

IN THE SUPREME COURT OF NEVADA

JOHN W. NEVILLE, JR., on behalf of
himself and all others similarly
situated,

Petitioner-Plaintiff,

VS.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, in and for the COUNTY
OF CLARK, and the HONORABLE
ADRIANA ESCOBAR, DISTRICT
JUDGE

Respondents

and

TERRIBLE HERBST, INC.,

Defendant-Real Party in Interest

**NOTICE OF INTENT TO RELY ON SUPPLEMENTAL AUTHORITY IN
PLAINTIFF-PETITIONER'S REPLY BRIEF**

Mark R. Thierman, Nev. Bar No. 8285

mark@thiermanbuck.com

Joshua D. Buck, Nev. Bar No. 12187

josh@thiermanbuck.com

Leah L. Jones, Nev. Bar No. 13161

leah@thiermanbuck.com

THIERMAN BUCK LLP

7287 Lakeside Drive

Reno, Nevada 89511

Tel. (775) 284-1500

Fax. (775) 703-5027

Attorneys for Petitioner-Plaintiff

Electronically Filed
Docket Number Sep 21, 2016 01:40 p.m.
Tracie K. Lindeman
Clerk of Supreme Court
District Court Case No. A-15-728P34-C

COMES NOW Plaintiff-Petitioner JOHN W. NEVILLE, JR., on behalf of himself and all others similarly situated (hereinafter "Plaintiff-Petitioner"), by and through their attorneys of record, Thierman Buck, LLP, and hereby submits the August 15, 2016 Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit in the case of *Evans v. Wal-Mart Stores Inc*, case number 14-16566, 2016 WL 4269904 (9th Cir. August 15, 2016), a copy of which is attached hereto as Exhibit A. Also attached hereto as Exhibit B is a true and correct copy of the unofficial transcript derived from video/audio recordings of the oral argument before the United States Court of Appeals for the Ninth Circuit in the aforesaid *Evans v. Walmart* case reported at 2016 WL 4041774 (9th Cir. August 15, 2016) (Oral Argument). The decision in *Evans v. Walmart* was issued as an unpublished opinion several weeks after the petition was filed in this case.¹

In the interest of full disclosure and to avoid surprise, Counsel for Plaintiff-Petitioner hereby informs counsel for Defendant-Respondent that the Plaintiff-Petitioner intends to rely on the logic underlying the colloquy with Defendant's counsel and Judge Silverman of the Ninth Circuit Court of Appeals at page 6 of Exhibit B that unless the workers were volunteers, they had an agreement to work for wages, which included by implication (express, implied or implied by law) that the employer would obey the law and pay overtime wages when statutorily required. In addition, Plaintiff-Petitioner intends to use the decision itself as further evidence that the denial of a private cause of action for overtime wages mandated by statute will result in further splitting of causes of action for wages due under the constitution, wages due by virtue of NRS 608.040-.050 and wages due by virtue of

¹ Even though unpublished, *Evans* may be cited under Ninth Circuit Federal Rule of Appellate Procedure Rule 32.1(a) ("Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007.").

1 NRS 608.018. As *Judge Silverman* stated to the employer's counsel in *Evans v.*
2 *Walmart* at page 6 of Exhibit B:

3
4 JUDGE SILVERMAN: I mean, it -- that means they had a
5 contract that either party could terminate at-will. It doesn't mean
6 there's --

7 MS. BOHMHOLDT: Correct.

8 JUDGE SILVERMAN: -- no contract.

9 MS. BOHMHOLDT: Correct.

10
11 JUDGE SILVERMAN: So it seems to me we've got a little bit
12 of a red herring here when we get bogged down and whether
13 there was a contract of employment. There was a contract of
14 employment. One of the terms was that they'll get paid 8.80 an
15 hour. Another term was they could be discharged without cause.
16 You know there may have been other terms too. Isn't -- isn't that
17 right?

18 MS. BOHMHOLDT: That -- I think that's right.

19 And so when you looked at 608.050, the wages or salary
20 reference, there must be in this case that 8.80 an hour. We know
21 that for a few reasons. One is that overtime didn't exist when
22 608.050 was enacted. It's statutorily imposed obligation. Of
23 course, we have to pay it. But the contract of employment is we'll
24 pay you 8.80 an hour. There's no guarantee to overtime hours at
25 all.

26 JUDGE SILVERMAN: So is it your contention that if they were
27 work overtime, there was no obligation to pay overtime?

