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COURT OF APPEALS

STATE OF NEW YORK

LILYA ANDRYEYeva AND MARINA ODRUS, ET AL.,

Respondents,

-against-

NO. 11

NEW YORK HEALTH CARE, INC., ET AL.,

Appellants.

ADRIANA MORENO And LEONIDAS PEGUERO-TINEO, ET AL.,

Respondents,

-against-

NO. 12

FUTURE CARE HEALTH SERVICES, INC., ET AL.,

Appellants.

20 Eagle Street
Albany, New York
February 12, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



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1 CHIEF JUDGE DIFIORE: The first appeals on this
2 afternoon's calendar are numbers 11 and 12, Andryeyeva v.
3 New York Health Care, and Moreno v. Future Care Health
4 Services.

5 Counsel?

6 MS. KOLATCH: Thank you, Your Honor. Judge
7 DiFiore, members of the court, may it please the court, my
8 name is Sari Kolatch. I represent the appellants New York
9 Health Care and Murray England in the Andryeyeva matter.
10 May I reserve one minute for rebuttal?

11 CHIEF JUDGE DIFIORE: You may.

12 MS. KOLATCH: Thank you. The Second Department
13 abused its discretion by failing to defer to the Department
14 of Labor's - - -

15 CHIEF JUDGE DIFIORE: Before we go any further,
16 counsel, just explain to me, what's the purpose - - - the
17 underlying purpose of the thirteen-hour rule?

18 MS. KOLATCH: The purpose is that the - - - the
19 employees are paid for the time that they're working, but
20 they're also given an opportunity for sleep and meals,
21 where they're not working, where they're not - - - where
22 they're relieved of their duties. They have the - - - to
23 remain in the premises, but other than that they're
24 relieved of their duties.

25 So they're only paid for those hours in which



1 they're working.

2 CHIEF JUDGE DIFIORE: When you say they have to
3 remain in the premises, flesh that out a little bit.

4 MS. KOLATCH: They have to remain - - - if
5 they're assigned to someone's apartment or house, they have
6 to remain in that apartment.

7 CHIEF JUDGE DIFIORE: And that is because?

8 MS. KOLATCH: That's because that's the - - -
9 that's the assignment. The - - - the care that that person
10 needed required someone in the premises but didn't require
11 twenty-four-hour care. So it didn't require - - - it's a -
12 - - there was an assessment done of patients - - - of
13 clients and if they're able to have someone with them
14 during the day where they're attending to their needs - - -
15 taking them for a walk, assisting them in dressing, helping
16 them eat if necessary, but they didn't require around-the-
17 clock care, where they're up all night or they had nursing
18 - - - where you needed to tend to them at various points
19 during the night - - -

20 JUDGE STEIN: Doesn't this boil down to whether
21 the DOL's interpretation of "available for work" is or is
22 not irrational - - - completely irrational?

23 MS. KOLATCH: It does.

24 JUDGE STEIN: Isn't that what this - - - there's
25 a lot of - - - there's a lot of stuffing here.



1 MS. KOLATCH: Yes.

2 JUDGE STEIN: There - - - there's a regulation,
3 and then there's all kinds of interpretations of the
4 regulation and every - - - but - - - but am - - - is it - -
5 - am I oversimplifying it if I say that's - - -

6 MS. KOLATCH: Not at all.

7 JUDGE STEIN: - - - what it boils down to?

8 MS. KOLATCH: That's exactly what it boils down
9 to. The Wage Order unquestionably - - -

10 JUDGE FEINMAN: So - - - so what is the
11 definition of "available for work"?

12 MS. KOLATCH: Available for work is - - - well -
13 - - well, if I can sort of reverse that, Your Honor, what
14 is not available for work, according to the Wage Order, is
15 the time that you're sleeping. You are not - - - according
16 to the Wage Order - - -

17 JUDGE FAHEY: So - - - so do you know any
18 firefighters?

19 MS. KOLATCH: Do - - - I do not.

20 JUDGE FAHEY: Do you know any firefighters?

21 MS. KOLATCH: I do not, but I - - - but I know
22 the distinction - - -

23 JUDGE FAHEY: Do you have any relatives who are
24 firefighters?

25 MS. KOLATCH: I do not.



1 JUDGE FAHEY: No. Well, every firefighter I know
2 has slept on the job.

3 MS. KOLATCH: Yes.

4 JUDGE FAHEY: But nonetheless, when that bell
5 goes off, they're available for work.

6 MS. KOLATCH: Yes.

7 JUDGE FAHEY: And so the distinction that would
8 be drawn, I think, is that they're there when you need
9 them, and they're required to be there. Aren't these
10 employees the same?

11 MS. KOLATCH: No. Actually I would make a
12 distinction, Your Honor.

13 JUDGE FAHEY: Well, let me - - - let me just - -
14 -

15 MS. KOLATCH: Oh, sorry.

16 JUDGE FAHEY: - - - finish on that analogy, then.
17 So you're an elderly person, you have problems, you can't
18 get up in the middle of the night to go to the bathroom.
19 Who gets up with you? This person, right? This - - - this
20 employee.

21 MS. KOLATCH: Well, it - - - it could be. The
22 distinction would - - -

23 JUDGE FAHEY: Well, but no, no, no. Come on.
24 Now, when you - - - somebody's staying in my apartment,
25 they're a home healthcare aide, I - - - I have to get up in



1 the middle of the night. Who gets up with me?

2 MS. KOLATCH: If someone needs to get up with me.

3 There's no - - - there's no - - -

4 JUDGE FAHEY: Okay.

5 MS. KOLATCH: - - - saying that every client - -

6 -

7 JUDGE FAHEY: All right, all right.

8 MS. KOLATCH: - - - needs - - -

9 JUDGE FAHEY: Exactly. And when the alarm goes
10 off, the firefighter - - - there may not be an alarm that
11 goes off all night, but nonetheless, when that alarm goes
12 off, that firefighter gets up. Isn't this the same kind of
13 thing?

14 MS. KOLATCH: It's - - -

15 JUDGE FAHEY: Doesn't that person have to be
16 there? They can't leave there.

17 MS. KOLATCH: Can I - - - if - - - can I make the
18 distinction between the two?

19 JUDGE FAHEY: Sure.

20 MS. KOLATCH: The di - - - distinction between
21 the firefighter, it is - - - it is fully expected that
22 fires could take place at any time of the day or night.

23 JUDGE FAHEY: Um-hum.

24 MS. KOLATCH: And so you work a twenty-four-hour
25 shift as a firefighter. I did it when I was a writing DA



1 in the D.A.'s Office.

2 JUDGE FAHEY: Um-hum.

3 MS. KOLATCH: We worked twenty-four-hour shifts.
4 2 in the morning, you got called to a precinct, you went to
5 a precinct.

6 JUDGE FAHEY: Sure.

7 MS. KOLATCH: You didn't get called, you slept on
8 your supervisor's couch.

9 JUDGE FAHEY: Um-hum.

10 MS. KOLATCH: But was expected that you would get
11 called. Here it's expected - - - the plan of care and the
12 people who are given home attendants that only work
13 thirteen of the twenty-four hours, it's expected that
14 you'll be able to get those eight hours' sleep.

