the shortened meal period.

12 Plaintiffs responded that the circumstances of each employee's shortened
13 meal period are not material to the dispute. Plaintiffs' view depends on their
14 understanding that the requirement to pay wages under OAR 839-020-0050(2)(b)
15 attaches if the record shows that a meal period was shortened, regardless of the cause.

16 The trial court agreed with defendants' interpretation and decertified the
17 class after concluding that a determination of liability under OAR 839-020-0050(2)(b)
18 would require a fact-specific inquiry regarding the circumstances of each employee's
19 shortened meal period. The court also denied plaintiffs' motion for partial summary
20 judgment on the issue of liability.

21 The court subsequently denied plaintiffs' motion to recertify the class, but

1 authorized this interlocutory appeal, pursuant to ORS 19.225,³ to address the following
2 question:

3 "Whether an employer can be found strictly liable under OAR 839-020-
4 0050(2) where an employee, regardless of the circumstances, takes less
5 than the entire duty-free 30-minute lunch break to which the employee is
6 otherwise entitled?"

7 We have exercised our discretion to allow the interlocutory appeal to address the trial
8 court's question.

9 The question presented requires an interpretation of OAR 839-020-0050.
10 In aid of that, the parties reprise their interpretations offered in the trial court. Plaintiffs
11 contend that OAR 839-020-0050(2)(b) is correctly understood to require that, with
12 certain exceptions not relevant here, to avoid the requirement to pay meal-period wages,
13 employers must not merely authorize but must actually require that employees take a
14 duty-free meal period for a full 30 minutes; if, for whatever reason, an employee takes a
15 shorter meal period, then, pursuant to OAR 839-020-0050(2)(b), plaintiffs contend that

³ ORS 19.225 allows an interlocutory appeal in a case brought as a class action under ORCP 32, even when the court has not yet decided that the action shall be maintained as a class action. The statute provides:

"When a circuit court judge, in making in a class action under ORCP 32 an order not otherwise appealable, is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order to the Court of Appeals if application is made to the court within 10 days after the entry of the order. Application for such an appeal shall not stay proceedings in the circuit court unless the circuit court judge or the Court of Appeals or a judge thereof shall so order."

1 wages must be paid for the entire meal period. That outcome is what defendants and the
2 trial court have characterized as "strict liability."⁴

3 In defendants' view, the requirement in OAR 839-020-0050(2)(a) to
4 "provide" a meal period means, simply, that a 30-minute meal period must be made
5 *available* for use, and that employers have no duty to enforce the use of the full 30-
6 minute break. Further, defendants assert that its written policies set out in the employee
7 handbook satisfy the requirement that it made the requisite meal period available. Under
8 defendants' interpretation, OAR 839-020-0050(2)(b) does not impose liability for wages
9 when an employee voluntarily returns to work before the 30 minutes have passed.⁵

10 In interpreting an administrative rule, we apply the same general principles
11 applicable to an interpretation of statutes to determine the intention of the administrative
12 agency that adopted the rule, in this case, BOLI. *Marshall's Towing v. Department of*
13 *State Police*, 339 Or 54, 62, 116 P3d 873 (2005); *see Perlenfein and Perlenfein*, 316 Or
14 16, 20, 848 P2d 604 (1993) (applying principles). We begin our analysis with the
15 relevant statutory and administrative texts and contexts. *Marshall's Towing*, 339 Or at
16 62. As noted, the statutory authorization for OAR 839-020-0050(2)(a) is found in ORS
17 653.261(1)(a), which provides:

⁴ Two *amici curiae*, BOLI and the Oregon AFL-CIO, have provided briefs supporting plaintiffs' interpretation.

⁵ The Oregon Health Care Association and Oregon Business & Industry have filed an *amicus curiae* brief supporting defendants' interpretation.

1 "The Commissioner of the Bureau of Labor and Industries may
2 adopt rules prescribing such *minimum conditions of employment*, excluding
3 minimum wages, in any occupation as may be necessary for the
4 preservation of the health of employees. The rules may include, but are not
5 limited to, *minimum meal periods*[".]"