28 MS. BOHMHOLDT: It is not my contention that there was no
obligation but it is statutorily imposed obligation. It is not the
expectation, the bargained-for --

JUDGE SILVERMAN: Why isn't that implicit?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MS. BOHMHOLDT: -- rate of pay.

JUDGE SILVERMAN: Isn't it a matter of common knowledge that if you work overtime you get time and a half?

MS. BOHMHOLDT: And -- yes. And I would say that just -- it's very easy to look at this and go, of course, overtime is a wage or is compensation. Of course, it is --

JUDGE SILVERMAN: Right.

Dated September 21, 2016

Respectfully submitted

THIERMAN BUCK LLP

/s/ Mark R. Thierman

Mark R. Thierman, Bar No. 8285

Joshua D. Buck, Bar No. 12187

Leah L. Jones, Bar No. 13161

7287 Lakeside Drive

Reno, Nevada 89511

Attorneys for Petitioner-Plaintiff

CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 7287 Lakeside Drive, Reno, Nevada 89511. On September 21, 2016, the following document was served on the following:

NOTICE OF INTENT TO RELY ON SUPPLEMENTAL AUTHORITY

- By **United States Mail** – a true copy of the document listed above for collection and mailing following the firm’s ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Reno, Nevada addressed as set forth below.

Rick D. Roskelley, ESQ.
 Roger L. Grandgenett II, ESQ.
 Montgomery Y. Paek, ESQ.
 Kathryn B. Blakey, ESQ.
LITTLER MENDELSON, P.C.
 3960 Howard Hughes Parkway
 Suite 300
 Las Vegas, NV 89169-5937
Attorneys for Defendant-Real Party in Interest

Honorable Adriana Escobar
 Eighth Judicial District Court
 County of Clark
 Dept. 14, Ctrm 3F
 200 Lewis Avenue
 Las Vegas, NV 89155
Respondents

I am readily familiar with the firm’s practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary

1 course of business. I declare under penalty of perjury that the foregoing is true and
2 correct.

3 Executed on September 21, 2016 at Reno, Nevada.

4
5 /s/ Jasmin Williams

6 Jasmin Williams
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

EXHIBIT A

FILED

AUG 15 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARDE EVANS, on behalf of herself,
and all others similarly situated,

Plaintiff - Appellant,

v.

WAL-MART STORES, INC.,

Defendant - Appellee.

No. 14-16566

D.C. No. 2:10-cv-01224-JCM-
VCF

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted July 8, 2016
San Francisco, California

Before: SILVERMAN and NGUYEN, Circuit Judges and ANELLO,** District
Judge.

Charde Evans appeals the district court's grant of summary judgment
regarding her claims for "waiting time" penalties pursuant to Nevada Revised

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable Michael M. Anello, United States District Judge for
the Southern District of California, sitting by designation.

Statutes §§ 608.040 and 608.050. We have jurisdiction under 28 U.S.C. § 1291, and review de novo. *See Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011). We reverse and remand.

Wal-Mart employed Evans as an hourly stocker and cashier. At times, Evans worked more than one eight-hour shift within a twenty-four-hour period or more than forty hours in a workweek, entitling her to overtime pay under Nevada law. After Evans filed suit, Wal-Mart settled her claims for unpaid overtime with the Nevada Labor Commissioner. Although the Commissioner's order does not address Evans's claims for waiting time penalties, the district court granted summary judgment on grounds that waiting time penalties are only available when an employer fails to timely pay the "contractually agreed upon wage," not statutory overtime pay.

The Labor Commissioner's order does not reference waiting time penalties, and therefore does not dispose of Evans's waiting time penalty claims. We conclude that overtime pay is a form of wages under Nevada law. *See Nev. Rev. Stat. § 608.012* (defining wages as "[t]he amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time"). Overtime pay is also a form of compensation under § 608.040. *See Nev.*

Rev. Stat. § 608.040 (providing for waiting time penalties for failure to pay wages or compensation). Wal-Mart conceded at oral argument that Evans was employed pursuant to an oral contract of employment, so Evans is also entitled to seek waiting time penalties under § 608.050. *See* Nev. Rev. Stat. § 608.050 (providing for waiting time penalties “in the sum agreed upon in the contract of employment”).

Appellant’s motion for judicial notice is DENIED.

REVERSED AND REMANDED.

EXHIBIT B

EXHIBIT B

2016 WL 4041774 (C.A.9) (Oral Argument)

This is an unofficial transcript derived from video/audio recordings
United States Court of Appeals, Ninth Circuit.

