SUMMARY
April 29, 2021

2021COA59

No. 19CA2051, *Pilmenstein v Devereux Cleo Wallace* — Labor and Industry— Colorado Minimum Wage Act — Colorado Minimum Wage Order — Colorado Wage Claim Act

A division of the court of appeals considers whether employees who do not receive the compensated and duty free rest periods required under the Colorado Minimum Wage Orders have a private right of action to recover monetary damages under the Minimum Wage Act. The majority holds that that Minimum Wage Act expressly authorizes a private right of action for rest period violations where the employee seeks to recover the minimum wage for the time the employee was entitled to receive, but the employer did not provide, for a rest period. The special concurrence agrees with the conclusion but would decide the case based on the Wage Claim Act.

COLORADO COURT OF APPEALS **2021COA59**

Court of Appeals No. 19CA2051
Jefferson County District Court No. 17CV30319
Honorable Jeffrey R. Pilkington, Judge

Abigail Pilmenstein,

Plaintiff-Appellee,

v.

Devereux Cleo Wallace, a Colorado nonprofit corporation, d/b/a Devereux Advanced Behavioral Health,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE LIPINSKY
Richman, J., concurs
Pawar, J., specially concurs

Announced April 29, 2021

The Sawaya & Miller Law Firm, David H. Miller, Denver, Colorado; HKM Employment Attorneys LLP, Adam M. Harrison, Denver, Colorado, for Plaintiff-Appellee

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Wolf Guevara LLP, John M. Guevara, Denver, Colorado; Towards Justice, David H. Seligman, Denver, Colorado, for Amici Curiae Colorado Plaintiff Employment Lawyers Association and Towards Justice

¶ 1 The Colorado Minimum Wage Orders (MWOs) — regulations promulgated by the Colorado Department of Labor and Employment (CDLE) — state that employers in the health and medical industries must provide their employees with compensated "duty free" rest periods. But defendant, Devereux Cleo Wallace, doing business as Devereux Advanced Behavioral Health, a health care company, did not provide its Direct Care Providers (DCPs) with compensated rest periods. Devereux contended that it was exempt from the rest period requirement based on the language of two opinion letters from CDLE. Plaintiff, Abigail Pilmenstein, one of Devereux's DCPs, sued Devereux to recover compensation for the rest periods to which she asserted she was entitled under Colorado law but that Devereux did not provide to her.

¶ 2 The division unanimously agrees with the district court's ruling that Devereux was required to provide its DCPs with rest periods and, thus, affirms the district court's judgment. The majority concludes that, in this case, Pilmenstein's right to sue Devereux for the unprovided rest breaks arises under the Colorado Minimum Wage Act, sections 8-6-101 to -119, C.R.S. 2020, because Pilmenstein stipulated to limit her recovery to the minimum wage.

The special concurrence concludes that this right is found in the Colorado Wage Claim Act, sections 8-4-101 to -123, C.R.S. 2020, based on language in Pilmenstein's complaint.

¶ 3 In addition, we are not persuaded by Devereux's other arguments on appeal and thus decide that the district court did not err (1) by holding that the members of the plaintiff class have a private right of action for recovery of damages or (2) in defining the class.

I. Background

¶ 4 Devereux provides residential and outpatient mental health services to children and adolescents with psychiatric disorders. Pilmenstein worked as a DCP for Devereux from October 2015 to June 2017. In that capacity, she simultaneously supervised several adolescents at Devereux's facility. Even though Pilmenstein worked shifts as long as twelve consecutive hours, Devereux did not provide her with compensated duty free rest periods. Nor did Devereux provide its other DCPs with rest periods.

¶ 5 In February 2017, Pilmenstein notified Devereux that she believed its failure to provide the rest periods violated Colorado law and, specifically, the applicable MWOs. (Three different MWOs were

in effect at the times relevant to this case. Because the relevant language of those MWOs is substantially similar, we only cite to MWO No. 32, which was in effect in 2016.)

¶ 6 The MWOs expressly require employers in the health and medical industries to provide their employees with a ten-minute rest period, compensated and duty free, for every four hours worked. *See, e.g.*, Colo. Minimum Wage Order No. 32, 7 Code Colo. Regs. 1103-1 (effective Jan. 1, 2016-Jan. 1, 2017) (2016 MWO).