15 JUDGE WILSON: But the two - - - the two - - -

16 MS. KOLATCH: If you can - - -

17 JUDGE WILSON: - - - the two named plaintiffs
18 here put in affidavits here and also testified that they
19 essentially never got the five hours. So why isn't a class
20 certifiable on that somewhat different ground?

21 MS. KOLATCH: For two reasons. First of all, one
22 of the named plaintiffs is not a class representative. She
23 pre-dated the class period. The other named plaintiff
24 testified differently than her affidavit. At deposition
25 she testified that sometimes she did get uninterrupted



1 sleep. In her affidavit she subsequently said she never
2 did.

3 But that's just those two. We don't know if
4 every other member of the class was able to sleep every
5 night. You can't - - - and that one plaintiff - - -

6 JUDGE RIVERA: But what they're claiming is
7 basically a pattern and practice by - - - excuse me - - -
8 by your client, by the employer, and that's the
9 quintessential class action type of claim. But - - - but
10 let me ask you something else going back to the
11 firefighter. A firefighter is on a salary, correct?

12 MS. KOLATCH: Honestly, I - - - I don't know. I
13 mean, I'm just not - - - you know - - -

14 JUDGE RIVERA: Well - - - well, all right. Well,
15 your employees are on a wage or are they on a salary?

16 MS. KOLATCH: They are paid for every - - - they
17 - - - they're on a wage. So if they work a shift, they're
18 paid - - -

19 JUDGE RIVERA: An hourly wage, because it's the
20 Labor Law, it's an hourly payment schedule under that Wage
21 Order, right?

22 MS. KOLATCH: It's either an hourly or - - - or
23 for the twelve-hour shift, you're paid X amount, which
24 covers - - -

25 JUDGE RIVERA: Which - - - which works out - - -



1 MS. KOLATCH: - - - more than minimum wage per
2 hour.

3 JUDGE RIVERA: - - - to at least being - - -

4 MS. KOLATCH: Yeah, yeah.

5 JUDGE RIVERA: - - - whatever that minimum wage
6 would be - - -

7 MS. KOLATCH: Yes.

8 JUDGE RIVERA: - - - well, for thirteen hours.
9 You can't slight them for - - -

10 MS. KOLATCH: Right.

11 JUDGE RIVERA: - - - for less than that. So but
12 you concede that if at any point in time any of your
13 employees actually don't get five hours of uninterrupted
14 sleep or the meal break, that you've got to pay them for
15 each hour of that twenty-four-hour shift at whatever is the
16 appropriate minimum wage under the Wage Order, correct?

17 MS. KOLATCH: Yes.

18 JUDGE RIVERA: Okay. So if they were able to
19 establish that, you owe them that money; that's correct?

20 MS. KOLATCH: If each individual plaintiff could
21 establish that they didn't get sufficient sleep and meal
22 time on each of their shifts, then yes.

23 JUDGE RIVERA: Yes, okay.

24 CHIEF JUDGE DIFIORE: Thank - - -

25 MS. KOLATCH: But there's no evidence of that.



1 There's just - - - there's one plaintiff who's a - - -
2 who's a named plaintiff, who worked for one - - - one
3 person for six months. She worked twenty-four-hour shifts.
4 You can't extrapolate that to a whole class for a twelve-
5 year period.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 Counsel?

8 MR. SCHLESINGER: May it please the court, my
9 name is Aaron Schlesinger. I represent the appellant,
10 Future Care. And I'd also like to reserve one minute for
11 rebuttal time.

12 CHIEF JUDGE DIFIORE: One minute, sir?

13 MR. SCHLESINGER: Yes, Your Honor.

14 CHIEF JUDGE DIFIORE: Please proceed.

15 MR. SCHLESINGER: I think a couple important
16 points to note on this case are: a) that the Department of
17 Labor is the agency charged with interpreting the Labor
18 Law, and what they did was they rendered an interpretation
19 for the industry to follow, stating that - - -

20 JUDGE GARCIA: Counsel - - - counsel, didn't - -
21 - my problem with that argument is they issue this Wage
22 Order and that has this term in it, "available for work",
23 and in that regulation, which has the force of a
24 regulation, they drop an exclusion for residential
25 employees under a "however".



1 So they have "available for work" and then they
2 have a "however". It seems to me pretty clearly to
3 indicate the definition they understand from this
4 regulation for "available for work" would otherwise cover
5 residential employees.

6 So I'm having a hard time understanding how later
7 you can just issue an opinion that says that "available for
8 work" doesn't cover the category of employees we're talking
9 about now, because you - - - the Department of Labor's
10 understanding of that term, from their own regulation, was
11 that it otherwise covered residential employees.

12 So what possibly could be the consistent
13 definition of that term that covers residential employees,
14 because you had to drop an exclusion in the reg, but
15 doesn't cover these - - - let's call them twenty-four-hour-
16 shift employees?

17 MR. SCHLESINGER: I think we can all agree that
18 the exemption applies to employees that physically reside
19 at the home of the employer.

20 JUDGE GARCIA: Right.

21 MR. SCHLESINGER: I think we all agree to that,
22 correct?

23 JUDGE GARCIA: But we also, I think, have to all
24 agree that otherwise those employees would be covered by
25 the definition of "available for work" in the reg.



1 MR. SCHLESINGER: But if you take the job
2 functions and the circumstances with regard to the
3 employees that reside at the home of the client and those
4 that do not, they're exactly the same.

5 JUDGE GARCIA: Yeah. So - - -

6 MR. SCHLESINGER: And - - -

7 JUDGE GARCIA: - - - you would have had to carve
8 them out from the definition in the regulation.

9 MR. SCHLESINGER: Well, they should really both
10 be subject to the exemption, because even those employees
11 that physically reside at the home of the client, if the
12 client is ill or injured or wakes up in the middle of the
13 night, they're going to have to tend to that individual
14 too.

15 JUDGE GARCIA: But you've got a carve-out for
16 them under the regulation, so they're not covered. But now
17 it seems - - - and I can ask the Department of Labor this
18 later - - - but now it seems as if the Department of Labor
19 would like to cover some other employees without having to
20 carve them out of their statutory definition by somehow
21 changing that definition through an opinion. And I don't
22 see any basis in administrative law or deference for being
23 able to do that.

24 MR. SCHLESINGER: Well, again, the Department of
25 Labor is the agency charged with interpreting and



1 implementing the Labor Law. I mean, they're - - -

2 JUDGE GARCIA: But they can't be inconsistent in
3 their own interpretations, I think, is also black-letter
4 law, right?

5 MR. SCHLESINGER: It is, but we're here to stress
6 the point that their interpretation is not inconsistent,
7 because with both sets of home health aides, and the ones
8 that live at the home of the client and those that don't,
9 they have the exact same work functions, they take the
10 exact same breaks, they provide the exact same care,
11 subject to the same plan of care, and when those clients
12 wake up in the middle of the night, both home health aides
13 are obligated to care for them.

14 JUDGE GARCIA: But I think - - - and I know we're
15 kind of passing in the night here, but to me that proves
16 that otherwise they would fall within the "available for
17 work" definition that's in the reg, and so would require a
18 regulatory exclusion as the residential employees did.
19 Since their job functions are essentially the same, I don't
20 know how you could specifically carve one out of the
21 definition in the regulation and then do the other one by
22 opinion letter.

