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CASE #: 21-2-13058-1 SEA

THE HONORABLE AVERIL ROTHROCK

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.

- Declaration of Peter Stutheit in Support of Plaintiffs' Motion for Partial Summary Judgment and exhibits attached thereto;
- Declaration of Brian Kriegler, Ph.D. in Support of Plaintiffs' Motion for Summary Judgment and exhibits attached thereto;
- Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment;
- Supplemental Declaration of Kylene Taylor in Support of Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment and exhibits attached thereto; [2]
- Supplemental Declaration of Melissa Mordy in Support of Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment and exhibits attached thereto;
- Plaintiffs' Reply in Support of Motion for Partial Summary Judgment; and
- Declaration of Peter D. Stutheit in Support of Plaintiffs' (1) Opposition To Defendant's Motion To Decertify The Second Meal Period And Rounding Class and (2) Reply In Support Of Motion For Partial Summary Judgment and exhibits attached thereto.

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

- Defendant's Motion for Summary Judgment;
- Declaration of Kylene Taylor in Support of Defendant's Motion for Summary Judgment and exhibits attached thereto;
- Declaration of Deepak Goel in Support of Defendant's Motion for Summary Judgment;
- Declaration of Heidi Hansen in Support of Defendant's Motion for Summary Judgment and exhibits attached thereto;

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

- Declaration of Sandra Klug in Support of Defendant's Motion for Summary Judgment and exhibit attached thereto;
- Declaration of Nina Boshart in Support of Defendant's Motion for Summary Judgment;
- Declaration of Melissa Mordy in Support of Defendant's Motion for Summary Judgment and exhibit attached thereto;
- Plaintiffs' Opposition to Defendant's Motion for Summary Judgment;
- Declaration of Peter D. Stutheit in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment and exhibits attached thereto;
- Declaration of Brian Kriegler, Ph.D in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment;
- Defendant's Reply in Support of Motion for Summary Judgment;
- The files and records herein.

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

I. DECISION

A. Rounding Class Claims

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

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

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

[3] For example, Keegan Fisher testified that regarding patient handoffs between outgoing and oncoming 12-hour shifts, the "process for patient handoff might look different unit to unit or department to department, depending on their protocols for transfer of care." *Suppl. Decl. of Melissa Mordy in Support of Providence's Response In 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.

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

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

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

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

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

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

B. Second Meal Break Class Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Implied waivers

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

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

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

Regarding Plaintiff Hughes's individual claim, the evidence submitted presents a question of fact whether Hughes was denied a second meal period, whether Hughes waived a second meal period, and whether Hughes received on-duty second meal periods. Thus, Hughes' individual claim regarding second meal breaks requires a trial.

C. Willfulness

The undisputed evidence supports a finding of willfulness. Providence also withdrew its defenses to willfulness based on good faith and reasonable belief of compliance with applicable wage and hour requirements, good-faith dispute regarding the alleged violations, lack of intent and carelessness or clerical errors, and good faith reliance on law. *See Order Granting Plaintiffs' Motion to Compel Discovery and Awarding Fees* (Docket #84).

II. ORDER

IT IS HEREBY ORDERED:

A. Plaintiffs' Motion for Partial Summary Judgment is **GRANTED IN PART**. Plaintiffs have established liability individually and on behalf of the Rounding Class, with a finding of willfulness. For the Rounding Class, damages are the only remaining issue for trial. Plaintiff has also established liability on behalf of the Second Meal Class, with a finding of willfulness. For the Second Meal Class, damages are the only remaining issue for trial. The Court denies summary judgment regarding Plaintiff Hughes' individual second meal period claim, which remains for trial.

B. Defendant's Motion for Summary Judgment is DENIED.

DATED this __ day of January, 2024.

E-signature attached
THE HONORABLE AVERIL ROTHROCK
KING COUNTY SUPERIOR COURT JUDGE

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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