Charde Evans, Plaintiff-Appellant,
v.
Wal-Mart Stores, Inc., Defendant-Appellee.

No. 14-16566.

July 8, 2016.

Oral Argument

Appearances:

[Joshua D. Buck](#), Thierman Law Firm, Reno, NV, for petitioner.

[Karin Bohmholdt](#), Greenberg Traurig, Denver, CO, for respondent.

Before:

[Barry G. Silverman](#), [Jacqueline H. Nguyen](#), Circuit Judges; [Michael M. Anello](#), United States Federal Judge of the United States District Court for the Southern District of California, sitting by designation.

CONTENTS

[ORAL ARGUMENT OF JOSHUA D. BUCK ON BEHALF OF THE PETITIONER](#)

[ORAL ARGUMENT OF KARIN BOHMOLDT ON BEHALF OF THE RESPONDENT](#)

[REBUTTAL ARGUMENT OF JOSHUA D. BUCK ON BEHALF OF THE PETITIONER](#)

[ORAL ARGUMENT OF JOSHUA D. BUCK ON BEHALF OF THE PETITIONER](#)

MR. BUCK: Good morning, your Honors.

JUDGE SILVERMAN: Good morning.

JUDGE ANELLO: Good morning.

MR. BUCK: May it please the Court. Joshua Buck on behalf of the plaintiff-appellants. I'd like to reserve four minutes of time for rebuttal, please?

JUDGE SILVERMAN: Okay.

MR. BUCK: This case presents a relative straightforward question as to whether overtime is a wage or compensation under the Nevada revised statutes. The district court held that it was not and we submit that that was an error.

Clearly -- first, I wanna start by -- by focusing this Court's attention to the standard that we looked at. We were reviewing a particular statutory scheme. And it is plaintiff's contention that the standard in the case of the plain language supports their position that overtime is a wage and compensation to support a claim for continuation wages. The standard in Nevada is that these wage and hour statutes under N.R.S. Chapter 608 is remedial in nature and should be liberally construed.

The legislation -- legislature's declarations contained an [N.R.S. 608.005](#). In that declaration, it says the legislature hereby finds and declares that health and welfare of workers and the employment of persons in private enterprise in this state are of concern to the state. And the health and welfare of persons required to earn their livings by their own endeavors require certain safeguard as to hours of service working conditions and compensation. I think that's important because that's the lens that we're using to be able to evaluate whether or not the district court erred here in concluding that overtime was not a wage or compensation.

Next, when we get to looking at the statutory scheme at issue here. It's important to look at what the overtime statute says. [N.R.S. 608.018](#) specifically states in its title that -- that the terms in that provision are compensation for overtime. It specifically uses the term compensation. Overtime clearly, is a form of compensation that's --

JUDGE ANELLO: Let -- let me interrupt, briefly, if I may just on that very point 'cause I -- 'cause I recall it, you really didn't raise that argument in your initial opposition, did you? Didn't that come later this compensation as opposed to wages?

MR. BUCK: We focused more heavily on this issue of the term "compensation" in a motion for reconsideration that was subsequently filed. And the reason is this, your Honor, when we initially opposed the motion for summary judgment that was filed by defendant, it was essentially phrased, for lack of better word, as overtime is not a valid basis for recovering continuation wages.

It wasn't until the court's decision in this case which specifically stated that overtime is not a wage and defined the wage as only being something that is contractually obligated to be paid that -- we took it upon ourselves, frankly, to say to the court -- what -- your Honor, on Judge Mahan in the lower court, even if you are correct that a wage is only applicable to contractually-owed wages -- which we dispute and I'll get in to in a minute -- it's nonetheless compensation, your Honor.

And -- and in that response, that was why the motion for reconsideration was filed, was -- and -- and that's one of the grounds provided for a motion for reconsideration is to prevent manifest injustice legal error.

So to the extent that we didn't raise it, I -- I believe that we -- we did raise in the context that overtime, as a whole, is a valid basis for recovering continuation wages under [N.R.S. 608.020](#) to .050. So I believe it's appropriately raised here, your Honor.

And -- and in -- and that's leaning, my argument is it that -- that specific term conversation is used in the overtime statute itself. And then when we go and we looked at what the claims are at issue in this particular case, the continuation wage statutes of 608.020 to 050 -- in 608 020, 030 and 040 it specifically talks about wages or compensation. And in those statutes, it provides that in the event an employer does not pay an employee all the wages or compensation owed to a particular employee at the termination of employment whether it be voluntary or involuntary, that -- the wages of that particular employee continue for 30 days or after. And that's what the -- the underlying issue is in this case.