23 MR. SCHLESINGER: Right, and that's why it's
24 unclear. And that's why the Department of Labor has come
25 in, and for several decades, has interpreted that



1 regulation to apply to both home health aides that
2 physically reside at the home of the client and those that
3 do not.

4 Secondly, with regard to the industry, it was
5 their practice to follow the Department of Labor. Again,
6 they're the agency charged with interpreting and
7 implementing the labor law. So you know, if there's any
8 specific agency that you're going to follow for advice on
9 when to provide overtime or when to pay a home health aide
10 over the course of thirteen hours, it's them. It's not
11 like the industry listened to someone off - - - you know,
12 some person off the road that just gave them, you know,
13 faulty advice. They - - - they - - -

14 JUDGE GARCIA: And the Labor Department has
15 enforcement authority, right? They can go after home
16 healthcare providers for violating these wage orders,
17 right?

18 MR. SCHLESINGER: They can. Yes, Your Honor.

19 JUDGE GARCIA: So it seems like what you're
20 saying would be a very good defense if the Labor Department
21 came after one of these providers and they could say you're
22 the agency charged with telling us what to do here; how can
23 you fine us? How can you take an enforcement action
24 against us?

25 But would that same logic apply to not paying



1 people who otherwise should have been paid under the reg?

2 MR. SCHLESINGER: Again, the Department of Labor
3 is the agency charged with interpreting the Labor Law to
4 the public, and that is the correct agency for these
5 businesses to listen to and take guidance from, and that's
6 what they did.

7 Again, it's not like they took it upon their own
8 initiative to say you know what, let's come up with this
9 thirteen-hour rule.

10 The other thing I want to say is that Medicaid
11 and Medicare reimbursement also follow that advice given by
12 the Department of Labor, and they only reimburse for
13 thirteen hours of a twenty-four-hour shift, and - - -

14 JUDGE FAHEY: So - - - so the core of your
15 argument, though, is that if - - - if there's an error it's
16 because we're following DOL's direction?

17 MR. SCHLESINGER: Right. It wasn't taken upon
18 the industry to come up with this idea by themselves. They
19 took it from the Department of Labor. And if you're not
20 going to take it from the Department of Labor, who else are
21 you going to take guidance from - - -

22 JUDGE FAHEY: I see.

23 MR. SCHLESINGER: - - - on the Labor Law?

24 CHIEF JUDGE DIFIORE: Thank you, Mr. Schlesinger.

25 MR. SCHLESINGER: Thank you.



1 CHIEF JUDGE DIFIORE: Counsel?

2 MR. ROZGER: Judge DiFiore, and may it please the
3 court, my name is Jason Rozger. I represent the plaintiffs
4 and certified class in the case of Andryeyeva.

5 My first point is there's a world of difference
6 between a residential employee under the Wage Order and a
7 nonresidential employee. And that's very clear from the
8 record in this case.

9 JUDGE RIVERA: And what category are home
10 healthcare aides?

11 MR. ROZGER: Nonresidential.

12 JUDGE RIVERA: Okay.

13 MR. ROZGER: They're spending three, four, five
14 days a week in the home of their patients, not the home of
15 the employer - - -

16 JUDGE RIVERA: Correct.

17 MR. ROZGER: - - - and that's the Settlement Home
18 Care case. And I don't think that is being disputed here.

19 JUDGE RIVERA: Right. So then they don't fit the
20 "however" clause? They don't fit - - -

21 MR. ROZGER: Correct.

22 JUDGE RIVERA: - - - under the Wage Order, any
23 description about residential employees?

24 MR. ROZGER: Correct, Your Honor.

25 JUDGE RIVERA: So then they fit otherwise, as



1 Judge Garcia was pointing out, to whatever else this Wage
2 Order says, correct?

3 MR. ROZGER: Yeah, that's correct.

4 JUDGE RIVERA: Okay.

5 MR. ROZGER: And the - - -

6 THE COURT: So then why - - - why is it that the
7 DOL is, in your opinion, not able to interpret "available
8 for work at a place prescribed by that employee (sic)", to
9 mean the hours that you actually work if you don't get the
10 sleep and meal times?

11 MR. ROZGER: Because they're available - - - the
12 home attendants are available whether they're awake or
13 asleep, eating or not eating. There's plenty of evidence
14 on this record and in the record in the Moreno case that
15 any time - - -

16 JUDGE RIVERA: Yeah, but as I understand the
17 DOL's position, the position is that if - - - if they sleep
18 the hours that the DOL has already identified, the five
19 hours uninterrupted - - - although they do obviously point
20 to eight hours - - - but they talk about the five hours
21 uninterrupted - - - and they have a meal break, that that's
22 not - - - that doesn't constitute availability.

23 MR. ROZGER: Well, that's contrary to the record
24 in this case and to any reasonable explanation of the word
25 "available", as the Second Department found.



1 When you're available, you're ready to go. The
2 dictionary definition is "present or ready for immediate
3 use". And if they're sleeping, however many hours the home
4 attendants are sleeping, if the patient needs their help,
5 they have to get up right away and do it. If they're
6 eating something, they have to stop what they're doing and
7 help the patient.

8 JUDGE RIVERA: Okay, so then - - - then explain
9 why Judge Cote is wrong in Severin, that your
10 interpretation means available for work is superfluous.

11 MR. ROZGER: Two things about the Severin
12 decision.

13 JUDGE RIVERA: Yeah.

14 MR. ROZGER: One, it didn't have the benefit of
15 the two Appellate Division decisions that came down later.
16 But what Judge Cote misunderstood - - -

17 JUDGE RIVERA: Um-hum.

18 MR. ROZGER: - - - is what "available" means in
19 the context of the home attendants. Judge Cote said that
20 they're not available during the time - - -

21 JUDGE RIVERA: Um-hum.

22 MR. ROZGER: - - - they're sleeping or eating.
23 And that's just not the case. It's not the case on this
24 record. Any time you're sleeping or eating, you're
25 available. The home attendants have to get up.



1 Ms. Odrus testified that she was afraid to sleep
2 because her - - - her charge - - -

3 JUDGE RIVERA: I think the point is if they
4 actually sleep and if they're actually on a meal break - -
5 -

6 MR. ROZGER: Right.

7 JUDGE RIVERA: - - - then no, they are not
8 actually working and available.

9 MR. ROZGER: No, well, I think that's - - -

10 JUDGE RIVERA: Right?

11 MR. ROZGER: - - - actually not true, quite
12 frankly. On a mean break, there's lots of evidence that -
13 - -

14 JUDGE RIVERA: But - - - but the question is not
15 the one I think you're posing; the question is whether or
16 not the Department of Labor's interpretation - - - their
17 construction of their regulation that has been longstanding
18 for decades, is irrational and unreasonable - - -

19 MR. ROZGER: I would - - - I would make two
20 points - - -

21 JUDGE RIVERA: - - - given - - - given the way
22 home health care aides work, given that particular work
23 industry.

24 MR. ROZGER: Sure. Given how home healthcare
25 aides work, they are available whether sleeping or eating,



1 and therefore it is unreasonable or irrational.