6 (Emphases added.) The statutory text authorizes the adoption of rules prescribing
7 minimum conditions of employment, including *minimum* meal periods. In adopting OAR
8 839-020-0050, BOLI mirrored the text of ORS 653.261(1)(a) and stated that the purpose
9 of the rule "is to *prescribe minimum* meal periods * * * for the preservation of the health
10 of employees." OAR 839-020-0050(1) (emphasis added). OAR 839-020-0050(2)(a)
11 then states that, with exceptions not applicable here, "every employer *shall provide* * * *
12 a meal period of not less than 30 minutes during which the employee is relieved of all
13 duties." (Emphasis added.) In ordinary usage, "shall" connotes a mandatory duty.
14 *Friends of Columbia Gorge v. Columbia River (S055915)*, 346 Or 415, 426, 212 P3d
15 1243 (2009). And OAR 839-020-0050(2)(b) states that, "if an employee is not relieved
16 of all duties for 30 continuous minutes during the meal period, the employer must pay the
17 employee for the entire 30-minute meal period." It is undisputed by the parties that a
18 meal period of not less than 30 minutes must be "provided," and that, if the employee is
19 not relieved of all duties during that 30-minute meal period, the employer must pay
20 wages for the entire 30-minute period.

21 What is disputed on appeal is whether the employer has an obligation to
22 ensure that the 30-minute meal period is actually taken. Defendants are of the view that
23 as long as a meal period is offered they have fulfilled their obligation under the rule.

1 Plaintiffs assert that the rule requires employees to actually take a 30-minute meal period,
2 and that it is the employer's responsibility to enforce that requirement or to pay wages if a
3 meal period is shortened.

4 We agree with plaintiffs, and we conclude that the rule's text and context
5 support plaintiffs' interpretation that the requirement to provide "a meal period of not less
6 than 30 minutes during which the employee is relieved of all duties" means that a 30-
7 minute meal is mandatory and, if not taken, the employer must pay the employee's wages
8 for the full 30-minutes. This is plain from the text of OAR 839-020-0050(2)(b), which
9 explicitly requires that "if an employee is not relieved of all duties for 30 continuous
10 minutes during the meal period, the employer must pay for employee for the entire 30-
11 minute meal period."

12 It is true, as defendants assert, that the word "provide" as used in OAR 839-
13 020-0050(2)(a), can be understood as a synonym for "to make available." *See Webster's*
14 *Third New Int'l Dictionary 1827* (unabridged ed 2002) (defining "provide" as "to supply
15 for use" and noting synonyms.) But the rule's context shows an intention to make the
16 meal period mandatory. As noted, OAR 839-020-0050(1) states that it "prescribes"
17 minimum meal periods. To "prescribe" means to "to lay down a rule : give directions :
18 DICTATE." *Webster's Third New Int'l Dictionary 1792* (as synonym, "PRESCRIBE
19 indicates authoritative dictating or commanding."). A "minimum" is defined as "the least
20 quantity * * * possible in a given case." *Id.* at 1438. In light of the rule's stated purpose
21 to *prescribe a minimum* meal period, we think that BOLI's intention in stating that

1 employers shall provide a minimum 30-minute meal period was to *require* the meal
2 period, *i.e.*, to make it mandatory.

3 OAR 839-020-0050(2)(b) states that, if an employee is not relieved of all
4 duties during "the meal period," the employer must pay for the entire 30-minute period.
5 "The meal period" is a reference to the minimum 30-minute meal period *prescribed* in
6 OAR 839-020-0050(2)(a), and under OAR 839-020-0050(2)(b), the employee must be
7 relieved of all work duties during that time. If, as defendants contend, taking a minimum
8 meal period were voluntary, then the obligation to pay wages for the meal period would
9 apply only when the employer forces the employee to return to work during the 30-
10 minute period against the employee's will. But the rule on its face does not include that
11 limitation. We conclude that, if an employee is not relieved of all duties for the
12 prescribed minimum 30-minute meal period, OAR 839-020-0050(2)(b) requires that the
13 employer pay the employee's wages for that period of time.⁶

⁶ We note that our interpretation is consistent with BOLI's interpretation of the rule since at least 2008, when it issued a "Technical Assistance for Employers" publication stating:

"It is not the employee's choice whether or not to take the required breaks. To be in compliance, you must require your employee to take all mandated breaks. * * * Since rules adopted in 1997 allow for penalties of up to \$1000 per violation, employers should be more vigilant than ever in enforcing break rules and should never permit an employee to skip required breaks."