Getting to the issue of -- of the district court's decision in -- in -- in this case that a wage only refers to contractually obligated wages, we also urge this Court through reverse this being simply incorrect. And --

JUDGE ANELLO: Well, you're talking about 050, right, the -- the statute 608.050 which refers, you know, on its face only to employment contract wages?

MR. BUCK: Well, I -- I disputed that the 050 only refers to the contract wages. But 050 certainly doesn't have the term "compensation" in it. 040 refers to wages or compensation. 050 does not have the term "compensation" included in that statutory provision. It only refers to wage.

And this is where we get to the issue of where the district court determine that wages under the entire Nevada wage and hour statutes only refer to contractually-owed wages. And this simply is not correct when looking at the entire statutory scheme.

And I wanna point this Court's attention to 608.100(b)(1). And the reason why that particular statutory provision is important is because that if -- accepting the district court's reasoning on its face would render that statute and frankly numerous others and with -- a nullity. They -- they wouldn't exist because in that statute it says that it is unlawful for an employer to pay a

lower wage salary or compensation to an employee than the amount that the employer is required to pay to the employee by virtue of any statute or regulation or by contract between the employer and the employee. So the district court is saying that a wage can only be the contractually agreed upon wage.

But here, that would render the employer's obligation to pay wages pursuant to statute irrelevant and that simply cannot be the case.

But that's not the only instance. There's also under instances such N.R.S. 608.1016, which mandates the employer pay an employee wages for each hour the employee works. An employee in many different employments and areas will work over eight hours in a work day or over 40 hours in the work week. By concluding that overtime is not a wage and that -- and a wage is only a statutorily or a contractually agreed upon rate, that statute is again read out of the -- of the -- the Nevada wage and hour statutes.

And the third point I will raise, is the -- the interplay with this minimum wage concept. By concluding that wages are only contractually agreed upon wages, an employer, hypothetically could say I'm only going to employ -- employ a person for \$5 an hour. That is what the employer agrees to employ the employee. And -- and suppose the employee agrees to that. The problem is that the minimum wage statutes command that an employer pay at least the minimum wage for those hours worked. An employer would be in violation of the Nevada wage and hour code.

And -- and clearly -- so as a whole, I think when we look at the statutory scheme here, the district court's decision in this respect was -- was inappropriate.

JUDGE ANELLO: Let me -- let me get down into the weeds just a little bit to make sure I'm clear of your argument on this statute, 608.04, you -- you brought claims under both 040 and 050, right?

MR. BUCK: That -- that is correct. The allegation in the complaint was for both of -- of those particular statutes.

JUDGE ANELLO: What's the difference from your client's standpoint in the real world? But you were to prevail on one or not the other, would it make any difference?

MR. BUCK: It's an interesting question, your Honor. And frankly, I -- I've -- we have always -- in these cases that I have brought on behalf of employees have alleged that they provide separate remedies for 30 days of pay.

050 also provides for a lien to be potentially filed against the property which is a separate remedy which is why when these cases are brought, they're brought together with both provisions. Indeed, that was -- there was a case cited in -- in our brief, Doolittle, which is a Nevada case from 1932 which recognized an -- a person's ability to lien a property for the failure to pay wages and for waiting time penalties or continuation wages.

JUDGE NGUYEN: But that -- that gets me back to Judge Anello's earlier question regarding 050 though. That does seem -- that remedy does seem to be limited to a situation involving contracts of employment 'cause the statute specifically says -- I'm looking at the statute -- due and owing to them under their contract of employment whether employed by the hour, day, week or month and employees may charge and collect wages in the sum agreed upon in the contract of employment.

To the -- to the extent that the employees do not have a contract employment, does that mean that they're not -- not entitled to the remedies set out by 050? They could -- they could still go under 040 but by the plain language of 050, it doesn't seem like that covers them.

MR. BUCK: I think that -- that, certainly, 040 would be a -- a stronger position for -- if there is no contract of employment to seek waiting time penalties. However, I'm -- I'm not clear as if 050 is, specifically, limited to a contract of employment such as a written employment contract.

JUDGE SILVERMAN: What do you mean by no contract? They're no volunteers, are they?