2 I also want to push back against the - - -

3 JUDGE RIVERA: But you agree that it is possible,
4 of course, that during the course of a night, the home
5 health care aide's sleep and meal breaks would not be
6 interrupted by a patient? You agree that that's possible,
7 correct?

8 MR. ROZGER: It's theoretically possible, sure.

9 JUDGE RIVERA: Yeah, because otherwise your - - -
10 you would be arguing for someone to literally be awake for
11 twenty-four hours.

12 MR. ROZGER: No, we're not arguing for that and
13 don't have to argue for that, because as long as they are
14 required to wake up and provide aid when needed, they are
15 available under the - - - under the regulation.

16 JUDGE FAHEY: Well, let me ask this question,
17 just to follow up on - - - with Judge Rivera's question.
18 The way it's positive - - - posited, this - - - this 2010
19 opinion letter, which - - - which set out an interpretation
20 that the industry has been relying on, that - - - that
21 establishes this five-hour uninterrupted sleep, eight hours
22 total, three hours of lunch, the - - - the question as to
23 whether or not it's possible that it could happen, wouldn't
24 that go to a summary judgment motion or a finder of fact
25 and not go to the class certification question?



1 MR. ROZGER: Potentially, yes.

2 JUDGE FAHEY: Um-hum. How so?

3 MR. ROZGER: But I would - - -

4 JUDGE FAHEY: In other words, what - - - what I'm
5 wondering is - - - is these factual questions, which
6 reasonably on both sides, there are factual questions, they
7 may exist, but how does that affect this class
8 certification, I guess, is what I'm wondering? It - - -
9 since - - - and normally the class certification, we take
10 these facts that are put forward and try to determine if
11 they meet the - - - the five-part threshold, and if they're
12 uncontested - - - at this point, it seems unquestioned that
13 they do meet the threshold.

14 So - - - so tell me if - - - what your take on it
15 is?

16 MR. ROZGER: Well, my primary take, of course, is
17 that the Second Department is correct and that all we need
18 to show is - - -

19 JUDGE FAHEY: We figured that.

20 MR. ROZGER: - - - for twenty-four hours, full
21 stop, right?

22 JUDGE FAHEY: We figured that.

23 MR. ROZGER: If we do have to get into how much
24 sleep or meal time people are getting, there's certainly
25 ways to do it on a class-wide basis. The way that patients

1 are assigned either twenty-four-hour care or twelve-hour
2 care - - -

3 JUDGE FAHEY: Well, in the initial determination,
4 was any effort made to show that it wasn't true, that as a
5 matter of fact, that people were sleeping five hours a
6 night all the time, and the industry came in - - - or - - -
7 or the defendants came in with proof saying, no, we have
8 all this proof that these people are getting five hours of
9 sleep at night, and there's no question that this is taking
10 place, and this certification shouldn't take place, Your
11 Honor?

12 MR. ROZGER: Yeah, there - - - there was no proof
13 of that in this case.

14 JUDGE FAHEY: Was there any proof offered at all
15 on that point?

16 MR. ROZGER: The - - - what is undisputed is that
17 the employers never tracked sleep time or meal time for the
18 home - - - twenty-four-hour home attendants. Home
19 attendants have to call in - - -

20 JUDGE FAHEY: So if that's correct, then there -
21 - - is there any available proof at all to make that point?

22 MR. ROZGER: I would say not in favor of the
23 employer. If they had the duty to keep those records, then
24 I think this class would still be available to the - - - to
25 the plaintiffs.



1 That brings me to another point.

2 JUDGE FAHEY: So it does - - - but I want to stay
3 with the certification point. So - - - so I - - - I - - -
4 it would be inappropriate for me to comment on whether or
5 not anything is being proven here, but I - - - what I'm
6 wondering is - - - is was there any attack on the factual
7 basis for the certification and if that wasn't attacked - -
8 - and if - - - and if there was, what was it, from your
9 point of view? And counsel can respond when they come up,
10 too.

11 MR. ROZGER: The court below really went just as
12 far as twenty-four-hour shifts, you need to get paid - - -

13 JUDGE FAHEY: I see.

14 MR. ROZGER: - - - a minimum wage.

15 JUDGE FAHEY: Okay. All right.

16 MR. ROZGER: And that's as far as it went.

17 JUDGE FAHEY: No, thank you. That answers my
18 question.

19 MR. ROZGER: And - - - and I wanted to push back
20 on this longstanding interpretation. If the - - -

21 JUDGE FEINMAN: So aren't there these letters,
22 memos, and remarks from 1980, '83, '84, '98, 2009, and 2010
23 which are sort of at odds with the position currently taken
24 by DOL?

25 MR. ROZGER: Yes, some of those remarks - - -



1 some of those internal memorandum (sic) set forth this
2 residential/nonresidential distinction. So I think it's
3 fair to say that DOL had a policy of making that
4 distinguish - - - distinction even from 1960.

5 But what I also want to leave the court with is
6 there's no evidence that they actually relied on this stuff
7 - - - well, not no evidence, but if you don't keep track of
8 the sleep time or the meal time, why is that - - - why
9 should we believe that the agencies were actually relying
10 on this 2010 opinion?

11 JUDGE RIVERA: May I ask, how - - - how - - - how
12 does one keep track?

13 MR. ROZGER: There's a call-in system. And each
14 home attendant has to, you know - - - and that tracks when
15 they arrive and when they leave. If there's a couple
16 twenty-four-hour shifts in a row, they call in in the
17 morning and at night and - - - just to sort of reset the
18 system. They also have to - - -

19 JUDGE RIVERA: But - - -

20 MR. ROZGER: - - - enter data about what work
21 they did. Did you change the patient, did you do her
22 nails, did you wash her hair? It would be very easy to ask
23 how much sleep did you get last night? Press the number
24 for the number of hours.

25 JUDGE RIVERA: Well, no, I'm ask - - - I'm sorry,



1 I wasn't clear. What - - - what - - - thank you for that
2 answer. What is it that they now do? They - - - they call
3 in and they say I've arrived, and when they leave they call
4 in and say I have left - - -

5 MR. ROZGER: Correct.

6 JUDGE RIVERA: - - - and then in between hour one
7 and hour twenty-four, what do they do?

8 MR. ROZGER: They don't call in. They're taking
9 care of the patient. At hour twenty-four - - -

10 JUDGE RIVERA: So at no point in time do they
11 indicate I am now going on a sleep break, I am now going on
12 a meal break?

13 MR. ROZGER: Correct.

14 JUDGE RIVERA: Did the employer ever require them
15 to do so?

16 MR. ROZGER: No.

17 JUDGE RIVERA: Okay.

18 MR. ROZGER: And they could have. Which makes me
19 very suspicious that they were actually relying on this
20 supposed opinion letter.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. ROZGER: Thank you, Your Honors.

23 CHIEF JUDGE DIFIORE: Counsel?

24 MR. SWEENEY: Chief Judge DiFiore, members of the
25 bench, my name is Mike Sweeney, and I represent Ms. Moreno



1 and Ms. Peguero in the class in the Moreno action.