And in 2009, BOLI issued a "BOLI ALERT" regarding revisions to OAR 839-020-0050(2)(b) stating: "The major provisions of the Oregon meal and rest period rule * * * require a basic 30-minute, unpaid meal period for every work period (six hours or greater) in which the employee is relieved of all duties."

The parties have argued extensively about whether deference to BOLI's

1 OAR 839-020-0050(8) reinforces our interpretation of OAR 839-020-
2 0050(2). That paragraph implements ORS 653.261(4) and describes conditions for a
3 food or beverage service employee's voluntary "waiver" of a meal period, by which an
4 employee may become authorized to work up to eight hours without a meal period. The
5 waiver must be in writing, OAR 839-020-0050(8)(a)(D), and must satisfy many
6 additional conditions. OAR 839-020-0050(8)(a)(A) - (J). If, as defendants contend,
7 BOLI's intention was that a 30-minute meal period must only be made available but may
8 be voluntarily skipped by the employee without consequence for the employer, then there
9 was no need for the legislature and for BOLI to also require a written waiver of a meal
10 period for certain types of employees. The existence of requirements for a food or
11 beverage service employee's written waiver of a meal period supports the interpretation
12 that the 30-minute meal period prescribed by OAR 839-020-0050(2)(a) is mandatory.

13 Finally, our conclusion that BOLI intended that meal periods be mandatory
14 is consistent with our observation that both ORS 653.261 and OAR 839-020-0050
15 include statements that the conditions of employment, including minimum meal periods,
16 are to be prescribed "as may be necessary for the preservation of the health of
17 employees." It seems to us that permitting employees to skip unpaid meal periods
18 necessary for the preservation of health and to continue to work despite risks to health
19 would defeat that objective. And employers, because of their authority over the

interpretation is appropriate here, but, in light of our interpretation, which agrees with BOLI's, we do not need to address that issue.

1 workplace, are in a unique position to enforce mandatory meal periods necessary for the
2 preservation of the health of employees. Indeed, OAR 839-020-0040(4) recognizes the
3 employer's unique role in monitoring the workplace to ensure that work is not performed
4 when it is not requested and that breaks are taken. The rule provides:

5 "It is the duty of the employer to exercise control and see that the
6 work is not performed if it does not want the work to be performed. The
7 mere promulgation of a policy against such work is not enough."

8 In other words, given the requirement for the mandatory meal period, it is not sufficient
9 for employers to merely require in a handbook that employees not work during meal
10 periods. It is the employer's duty to monitor employees' work and meal periods to ensure
11 that full meal periods are taken.

12 Based on our review of the text and context of OAR 839-020-0050, we
13 conclude that, in the absence of a waiver of the meal period as provided in OAR 839-
14 020-0050(8), an employer who is not exempt must require a 30-minute meal period
15 without work duties and, under OAR 839-020-0050(2)(b), pay wages to an employee
16 who is not relieved of duties during the entirety of the required minimum 30-minute meal
17 period. Because our conclusion requires the trial court to reconsider its rulings regarding
18 the certification of a class under ORCP 32 A, we vacate and remand the case to the trial
19 court.

20 Rulings under ORCP 32 A vacated and remanded.

APPENDIX

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OAR 839-020-0050 provides:

"(1) The purpose of this rule is to prescribe minimum meal periods and rest periods for the preservation of the health of employees.

"(2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.

"(b) Except as otherwise provided in this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.

* * * * *

"(3) If an employer does not provide a meal period to an employee under section (2) of this rule, the employer has the burden to show that:

"(a) To do so would impose an undue hardship on the operation of the employer's business as provided in section (4), and that the employer has complied with section (5) of this rule;

"(b) Industry practice or custom has established a paid meal period of less than 30 minutes (but no less than 20 minutes) during which employees are relieved of all duty; or

"(c) The failure to provide a meal period was caused by unforeseeable equipment failures, acts of nature or other exceptional and unanticipated circumstances that only rarely and temporarily preclude the provision of a meal period required under section (2) of this rule. If an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.

"(4) As used in section (3)(a) of this rule, 'undue hardship' means significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business. For the purpose of determining whether providing a meal period requires significant difficulty or expense, the following factors may be considered:

1 (a) The employer's cost of complying with the requirement to
2 provide a meal period under section (2) of this rule.

3 (b) The overall financial resources of the employer.