MR. BUCK: No -- no, they're not, your Honor.

JUDGE SILVERMAN: So -- didn't -- don't these people have an agreement with Wal-Mart that they will work in exchange for getting X dollars an hour?

MR. BUCK: I -- I think you're correct. And --

JUDGE SILVERMAN: Isn't that a contract?

MR. BUCK: I -- I think it -- it is -- it can be a contract. It is a contract. And -- and even -- getting to -- to another third part of -- of what we raised with the district court was -- when the -- when the district court identified that you cannot sue for continuation wages because wages are only contractually owed wages, we, again, in our motion for reconsideration will -- even -- even if -- you are correct, your Honor, in saying that the only thing you can sue for in Nevada wage and hour code are for contractually owed wages, we have a contract here.

The contract was an employee was expected to receive a certain amount of pay for the hours that he or she worked including overtime pay. And that was specifically put forth in an employee handbook that the employee here was instructed to become familiarized with upon hire of employment. And --

JUDGE SILVERMAN: I see you are -- excuse me, do you wanna finish your time? I thought you said you wanna reserve some time. I don't want you to forget.

MR. BUCK: I -- I do wanna reserve some time. Thank you very much.

JUDGE SILVERMAN: Thank you, Mr. Buck.

ORAL ARGUMENT OF KARIN BOHMHOLDT ON BEHALF OF THE RESPONDENT

MS. BOHMHOLDT: Good morning.

May it please the Court.

Karin Bohmholdt on behalf of the appellee Wal-Mart Stores Inc.

The idea that a plaintiff may bring a claim in a case like this solely for penalties for 30 days of wages based on some missed overtime payments sometime back in the history of the employment after the employer voluntarily cooperated, paid the missed overtime payments and settle the entire matter with the labor commissioner is offensive but more importantly, not what the Nevada legislature intended.

JUDGE NGUYEN: But the settlement doesn't refer to waiting time penalties, does it?

MS. BOHMHOLDT: It does. It absolutely does. It doesn't refer to them by name but the labor commissioner's order says quite clearly that the matter is settled and resolved without further fine or penalties. Now the --

JUDGE NGUYEN: How -- how do we know that they're not talking about administrative type penalties versus waiting time penalties?

MS. BOHMHOLDT: You know that the labor commissioner must be talking about both because the labor commissioner is charged with enforcement of all those statutes including 040 and 050. That is the authority the -- the Nevada legislature has given to the labor commissioner. So when --

JUDGE NGUYEN: But you think that then -- in that instance, the labor commissioner would specifically reference Nevada

Statute 040 and 050. I mean, the order did reference a particular statute. And the only one that it referenced was 018. So what do we make about?

MS. BOHMHOLDT: Well, I would say, your Honor, that if the labor commissioner intended only to impose the penalties referred to under the other statute the administrative in criminal penalties, then the labor commissioner would have referred to that statute. But because the labor commissioner did not qualify which penalties he was referring to, there is no other way to read without further fine -- fine or penalty other than to include all the fines and penalties that this labor commissioner is -- is permitted to and charged with enforcing.

As a matter of fact, this plaintiff has argued to this Court that we somehow circumvented this lawsuit by settling with the labor commissioner. Well, that's true and the labor commissioner has chosen without qualifications to resolve the matter without further fine or penalty then that must mean all of the available fines and penalties under the statute.

The appellant has argued, well, that can only mean these criminal statutes and these administrative penalties. But there's no basis to -- to believe that's true and this plaintiff presented no evidence, none, in opposition to our summary judgment motion.

JUDGE ANELLO: Is -- is there anything -- to follow up on that, is there anything in the record anywhere other than the wording of the order itself that would support your argument that you just paid at the labor commissioner intended to cover waiting time penalties?

MS. BOHMHOLDT: I would say the record shows us basically two things. The order itself as -- as the Court's recognize which provides that adequate proof was -- was provided.

And second, the appellant's arguments that has been made throughout these proceedings both in their district court briefing and on appeal here that, supposedly, the labor commissioner settlement circumvented this lawsuit. So the suggestion that the labor commissioner was somehow unaware of the availability of these penalties just doesn't make any sense.

So either the labor commissioner was very aware and decided not to impose these penalties or the labor commissioner agrees with our interpretation of the statute and also chose not to impose the penalties. The only evidence before you is this order and what I've referred to and no evidence that the labor commissioner intended anything other than the plain language of what his order said.