¶ 7 In arguing that it was exempt from the MWOs, Devereux pointed to two opinion letters from CDLE officials issued in 1998 and 2003. The officials did not issue the letters to Devereux, but, rather, to the Colorado Association of Family and Children's Agencies, Inc. (CAFCA), a membership association of child welfare, juvenile justice, and children's mental health organizations. Devereux was a founding member of CAFCA.

¶ 8 The opinion letters responded to CAFCA's request for an opinion that employers providing twenty-four-hour residential treatment and care to children are exempt from Colorado's *overtime regulations*. CAFCA's request did not refer to the rest period requirement. But, without any explanation or analysis, the opinion

letters said in sweeping language that such employers are exempt from *all aspects of the MWOs*.

¶ 9 On March 2, 2017, Pilmenstein filed a class action lawsuit against Devereux on behalf of herself and other Devereux DCPs who had not been provided with rest periods. Pilmenstein sought monetary damages for Devereux's failure to provide rest periods under the applicable MWOs.

¶ 10 Pilmenstein and Devereux each filed a motion for summary judgment. The district court denied both motions, ruling that the opinion letters did not exempt Devereux from the MWOs because, among other reasons, the letters contained no justification for the exemption and there was no evidence that the letters were the result of a thorough decision-making process.

¶ 11 In a separate order, the district court granted Pilmenstein's motion for class certification, defining the class as all DCPs who worked for Devereux on and after March 2, 2014. This effectively applied a three-year statute of limitations to the action.

¶ 12 Following these rulings, the parties jointly asked the district court to decide a number of disputed legal questions under C.R.C.P. 56(h). These questions included whether Devereux's failure to

provide the DCPs with rest periods could give rise to a private right of action for monetary damages and whether, as a matter of law, Devereux acted willfully by failing to provide the rest periods.

¶ 13 In its ruling on the C.R.C.P. 56(h) motion, the district court concluded that employees have a private right of action to recover monetary damages if their employer fails to provide them with rest periods in violation of the MWOs. The court noted, however, that it could not determine as a matter of law whether Devereux acted willfully by failing to provide rest periods and left that issue for the finder of fact.

¶ 14 To expedite an appeal of the district court's rulings, the parties jointly moved for entry of a stipulated final judgment. The parties asked the court to include in the final judgment an award of damages to Pilmenstein and the class members, subject to Devereux's right to appeal. The court then entered a final judgment, as the parties requested, and Devereux filed this appeal.

II. The Opinion Letters Did Not Exempt Devereux from the Rest Period Requirement in the MWOs

¶ 15 Devereux argues that the district court erred by ruling that it was required to comply with the rest period requirements in the

applicable MWOs because the opinion letters stated that companies such as Devereux were exempt from the MWOs. Resolving this issue requires us to interpret the MWOs, which are administrative regulations, and the opinion letters, which are an agency's interpretations of those regulations. We therefore review the district court's ruling de novo. *See Brunson v. Colo. Cab Co., LLC*, 2018 COA 17, ¶ 10, 433 P.3d 93, 96 ("We . . . review administrative regulations de novo.").

¶ 16 The rules governing our interpretation of administrative regulations are the same as those governing our interpretation of statutes. *Id.* We give effect to the promulgating body's intent. *Id.* If the language of a regulation is clear and unambiguous, we apply the plain meaning of the words the promulgating body chose without resort to other interpretive tools. *Id.* Only when the language of a regulation is ambiguous or unclear may we consider the agency's interpretation of the regulation. *Id.* at ¶¶ 10-11, 433 P.3d at 96. In addition, the agency's interpretation of the regulation in an opinion letter, which lacks the force of law, is entitled to respect only to the extent the interpretation is persuasive. *Id.* at ¶ 12, 433 P.3d at 96.

¶ 17 The MWOs at issue "regulate[d] wages, hours, working conditions and procedures for certain employers and employees for work performed within the boundaries of the state of Colorado in the following industries: . . . Health and Medical." *See, e.g.*, 2016 MWO § 1(D). Each MWO contains the following language regarding rest periods:

> Every employer shall authorize and permit rest periods, which, insofar as practicable, shall be in the middle of each four (4) hour work period. A compensated ten (10) minute rest period for each four (4) hours or major fractions thereof shall be permitted for all employees. Such rest periods shall not be deducted from the employee's wages. It is not necessary that the employee leave the premises for said rest period.