2 JUDGE STEIN: Mr. Sweeney, could I pick up on - -
3 - on this, because there are a number of different issues
4 here, and one of them is the interpretation - - - DOL's
5 interpretation of the - - - of the reg. And another one is
6 whether they meet the requirements for class certification.
7 And then there are a bunch of sub-issues underneath that.

8 But I - - - I'd like to - - - I'd like to know if
9 you've - - - if you would agree with me that even if there
10 is evidence that the employers or at least these employers
11 - - - we don't necessarily know about all employers - - -
12 but these employers aren't following the rules, does that
13 have any bearing on whether the rules - - - the DOL's
14 interpretation of the rules are rational or irrational?

15 MR. SWEENEY: Well - - -

16 JUDGE STEIN: In other words, those are two
17 separate questions, right?

18 MR. SWEENEY: Yes. I - - - I would say this. I
19 mean, whether or not the court finds that the DOL's
20 interpretation is appropriate or not, there certainly still
21 is a class issue here as to whether or not the policies and
22 practices of these defendants in this case actually meet
23 that regulatory requirement.

24 JUDGE WILSON: You mean even as interpreted by
25 DOL?



1 MR. SWEENEY: As interpreted by DOL or
2 interpreted by the courts. I mean, the - - -

3 JUDGE WILSON: So it's - - - but well - - - but
4 sticking with - - - if we assume for a moment that DOL's
5 interpretation is not irrational, so let's just for the - -
6 - hypothetically assume we're stuck with that. The thing
7 that I thought - - - maybe I'm wrong, and correct me if I
8 am - - - that was different in your case from Andryeyeva,
9 is that your two plaintiffs did not allege that they never
10 got or didn't usually get the five hours of sleep, and
11 there wasn't either pleading or evidence like that in your
12 case. Is that right or wrong?

13 MR. SWEENEY: That - - - Your Honor, the - - -
14 there is an allegation of class-wide practices. There was
15 not testimony from the individual plaintiffs, you're
16 correct.

17 JUDGE WILSON: Right but what is - - - what was
18 the - - - what was the allegation? What practice?

19 MR. SWEENEY: The allegation of the class-wide
20 practices were that they did not pay for all the hours that
21 were worked; that they did not pay overtime wages; that
22 they did not pay spread-of-hours wages; that they did not
23 pay - - -

24 JUDGE WILSON: Was the - - - right. So I'm
25 asking more specifically, was there an allegation that the



1 members of the class did not, as a regular matter, get five
2 hours of uninterrupted sleep?

3 MR. SWEENEY: There - - - there - - - was there
4 an allegation in the pleadings? No, Your Honor, there was
5 not.

6 JUDGE WILSON: And proof of that?

7 MR. SWEENEY: Yes, there is plenty of proof of
8 that, Your Honor.

9 JUDGE WILSON: okay.

10 MR. SWEENEY: I mean, the - - - the - - - the
11 case has proceeded since then, and - - - and discovery has
12 gone on. We talked about "available for work". I mean,
13 Ms. Moreno slept in a chair in her client's room. And when
14 her client woke up, she was responsible for taking care of
15 her client. That is quintessentially "available for work".

16 What's gone on here is a medical professional has
17 made a determination that this patient requires someone to
18 be on premises twenty-four hours a day.

19 JUDGE STEIN: On premises, but not necessarily
20 caring for them at all times. Isn't that the - - - isn't
21 that what differentiates the clients that can have twenty-
22 four-hour care from the clients that have split shifts?
23 Isn't that one of the differentiating characteristics?

24 MR. SWEENEY: Well, I think the characteristic -
25 - - again, the - - - the twenty-four-hour shift is a



1 requirement that they're there available for work. I agree
2 that there's some - - -

3 JUDGE STEIN: Well, there - - - there's
4 definitely a requirement that they're there, right?

5 MR. SWEENEY: Well, beyond that.

6 JUDGE STEIN: Okay.

7 MR. SWEENEY: They're available for work. Right?
8 I mean - - -

9 JUDGE STEIN: But I guess - - - to me, the
10 "available for work" seems like it's a term of art, and
11 that's what we're determining what that means, that it may
12 not mean - - - it may or may not mean the same as the
13 dictionary might - - - or what we might in common parlance
14 think.

15 And the question here is, is do we give deference
16 to DOL in how it's interpreting that phrase?

17 MR. SWEENEY: So the Department of Labor is - - -
18 is due deference for their interpretations of - - - of
19 their own regulations, where they're ambiguous. And - - -
20 and we would argue that there is no ambiguo - - - ambiguity
21 here. This is pretty clear, the language. It says if
22 you're required to be available for work at a prescribed
23 location. It doesn't say if you're not sleeping.

24 In fact, as Judge Garcia pointed out, there is a
25 specific exemption in there for sleep time. But that only



1 applies to residential employees. These employees are
2 nonresidential employees. So - - -

3 JUDGE STEIN: So is it - - -

4 MR. SWEENEY: - - - I suppose - - -

5 JUDGE STEIN: - - - irrational for the state
6 Department of Law (sic) to interpret the rules the same as
7 the federal Department of Law (sic) interprets the federal
8 rules?

9 MR. SWEENEY: It is irrational and unreasonable
10 for the Department of Labor to interpret a law contrary to
11 its plain meaning. The - - - the federal standard may be a
12 reasonable standard. No quest - - -

13 JUDGE GARCIA: Is that - - - is that regulatory,
14 though? The federal standard that they defer to, isn't
15 that by regulation?

16 MR. SWEENEY: It - - - it is by regulation. The
17 problem on the federal side is there is no definition.
18 There is no statute 142-2.1 that describes the - - -

19 JUDGE RIVERA: The problem - - -

20 MR. SWEENEY: - - - it tells you what work - - -

21 JUDGE RIVERA: - - - the problem with that
22 argument is that this is a regulation. They wrote it. It
23 - - - it's their terms. It's their words. It's what Judge
24 Garcia referred to as the carve-out they've got. But it's
25 their distinction between residential and nonresidential.



1 It's their distinction between on-call versus subject to
2 call. And the question boils down to, is it irrational and
3 unreasonable - - - because there's a lot of deference
4 embedded in that phrase - - - for them to have used this
5 term and to interpret it as they have, which is, we assume
6 that if you sleep and eat these required hours, no, you're
7 not available, because of course, you will not actually
8 work.

9 But if you actually work and don't get five hours
10 of uninterrupted sleep and the meal break, then yes, the
11 employer must pay for every twenty-four - - - every hour of
12 your twenty-four hours during the shift. Why is that
13 unreasonable and irrational?

14 MR. SWEENEY: Because it's contrary to the plain
15 language of the regulation. Available for work, as the
16 Second Department said, means you're there and you have to
17 be available for work. These people are required to be
18 there and they're required to be available for work.

19 JUDGE FEINMAN: So - - - so "available for work"
20 is synonymous with "on-call" or synonymous with "subject to
21 call"; or "on-call" versus "subject to call" is irrelevant?