Just to --

JUDGE SILVERMAN: I wanted to ask you about the 050 and this business about whether there was a contract of employment. Is it your position that Wal-Mart did not have a contract of employment with these employees?

MS. BOHMHOLDT: There -- there is no -- it is at-will employment but, certainly, when you talk --

JUDGE SILVERMAN: The at-will -- that's -- that's -- that does not mean there's no contract. That's a term of the employment, right?

MS. BOHMHOLDT: Right. And so certainly, there is an agreed upon hourly wage for each employee.

JUDGE SILVERMAN: Which is another way of saying they had a contract to work and get paid?

MS. BOHMHOLDT: And exactly, you get -- you get paid. In this case, I believe, this particular plaintiff was 8.80 an hour. That was for her agreed upon wage.

JUDGE SILVERMAN: So am I right? There was a contract of employment. There was, I guess, some kind of oral contract where the employees would get -- would -- would do work for Wal-Mart in exchange for Wal-Mart's promise to pay 8.80 an hour. Is that fair to say?

MS. BOHMHOLDT: I -- I -- yes, in terms of what the agreed upon hourly wage is. It is at-will employment and the --

JUDGE SILVERMAN: Why can -- you keep saying that?

MS. BOHMHOLDT: Yeah.

JUDGE SILVERMAN: I mean, it -- that means they had a contract that either party could terminate at-will. It doesn't mean there's --

MS. BOHMHOLDT: Correct.

JUDGE SILVERMAN: -- no contract.

MS. BOHMHOLDT: Correct.

JUDGE SILVERMAN: So it seems to me we've got a little bit of a red herring here when we get bogged down and whether there was a contract of employment. There was a contract of employment. One of the terms was that they'll get paid 8.80 an hour. Another term was they could be discharged without cause. You know there may have been other terms too. Isn't -- isn't that right?

MS. BOHMHOLDT: That -- I think that's right.

And so when you looked at 608.050, the wages or salary reference, there must be in this case that 8.80 an hour. We know that for a few reasons. One is that overtime didn't exist when 608.050 was enacted. It's statutorily imposed obligation. Of course, we have to pay it. But the contract of employment is we'll pay you 8.80 an hour. There's no guarantee to overtime hours at all.

JUDGE SILVERMAN: So is it your contention that if they were work overtime, there was no obligation to pay overtime?

MS. BOHMHOLDT: It is not my contention that there was no obligation but it is statutorily imposed obligation. It is not the expectation, the bargained-for --

JUDGE SILVERMAN: Why isn't that implicit?

MS. BOHMHOLDT: -- rate of pay.

JUDGE SILVERMAN: Isn't it a matter of common knowledge that if you work overtime you get time and a half?

MS. BOHMHOLDT: And -- yes. And I would say that just -- it's very easy to look at this and go, of course, overtime is a wage or is compensation. Of course, it is --

JUDGE SILVERMAN: Right.

MS. BOHMHOLDT: -- in the sort of little [inaudible] version. But we have to do this by looking more carefully at the entire statutory scheme and the context in which it was enacted. So let me skip to that briefly. And I wanna start a little -- in a little different way than we brief this in our briefs and come out in a different order.

608.018 is the overtime statute itself. And it defines overtime to be an -- to -- to include an employee's regular wage rate times one and a half. It uses the words "wage" and the word "rate" to define overtime. So wages under the statute which are separately defined have to be something else.

And the district court here has correctly harmonized all of these things by saying it must -- wages which are defined as what is agreed upon between the employer and the employee, must mean that regular rate of pay that 8.80 an hour. Overtime is something different. It's something extra. It's something you're not even entitled to ever work one minute of overtime.

And when we take that and we place that over -- let's take 608.040. 608.040 talks about wages or compensation -- and I'll talk about compensation in just a minute but let's stay with wages. The wages or compensation of the employee continues at the same rate. It doesn't make sense to include overtime in that because overtime is [inaudible] that was due at some point in the past 'cause you happen to work an extra hour.

The same rate language when you put that against the definition of wages in the Nevada statutory scheme, when you place that against the history where we know that these statutes were enacted before overtime was even an apple in anyone's legislative eye then you know that this has to be referring to that 8.80 an hour rate. There's nothing to continue when you're dealing with overtime.

Let me talk about compensation for a moment because I think it is very important. We have to start with the notion that if this were so apparent and so obvious then this appellant would have raised it from the get-go. But instead, the prayer for relief in the complaint actually separates these two things out. They did not make that legal argument. It wasn't a matter of -- I think counsel said well, we didn't emphasize it. They didn't argue it at all, period.