E.g., 2016 MWO § 8. In short, the MWOs unambiguously required employers in the health and medical industry to provide their employees with ten-minute compensated and duty free rest periods for every four hour period the employee worked.

¶ 18 As the district court found, Devereux conceded that, but for the exemption reflected in the opinion letters, the MWOs expressly covered it as an employer. And, contrary to its argument before the district court, Devereux concedes on appeal that the rest period

requirement is unambiguous. Specifically, Devereux does not contest that, if not for the opinion letters, it was required under the MWOs to provide ten-minute compensated and duty free rest periods to its DCPs for every four hours they worked.

¶ 19 Thus, for every four hours of work (or "major fractions thereof"), Devereux's DCPs were entitled to an additional ten minutes of pay without having to work that additional ten minutes. Devereux was obtaining those ten minutes of work from the DCPs even though Devereux was not entitled to it and was not paying the DCPs for that work. Accordingly, every unprovided rest period resulted in ten minutes of unpaid wages for the DCP. *See Wingert v. Yellow Freight Sys., Inc.*, 50 P.3d 256, 260 (Wash. 2002) (interpreting similar Washington regulation).

¶ 20 Because Devereux does not dispute that the language of the MWOs unambiguously imposed the rest period requirement on it, we need not resort to the opinion letters to interpret the MWOs. *See Brunson*, ¶¶ 10-11, 433 P.3d at 96 ("[I]f the language of a regulation is clear and unambiguous, we do not resort to other rules of construction. But if the language of a regulation or

administrative rule is ambiguous or unclear, we may consider an agency's interpretation of its own regulation or rule.").

¶ 21 This conclusion is reinforced by Devereux's argument that the opinion letters do not interpret any ambiguity in the MWOs (indeed, there is none), but rather exempt Devereux from the MWOs altogether. We reject this reading of the opinion letters. Interpreting them as exempting Devereux from an entire category of regulations that unambiguously apply to it would allow an agency opinion letter that lacks the force of law to nullify clear and unambiguous regulations.

¶ 22 Because the MWOs unambiguously bind Devereux, we reject the language in the opinion letters to the contrary. *See Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 2015 COA 11M, ¶ 27, 360 P.3d 186, 192 ("[W]here a regulation plainly requires a different interpretation, 'to defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000))).

¶ 23 We therefore conclude that the district court did not err by determining that Devereux was not exempt from the rest period requirement in the MWOs.

III. Employees Who Do Not Receive Their Mandatory Rest Periods Have a Private Right of Action to Recover Monetary Damages

¶ 24 Devereux next argues that the district court erred by ruling that an employer's failure to provide the required rest periods can give rise to a private action for monetary damages. Like the question of whether Devereux is subject to the rest period requirement, this issue requires us to interpret the relevant statutes and regulations. We review the district court's ruling de novo. *See Brunson*, ¶ 10, 433 P.3d at 96.

¶ 25 The MWOs are regulations that, despite their title, extend to wage and compensation issues beyond payment of the minimum wage. They implement several statutes, including the Colorado Wage Claim Act and the Colorado Minimum Wage Act. *See, e.g.*, 2016 MWO; *Brunson*, ¶ 3, 433 P.3d at 95. Both the Wage Claim Act and the Minimum Wage Act authorize private rights of action to recover monetary damages. *See* §§ 8-4-110(2), 8-6-118, C.R.S. 2020.

¶ 26 Like the district court, we review Pilmenstein's private right of action argument through the lens of the Minimum Wage Act.

¶ 27 In its ruling on the C.R.C.P. 56(h) motion, the district court began its analysis of Pilmenstein's private right of action argument with a review of section 18 of the MWOs:

> Section 18 . . . states in relevant part: An employee receiving ***less than the legal minimum wage*** applicable to such employee is entitled ***to recover in a civil action*** the unpaid balance of the full amount of such minimum wage together with reasonable attorney fees and court costs . . . .

The district court explained that section 18 means what it says: an employee who receives "less than the legal minimum wage" may pursue damages in a civil action "for all hours worked."