22 MR. SWEENEY: So - - - so let me give you
23 distinction of on-call and subject to call, right? Take,
24 for example - - - you could take for example, a - - - a
25 doctor, right? So a doctor may be at home on-call in case



1 she's called in to come and do some work. And in that
2 case, they're subject to call. But that same doctor may be
3 required to be at the emergency room, ready to take
4 patients as they come in. That person is working. They
5 may get some sleep on a couch, they may have an opportunity
6 to have a meal, but that doesn't mean that - - -

7 JUDGE RIVERA: But the problem - - - the problem
8 - - -

9 MR. SWEENEY: - - - they're not - - -

10 JUDGE RIVERA: - - - the problem with that
11 analogy was what - - - what was raised before by the bench,
12 which is DOL, based on its experience and expertise, has
13 said unlike an emergency room surgeon, who will be called
14 upon many times during the time that they are at that ER, a
15 - - - a home healthcare aide may not have interrupted sleep
16 or interrupted meal hours. That's the difference. And
17 that's based on their experience, their expertise, the way
18 they understand the industry. And why is it unreasonable
19 and irrational based on that experience and expertise, for
20 them to read this this way?

21 I - - - I think - - - my problem with your
22 argument is that it - - - your argument - - - and it may
23 very well be borne out - - - is that the defendants have
24 abused their employees, that they have exploited their
25 employees. But that strikes me as different. That's about

1 enforcement versus what goes on here.

2 If - - - if things are as you describe, there
3 shouldn't be those twenty-four-hour shifts. They should be
4 on two twelve-hour shifts or maybe they need three eight-
5 hour shifts or even more shifts. Right?

6 MR. SWEENEY: So I - - - I - - - I appreciate
7 Your Honor's position. I appreciate that there is a
8 tremendous amount of deference that goes to the Department
9 of Labor. Nonetheless there's a line. And the Department
10 of Labor is not entitled to create an exemption to the law
11 from the plain language of the law through - - - through
12 its own opinion letters or through its own interpretations.

13 JUDGE RIVERA: Let's - - - let's clarify. There
14 is the New York Labor Law, the statute that the elected
15 officials have passed; and then it's this Wage Order,
16 right, which is - - - this is their Wage Order, right,
17 pursuant - - - I'm sorry, I can't remember the - - - the
18 Wage Act that requires the commissioner to pass these wage
19 orders. This is their language, correct?

20 MR. SWEENEY: Yes.

21 JUDGE RIVERA: So they're interpreting their own
22 language.

23 Let me ask you this. You - - - do you concede
24 that - - - let's say we held in your favor with respect to
25 this interpretation. Do you concede that the day after



1 they could proceed to pass a regulation, as they have tried
2 with their emergency regulation - - - to actually define
3 availability of work in the way that they have always
4 interpreted it?

5 MR. SWEENEY: The Department of Labor can
6 certainly promulgate a new regulation. To do so, it must
7 go through the legal requirements to change the regulation,
8 to change the minimum wage order.

9 JUDGE RIVERA: But your position isn't that they
10 could never actually take this position?

11 MR. SWEENEY: The - - - there's - - -

12 JUDGE RIVERA: Just that they have to go through
13 the proper regulatory process to do so, that - - -

14 MR. SWEENEY: There - - - there's a clear process
15 by which the Department of Labor promulgates regulations.
16 And - - - and they must follow that. That's the law. They
17 - - -

18 CHIEF JUDGE DIFIORE: And now, counsel, we'll
19 hear from the Government. Thank you.

20 MR. SWEENEY: Thank you.

21 MR. WU: May it please the court, Steven Wu for
22 the Department of Labor.

23 CHIEF JUDGE DIFIORE: Take us through, counsel,
24 your interpretation of the Wage Order, getting straightaway
25 to "available for work".



1 MR. WU: Absolutely. And let me begin with the
2 purpose of this rule. I mean, the purpose of DOL's
3 longstanding policy is to identify the quite narrow set of
4 circumstances under which the ordinary rule that idle time
5 is compensable time - - -

6 JUDGE FAHEY: Well - - - well, let's take a step
7 back - - -

8 MR. WU: - - - should be excepted.

9 JUDGE FAHEY: - - - excuse me counselor. Before
10 you do that, let's take a step back for a second and
11 clarify what you're talking about. You are not talking
12 about - - - when we talk about this eight-hours sleep or
13 eight-hours work during the night and five hours
14 uninterrupted sleep, what we're talking about is an opinion
15 letter. We're not talking about a rule, a regulation, or
16 any statutory requirement, are we?

17 MR. WU: Well, it's a series of interpretations
18 and enforcement guidelines - - -

19 JUDGE FAHEY: I understand that.

20 MR. WU: - - - and so on.

21 JUDGE FAHEY: But in essence it culminates in a
22 2010 opinion letter. It's an opinion letter, right?

23 MR. WU: The 2010 opinion letter is - - - is part
24 of that. But - - -but I want to be clear that it is
25 routine in the labor area in both federal and state levels



1 - - -

2 JUDGE FAHEY: No, no, no. Not my question. You
3 can - - - you can say all those things. But I want to be
4 clear as to what it is.

5 MR. WU: Correct. All right.

6 JUDGE FAHEY: It is - - -

7 MR. WU: These are a series of enforcement
8 guidelines and opinion letters that interpret - - -

9 JUDGE FAHEY: All right, so - - -

10 MR. WU: - - - the underlying statute and the
11 Wage Order.

12 JUDGE FAHEY: - - - and they're - - - we see
13 these all the time. We see them from the Attorney General
14 opinion letters. The court, of course, has to take notice
15 of them, but they are not entitled, in any statutory
16 construction standard, to the kind of deference that I
17 would give to a normal regulation. And you aren't arguing
18 that here today?

19 MR. WU: And - - - and we are not. And I think
20 the case that I think answers that question quite directly
21 is the Supreme Court's decision in Skidmore, which was
22 about a federal Department of Labor interpretation quite
23 like this one, arose from a series of informal enforcement
24 guidelines. And that's the origin of Skidmore deference in
25 the federal courts, which is to defer to the expertise and



1 experience of the agency, you know, given its
2 persuasiveness, consistency, and history.

3 JUDGE FAHEY: Of course we - - - of course.
4 You're the people who do it every day. Of course we should
5 listen to you. That however, is not the same as the kind
6 of mandatory deference that we would be required to give.
7 And you aren't - - - you aren't asking us to do that here?

8 MR. WU: We are not. And that is part of the
9 reason why we think the length and vintage of this history
10 is important for our deference - - -

11 JUDGE FAHEY: I see.

12 MR. WU: - - - argument.

13 JUDGE FAHEY: Go ahead, Mr. Wu.

14 MR. WU: And - - - and on the question of what
15 this criteria is - - - is intending to accomplish, it is to
16 identify those circumstances where meal breaks and sleep
17 breaks are regularly scheduled, substantial, and
18 meaningful, so much so, that it is reasonable for the
19 Department to conclude that the time spent on those breaks
20 is really for the employee's benefit, and not for the
21 employer's.

22 And in that sense, as a practical matter, the
23 employee is not available for work if the employer honors
24 the restrictions that the Department has imposed.

25 JUDGE WILSON: Can you try, then, to answer Judge



1 Garcia's question, which is: the statute looks as if it
2 has a specific exclusion that applies only if you are
3 residential, which at least arguably implies that if you
4 are not residential, if your stuff is somewhere else, you
5 don't get the benefit of the exclusion, and the rest of the
6 statute applies?