4 (c) The number of persons employed at the particular worksite and
5 their qualifications to relieve the employee; the total number of persons
6 employed by the employer; and the number, type and geographic
7 separateness of the employer's worksites.

8 (d) The effect of providing the meal period required under section
9 (2) of this rule on worksite operations involving: the startup or shutdown of
10 machinery in continuous-operation industrial processes; intermittent and
11 unpredictable workflow not in the control of the employer or employee; the
12 perishable nature of materials used on the job; and the safety and health of
13 other employees, patients, clients or the public.

14 (5) When an employer does not provide a meal period to an
15 employee under section (2) of this rule, and is able to make the required
16 showing under section (3)(a) of this rule:

17 (a) The employer shall instead provide the employee adequate paid
18 periods in which to rest, consume a meal, and use the restroom; and

19 (b) The employer shall first provide to each employee a notice
20 provided by the commissioner of the Bureau of Labor and Industries
21 regarding rest and meal periods in the language used by the employer to
22 communicate with the employee. The employer shall retain and keep
23 available to the commissioner a copy of the notice for the duration of the
24 employee's employment and for no less than six months after the
25 termination date of the employee. Notices that comply with this subsection
26 are available upon request from the bureau. This subsection takes effect on
27 March 16, 2009.

28 ** * * * *

29 (8)(a) Pursuant to the provisions of ORS 653.261[4], if an employer
30 agrees, an employee may waive a meal period if all of the following
31 conditions are met:

32 (A) The employee is employed to serve food or beverages, receives
33 tips, and reports the tips to the employee's employer;

1 "(B) The employee is at least 18 years of age;

2 "(C) The employee voluntarily requests to waive the employee's
3 meal periods no less than seven calendar days after beginning employment;

4 "(D) The employee's request to waive the employee's meal periods is
5 in writing in the language used by the employer to communicate with the
6 employee, on a form provided by the commissioner, and is signed and
7 dated by both the employee and employer;

8 "(E) The employer retains and keeps available to the commissioner a
9 copy of the employee's request to waive the employee's meal period during
10 the duration of the employee's employment and for no less than six months
11 after the termination date of the employee;

12 "(F) The employee is provided with a reasonable opportunity to
13 consume food during any work period of six hours or more while
14 continuing to work;

15 "(G) The employee is paid for any and all meal periods during which
16 the employee is not completely relieved of all duties;

17 "(H) The employee is not required to work longer than eight hours
18 without receiving a 30-minute meal period during which the employee is
19 relieved of all duties;

20 "(I) The employer makes and keeps available to the commissioner
21 accurate records of hours worked by each employee that clearly indicate
22 whether or not the employee has received meal periods; and

23 "(J) The employer posts a notice provided by the commissioner
24 regarding rest and meal periods in a conspicuous and accessible place
25 where all employees can view it.

26 "(b) Either the employer or employee may revoke the agreement for
27 the employee to waive the employee's meal periods by providing at least
28 seven (7) calendar days written notice to the other.

29 "(c) Notwithstanding subsection (b) of this section, an employee
30 who has requested to waive meal periods under this section may request to
31 take a meal period without revoking the agreement to waive such periods.
32 The request to take a meal period must be submitted in writing to the
33 employer no less than 24 hours prior to the meal period requested.

1 (d) An employer may not coerce an employee into waiving a meal
2 period.

3 (e) An employer will be considered to have coerced an employee
4 into waiving the employee's meal period under the following
5 circumstances:

6 (A) The employer requests or requires an employee to sign a
7 request to waive meal periods;

8 (B) An employee is required to waive meal periods as a condition
9 of employment at the time of hire or at any time while employed;

10 (C) The employer requests or requires any person, including
11 another employee, to request or require an employee to waive meal periods;
12 or

13 (D) The employee signs a form requesting to waive meal periods
14 prior to being employed for seven calendar days.

15 (f) Employee waiver forms and notices regarding rest and meal
16 periods that comply with this section are available upon request from the
17 bureau.

18 * * * * *

19 (11) As used in this rule:

20 (a) 'Work period' means the period between the time the employee
21 begins work and the time the employee ends work.

22 (b) 'Work period' includes a rest period as provided in section (6) of
23 this rule, and any period of one hour or less (not designated as a meal
24 period) during which the employee is relieved of all duties.

25 (c) 'Work period' does not include a meal period unless the meal
26 period is paid work time as provided in section (2) or (5) of this rule."