They -- they hung their hat on wages. And I think that does partly because they probably recognize these two -- two terms have to have some independent meaning if you're gonna do a statutory construction, and so they went with wages.

The district court properly exercises its discretion in declining to address a legal argument that could have been raised and was not. And, you know, this Court has held that on numerous occasions that if a -- a plaintiff or a party fails to raise a legal argument that could've been raised in their briefing, it's not properly preserved when you raised it in a motion for reconsideration.

JUDGE ANELLO: We -- we can nevertheless consider that here, can we not, a purely legal argument that doesn't require any development of a factual record or --

MS. BOHMHOLDT: You could but this Court routinely declines to. And the reason is that you would render that rule completely futile that parties timely raise arguments in the district court if you were always going to consider legal arguments that weren't properly preserved.

But even if you go on to consider it, again, as I -- as I noted, it's easy to say well, sure, that overtime is compensation. But you really have to look at this in the context of these statutes and when they were enacted. There was no overtime at adpoment. It must mean something different from wages.

And so is it -- is -- is overtime compensation in the general little [inaudible] version of the word? Of course, it is. But under this statutory scheme, it can't be what was intended.

And I've covered 608.040. Now on 050, we don't even have compensation in that particular statute. It deals only with wages and salary of an employee who has been discharged or laid off.

Now, 050 was enacted in 1925 and I've grappled with the differences between the two statutes. What -- one might mean what the other wouldn't. I think the context in this one being enacted in 1925 and focusing particularly on labor that is laid off and not timely paid what was agreed upon, that really it's the historical context of that statute that explains the difference as well as the lien.

JUDGE ANELLO: Is -- is it true that 040 relates, specifically, to employees not who are discharged and laid off but who resigned or quit? Is that another difference between the two?

MS. BOHMHOLDT: Well, 040 includes employees who resigned or quit. That is -- that is true. It also includes discharged employees --

JUDGE ANELLO: Okay.

MS. BOHMHOLDT: -- but not lay off employees.

JUDGE ANELLO: All right. And just a follow up on the question previously asked by Judge Silverman, I -- I wanna make sure I got -- I got this clear. I'm having a little trouble with it, this employment contract. It seems to me the position espoused in the -- in the briefs or that -- at least I -- I took it to be so is that 050 applies only to employees working under an employment contract deemed to be a written contract, you know, whether a labor contract or otherwise. In answer to Judge Silverman's question you seem to concede that you don't have to have a written -- it's just an agreement to work, any employee.

MS. BOHMHOLDT: Yeah. I don't think you have to have a written contract. I -- I'm trying to -- the only reason I'm trying to be careful about whether there is a contract or not is that Wal-Mart is very careful to have its relationship be at-will employment. But that doesn't mean that there's not a contract agreement for the rate of pay. Of --

JUDGE SILVERMAN: I guess it's one of --

MS. BOHMHOLDT: -- of course, there is.

JUDGE SILVERMAN: -- your -- it's one of your --

MS. BOHMHOLDT: It -- it --

JUDGE SILVERMAN: -- contractual rights.

MS. BOHMHOLDT: -- right, exactly.

JUDGE SILVERMAN: You can discharge somebody.

MS. BOHMHOLDT: Exactly, and -- and that's the only reason I was making that distinction.

If -- if I may come back to the labor commissioner order for just a moment because I do think that that is the basis on which this Court is required to resolve the case because otherwise, you would be resolving questions of state law that haven't been answered by the Nevada Supreme Court. So I -- I believe that the labor commissioner order controls here for the reasons I have explained. It -- it -- there is no qualification in this order as to what further fine or penalty means.

If it was intended to be limited solely to the administrative penalties under, I believe it was 608.195, that the appellant argued then that would've been included in this order and it is not.

The labor commissioner is charged with all of those statutes including 040 and 050. The whole point of the compromise with the labor commissioner is to end this entire issue. And to leave it hanging now that this plaintiff may seek solely penalties of 30 days wages for some overtime payment missed in the history of her employment is not what the statutes could mean. It's not what they are intended to do.

And I would just urge the Court to focus on in 040 that continues at the same rate language in understanding that because there's no way to read overtime as making any sense in that context particularly in light of the statute.

Unless the Court has further questions, I --

JUDGE ANELLO: I --

MS. BOHMHOLDT: Yes, your Honor?