7 MR. WU: So - - - so there's a couples of answers
8 to that. And one is that in the speech that's on page 119
9 and 120 of our addendum, it was explained that that was in
10 the Wage Order, because at the time, residential employees
11 were common, and the type of arrangement we have now, where
12 you have a third-party employer of individuals sent to
13 clients' homes, didn't really exist. I think that's the
14 explanation for why that specific provision is in - - - is
15 in the Wage Order.

16 But - - - but the other broader point is this.
17 That the - - - the Wage Order has never been understood to
18 be sort of the four corners of the Department's policy when
19 it comes to compensable time. I mean, there was earlier
20 discussion of "subject to call" and "on-call" and that
21 distinction. And that - - - that distinction between sort
22 of the - - - the gray area where somebody is working or not
23 working is not contained in the Wage Order either, and yet
24 is a well-established feature of compensable time.

25 JUDGE GARCIA: I have a problem with that. I



1 mean, this is a Wage Order. It's promulgated through a
2 specific process that's spelled out, and it tells people,
3 you're working twenty-four hours, when are you going to get
4 paid. But now you're saying, no, no, no, it's not the four
5 corners. Because we can have a speech or we can have a
6 letter, and that will knock off what, forty-five percent of
7 whatever time you're there. One, I have a problem with
8 deferring to that type of an arrangement, but two, I still
9 don't understand how within a regulation, you can have a
10 term "available for work", where as an agency, you felt it
11 necessary to carve out sleeping time within the reg,
12 because otherwise it would be covered by "available to
13 work", but now in an opinion letter you're saying no, no,
14 no; "available for work" doesn't really mean that you're
15 sleeping. It's only you're sleeping.

16 But here, you assumed "available for work" when
17 you made - - - covered you, you got paid when you were
18 sleeping, because you had to carve it out.

19 MR. WU: Well, and I guess my answer is this. We
20 don't think the residential employee provision is a carve-
21 out. It is a clarification. The word "however" there is
22 really to express - - - to avoid any doubt about how you
23 might apply this provision.

24 And the Department has consistently said and has
25 interpreted the phrase "available to work" or "required to



1 be available for work" separate from residential - - -

2 JUDGE GARCIA: I think it's almost - - -

3 JUDGE FAHEY: How about - - -

4 JUDGE GARCIA: - - - a difficult argument to
5 make, because someone who's living on the premises, you can
6 almost see saying that's your normal sleeping quarters, so
7 when you're sleeping, you know, you're there anyway. You
8 live there.

9 But now you're - - - and you needed to "however"
10 that. Now you're saying no, no, no, you were sent there by
11 your employer, so all things being equal, you're not
12 sleeping in that chair, but because you get to sleep in the
13 chair, we're not going to pay you for that time.

14 MR. WU: Well - - -

15 JUDGE GARCIA: And that would seem to be a more
16 necessary carve-out from your definition than even what you
17 have.

18 MR. WU: Well, and I think that's part of the
19 reason why the Department has been consistently issuing
20 these guidance documents and guide - - - and opinion
21 letters almost contemporaneously - - -

22 JUDGE GARCIA: Why didn't you must amend the reg
23 - - -

24 MR. WU: - - - with the - - - with the Wage
25 Order.



1 JUDGE GARCIA: - - - why didn't you amend the
2 regulation?

3 MR. WU: As I said, the Department could - - - I
4 think has the power to do so. The longstanding practice in
5 this area has to be proceeded by - - - has been to proceed
6 in the form of these informal enforcement - - - enforcement
7 guidelines.

8 JUDGE STEIN: How wide is the applicability of
9 this? Does this apply to ambulance drivers? Does it apply
10 to firefighters? Does it - - - you know, are we limited
11 here to - - - to home healthcare aides?

12 MR. WU: Well, so the origins of this rule comes
13 from workers working twenty-four-hour shifts. And the
14 Department made a judgment about the nature of the meal and
15 sleep breaks that workers with twenty-four-hour shifts will
16 be undertaking.

17 It was then applied to home health aides when
18 they were brought under the scope of the - - - of the
19 Minimum Wage Act. And you know, to defend the
20 reasonableness of that interpretation, I think the judgment
21 here was that when somebody is working twenty-four hours,
22 they will have to sleep and eat some time during that
23 period. And the Department will allow exclusion from
24 minimum wage and overtime for those periods, but only when
25 the employer adheres strictly to the requirements the

1 Department has - - - has imposed.

2 And that's why, for instance, although the facts
3 of this case are not something that the Department has
4 investigated, you know, sleeping in a chair next to a
5 patient's bed is - - - it is unclear whether that would
6 comply with the requirement that there be adequate sleep
7 facilities, which has been a feature of this part of the
8 Department's interpretation, since its inception.

9 JUDGE RIVERA: So can I - - - just to be clear,
10 with respect to the residential employee, there - - - this
11 carve-out always applies. Is a residential employee never
12 able to get paid if they too are disrupted in their sleep
13 and meal patterns?

14 MR. WU: There's - - - I think there's separate
15 guidelines for residential employees - - -

16 JUDGE RIVERA: Yeah.

17 MR. WU: - - - that are interpreting this - - -
18 this provision. I do not think it is a flat rule that they
19 can never get paid for that - - - for that period of time.
20 And - - - and importantly, the policy for what - - - what
21 are in this case nonresidential employees and residential
22 employees, is consistent. The Department is trying to
23 apply the same principle across both of these categories of
24 workers, namely, just identify circumstances where I think
25 it is reasonable to think that the time is largely the



1 employer's (sic) own.

2 JUDGE RIVERA: Well, in part - - - well, I know
3 that you've argued in part there's a desire for the
4 commissioner to align these rules with the federal rules.
5 But I also want to ask, is this in part an attempt to
6 recognize that you deal with the kinds of abuses that are
7 alleged here through enforcement as opposed to a particular
8 way of reading your own regulation?

9 MR. WU: That - - - that - - - that's exactly
10 right. And - - - and one thing I do want to emphasize is
11 that the Department treats as seriously the exclusion parts
12 of this - - - the - - - the narrow circumstance of this
13 rule as it does the exclusion.

14 I mean, the - - - there are many situations where
15 employers fail to satisfy the prerequisites for excluding
16 this time. And one thing I do want to clarify, Judge
17 Rivera, is that if the employer does not satisfy these
18 prerequisites, it's not just the time working that the
19 employee is compensated, but actually the entire twenty-
20 four-hour period. You get interrupted for meal times, you
21 get that hour of compensation. You don't get the five
22 hours of sleep, you get paid for the full eight hours.

23 So it is a hair-trigger application of these
24 provisions to protect workers from the types of abuses that
25 the Department regularly sees.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. WU: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MS. KOLATCH: Thank you, Your Honor.

5 CHIEF JUDGE DIFIORE: You're welcome.

6 MS. KOLATCH: I - - - I just want to address two
7 quick things. You know, there was a lot of discussion
8 about the distinction between residential and not
9 residential. And the distinction is who the employer is.
10 There's - - - there's no basis in any regulation, in any
11 law, in any history, in any opinion letter, that a
12 residential employee otherwise lives at that - - - as the
13 premises. That they - - - it just means that the - - -
14 they're working for person - - - their employer is the
15 person - - - is the patient, and that's the person who pays
16 them versus - - -

17 JUDGE GARCIA: But the language in the regulation
18 says "a residential employee - one who lives on the
19 premises of the employer".