JUDGE ANELLO: -- I have one -- one question. You -- you addressed this briefly. I just wanna make sure I understand. Overtime is not a compensation from your standpoint whether [inaudible] statute. How can that be -- is it anything that an employee is entitled to -- for work compensation?

MS. BOHMHOLDT: Putting aside that, I think the argument has been waived and the Court should not consider it here and that if it were so apparent under the statutes so it's surely the appellant would've raised it at a timely fashion, it's -- the problem is in looking at the historical context of the statute, what could the Nevada -- excuse me -- the Nevada legislature have intended to mean when it said compensation under 050 and it could not have intended to include overtime because overtime didn't exist at that point in time.

Now, the Nevada legislature did not go back when overtime was enacted and say in 040 or 050 including overtime. And that means that the Nevada legislature has not intended for compensation in this -- in this context to be included.

JUDGE SILVERMAN: Thank you very much.

MS. BOHMHOLDT: Thank you.

REBUTTAL ARGUMENT OF JOSHUA D. BUCK ON BEHALF OF THE PETITIONER

JUDGE SILVERMAN: Mr. Buck, you had about three minutes left I believe.

MR. BUCK: Thank you, your Honors.

I just want to piggyback on the last point made by my opposing counsel. The legislative inaction of not revising 608.040 or 050 after the overtime statute does not support their position. In fact, it supports our position. Why would you need to amend a statute that states wages or compensation to include overtime when overtime itself in 608.018 says compensation? It wouldn't make any sense.

I wanna point -- focus now on this issue of the labor commissioner proceeding in the release 'cause I've been focused on that on my opening remarks. First of all, as stated in our brief, the -- the defendant here could have cross-appealed that decision. The district court did not rule in our favor that the release was not -- did not apply the continuation wages. That was their obligation to appeal that decision if they want it before --

JUDGE SILVERMAN: Why can't they say --

MR. BUCK: -- your Court.

JUDGE SILVERMAN: -- we got to affirm on any basis supported by the record? They don't have to cross-appeal, do they?

MR. BUCK: Well, I think that the -- there's a couple of problems with that. One is under the -- the case law, as I read it, that in order to enlarge a particular order in order to affect substantive rights -- their substantive rights and they should have appeal that decision. And secondly, though, in the -- the one of the -- the issues --

JUDGE SILVERMAN: Well, I don't understand why they would cross-appeal. They -- they had four to five arguments. The judge bought one and not -- not the other but they left there with a judgment on their favor. There's nothing -- there's nothing to appeal. I mean, normally, we see this as they say, you know, their judgment had been wrong about this but you can affirm on another ground that was raised and is supported by the record.

MR. BUCK: Well, if -- if that -- if that is what the -- the Court is inclined to do, is to look at substantively the issue, I think that if it is before this Court that the -- the record is clear based on the -- the labor commissioner order that is before you only talks about 608.018. And the penalties that it talks about have no reference or whatsoever to 608.020 or 050.

And frankly, the -- the defendant here is placing the burden on the plaintiff whereas the burden to -- to describe and release should be on defendant and that's what set forth in the Torres v. Metropolitan Life case out of the Third Circuit. It says any

release has to be specific and express. And silence is not enough. They're trying to incorporate somehow that it's being silent in that specific release to the continuation penalties therefore, it goes on their favor. It's the other way around.

And I also wanna -- focus this Court's attention on the Dent v. Cox case. While, a little bit different, Dent case did deal with what was specifically release in a Wage and Hour DOL Settlement. And in that particular case, there was a specific release of wages for a specific period of time. The plaintiff filed the case [inaudible] outside of that that was specified in the wage and hour form. And this Court held that -- that defendant or the plaintiff had not waived the right to seek on paid wages.

Again, it goes to, one, whether its specifically addressed in the release and, two, what kind of notification do -- does the plaintiff or an employee received in this particular matter.

And Wal-Mart, if it wanted to have a greater release could have work with the labor commissioner. And indeed when it sent its letter out to the particular employees, could have stated what was in the release. It failed to do so and only state that it was released for overtime.

We respectfully request that this Court reverse the district court's order and remand for further proceedings.

Thank you very much.

JUDGE SILVERMAN: Mr. Buck, Ms. Bohmholdt, thank you.

The case just argued is submitted. We'll stand in recess.

Ms. -- Ms. -- Ms. [inaudible] do you wanna bring your visitor back to say hello for a second? [inaudible] too, you're welcome.