20 MS. KOLATCH: Yes, and - - - and then if you look
21 at your - - - they do, because for those twenty-four hours,
22 they live on the premises of the employer. As - - - as a
23 nonresidential lives on the premises of third-party
24 recipients - - -

25 JUDGE GARCIA: So your interpretation of that



1 language would be one who lives on the premises of the
2 employer, lives there for twenty-four hours when they have
3 a twenty-four-hour shift?

4 MS. KOLATCH: Yes. It's not just my
5 interpretation. That was the interpretation of the Second
6 Department in Settlement Home Care v. Industrial Board of
7 Appeals.

8 The issue there was - - -

9 JUDGE GARCIA: If it was an eight-hour shift,
10 would they live there?

11 MS. KOLATCH: No, because they wouldn't sleep
12 there.

13 JUDGE GARCIA: So - - -

14 JUDGE WILSON: I think you're living in the
15 court, Judge Garcia.

16 MS. KOLATCH: Right. No, it's where you - - -
17 it's if you work a twenty-four-hour shift and you're
18 sleeping there.

19 JUDGE GARCIA: So twenty-four hours is the "live
20 there" definition?

21 MS. KOLATCH: Because you're - - - it's where
22 you're sleeping. And - - - and in Settlement - - -

23 JUDGE GARCIA: But if you were there twenty-four
24 hours and awake, then you wouldn't be living there?

25 MS. KOLATCH: If you were - - - if you were there



1 for twenty-four hours and on - - - on duty and awake, then
2 I suppose you wouldn't be living.

3 JUDGE GARCIA: Then you wouldn't live there.

4 MS. KOLATCH: But Settlement Home Care
5 specifically says you reside in the home of the third-party
6 recipients of services versus residing in the home of the
7 employer, if you're employed by an agency.

8 JUDGE RIVERA: Yeah, yes, okay. So that's kind
9 of here and there. It's a little bit of a red herring to
10 me, because the real issue is whether or not the Department
11 of Labor has been irrational or unreasonable in its
12 interpretation of the remainder of this particular Wage
13 Order to treat home healthcare aides in a way that is
14 somewhat similar to those who are residential employees - -
15 - not exactly, but somewhat similar.

16 MS. KOLATCH: But the only distinction is who
17 their employer is. So whether I hire someone directly to
18 be an aide for a family member or I go through an agency -
19 - -

20 JUDGE RIVERA: Yeah, I understand. But I just
21 asked counsel for the Department of Labor what happens when
22 you don't meet these requirements for the residential
23 employer, and he told me there's a whole 'nother bunch of
24 regulations that apply to that individual. So that's why I
25 say similarly, not necessarily exactly the same.



1 MS. KOLATCH: I understand. Okay.

2 JUDGE RIVERA: But - - - but - - -

3 MS. KOLATCH: I understand, Your Honor.

4 JUDGE RIVERA: - - - the question is, if you have
5 someone who is spending what otherwise would be their
6 personal time to rest, sleep - - -

7 MS. KOLATCH: Yes.

8 JUDGE RIVERA: - - - to eat, take a break, in
9 that home, right, is it unreasonable or irrational - - - I
10 know your position already - - - but that's the question
11 before us, right - - - for the Department of Labor to say
12 usually we assume that person working under this
13 environment, given our expertise and our knowledge about
14 this industry, does get that break time. And if the
15 employer doesn't allow that, or doesn't otherwise reimburse
16 them - - - as he says, it's a hair trigger - - - they have
17 to pay. And then they're subject to DOL enforcement and
18 these lawsuits, obviously.

19 MS. KOLATCH: And - - - and that is not
20 unreasonable and irrational. And - - -

21 CHIEF JUDGE DIFIORE: Thank you, Ms. Kolatch.

22 MS. KOLATCH: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel?

24 MR. SCHLESINGER: Thank you, Your Honor. I'd
25 just like to end by saying that the other issue that this



1 court is going to have to decide is whether or not class
2 action should be granted. And I just want to say, in the
3 Future Care case, regardless of how this court rules on the
4 exemption, plaintiffs did not meet their burden of proof to
5 meet all the Article 9 factors for class certification.

6 JUDGE STEIN: Well, since - - - at least - - -
7 you're talking about your case. But it's questionable
8 about how - - - how the courts below looked at this,
9 because in one case it was the Supreme Court and the
10 Appellate Division, and in the other case it was the
11 Appellate Division, said that the twenty-four-hour rule - -
12 - that they were entitled to payment for twenty-four hours.

13 So given that, would it not make sense to - - -
14 to remit to one or the other of the courts to - - - to look
15 at this fresh - - - in a fresh way?

16 MR. SCHLESINGER: The only reason that you would
17 not have to do so in the Future Care case is because at the
18 trial court level, two different judges upheld the
19 exemption and gave deference to the exemption and already
20 ran the analysis on whether or not a class action in this
21 case is appropriate.

22 JUDGE WILSON: Well, except Mr. Sweeney says that
23 there's a lot of discovery that's occurred since then. I
24 mean, is there a reason not to let them try again?

25 MR. SCHLESINGER: There is, Your Honor, because



1 when plaintiffs made their motion for class certification,
2 they were provided with documents; they made their motion;
3 they made their arguments; and they're locked into those
4 arguments. And that's called preserving your argument.
5 You're not allowed to bring new arguments on appeal.

6 JUDGE STEIN: But - - - but doesn't the statute
7 allow plaintiffs seeking class certification or allow
8 courts to modify the order to - - - to give conditional
9 orders and so on and so forth? So - - -

10 MR. SCHLESINGER: It does, but again - - -

11 JUDGE STEIN: - - - why shouldn't they have an
12 opportunity to request that?

13 MR. SCHLESINGER: Because in this case, not one
14 but two separate judges ran the analysis providing
15 deference to the exemption. Justice Schmidt - - -

16 JUDGE FEINMAN: Well, did Judge Knipel really run
17 it again or did - - - I mean, it was, if I recall, a
18 renewal and reargument, and basically - - -

19 MR. SCHLESINGER: It was. And both judges
20 correctly held that plaintiffs had not put in the proper
21 evidence to be given class certification. They put in
22 conclusory affidavits saying I was not paid my proper
23 wages, I was not paid for certain uniform expenses, and I
24 saw other people pick up paychecks when I was picking up my
25 paycheck up or I saw them in classes, and therefore they



1 too must have been wronged also. That's not evidence under
2 the laws of this state, and therefore those statements were
3 conclusory and the courts correctly both stated that
4 plaintiffs did not meet their burden of proof.

5 They had their chance. They didn't put in the
6 proper evidence; and it's too late now.

7 CHIEF JUDGE DIFIORE: Thank you, Mr. Schlesinger.

8 MR. SCHLESINGER: Thank you.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Lilya Andryeyeva and Marina Odrus, et al. v. New York Health Care, Inc., et al., No. 11, and Adriana Moreno and Leonidas Peguero-Tineo v. Future Care Health Services, Inc., et al., 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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