¶ 28 The court then turned to sections 3 and 8 of the MWOs, noting that

> [s]ection 3 . . . requires employers to pay employees the minimum hourly wage (currently $11.20/hour) "***for all hours worked***." . . . This section covers ***both the hourly rate and the number of hours worked.*** If an employee works but is not paid for her time, she has received less than the legal minimum wage for the hours worked.

¶ 29 Under the court's analysis,

> [s]ection 8 [of the MWOs] then elaborates on what time must be compensated in terms of rest periods — rest periods must be compensated and included in "hours worked." Section 8 ("a compensated ten (10) minute rest period for each four (4) hours or major fractions thereof shall be permitted for all employees. Such rest periods shall not be deducted from the employee's wages"). ***So, if an employee works during rest periods required by Section 8 and is not paid, she is "receiving less than the legal minimum wage . . . for all hours worked.***"

¶ 30 In applying these sections of the MWOs, the court said that "[a]n employee who is deprived of her rest period effectively provides the equivalent number of minutes of work to her employer without additional compensation. As such, she can pursue monetary damages in a civil action."

¶ 31 The court concluded that, had Pilmenstein's hours been properly calculated, "she would have been entitled to receive minimum wage for the time worked. . . . Since she was not paid for the would-be rest periods, she may pursue a civil action for the unpaid balance of any minimum wage amounts owed to her by reason of [Devereux's] alleged violations."

¶ 32 Consistent with this analysis, in the parties' joint motion for entry of a stipulated final judgment, Pilmenstein stipulated that she

and the class members would be entitled to recover no more than the minimum wage for the rest periods that Devereux failed to provide to them.

¶ 33 Specifically, Pilmenstein stipulated that, although she "maintains rest periods that have not been provided to employees should be paid at the employees' agreed hourly rates," based on the court's reasoning in its ruling on the C.R.C.P. 56(h) motion, she would no longer pursue damages in that amount. Rather, she was limiting her damage claim to "the Colorado minimum wage."

¶ 34 As a consequence of that stipulation, Pilmenstein is judicially estopped from seeking any damages above the minimum wage. *See Durbin v. Bonanza Corp.*, 716 P.2d 1124, 1128 (Colo. App. 1986) ("Stipulations are a form of judicial admission which are binding on the party who makes them and may constitute the basis for a judgment.").

¶ 35 Based on the parties' stipulation, in its Order: Amended Stipulated Final Judgment, the district court ruled that Pilmenstein and the other class members were entitled to be paid "ten minutes of compensation at the minimum wage of $1.85/period for a maximum of seven periods per week that the Class member

worked . . . ." ($1.85 is one-sixth of the applicable hourly minimum wage; ten minutes is one-sixth of an hour.) Thus, by the time this matter reached us, Pilmenstein, Devereux, and the district court had reached a consensus that this was a minimum wage case.

¶ 36 We therefore turn to whether the district court correctly decided that Pilmenstein could assert a private right of action under the Minimum Wage Act.

¶ 37 Section 8-6-118 of the Minimum Wage Act provides that an employee receiving less than the minimum wage "is entitled to recover in a civil action the unpaid balance of the full amount of such minimum wage." Section 18 of the MWOs mirrors this language:

> An employee receiving less than the legal minimum wage applicable to such employee is entitled to recover in a civil action the unpaid balance of the full amount of such minimum wage, together with reasonable attorney fees and court costs, notwithstanding any agreement to work for a lesser wage, *pursuant to § 8-6-118 C.R.S. (2015).*

2016 MWO § 18 (emphasis added). Therefore, we agree with the district court that the Minimum Wage Act and the MWOs authorize

a private right of action for employees who seek to recover the minimum wage.

¶ 38 Devereux's arguments that Pilmenstein has no private right of action do not persuade us. Devereux argues that (1) a private right of action exists only for an alleged statutory violation, not a regulatory one; (2) courts may not imply a private right of action; (3) because CDLE cannot impose a monetary damages penalty for rest period violations, an aggrieved employee likewise cannot obtain monetary damages; and (4) the MWOs have since been revised to expressly authorize a private right of action for rest period violations, thereby establishing that such a right did not exist before the revision. We hold that these arguments cannot be squared with our determination that the Minimum Wage Act expressly authorizes a private right of action for rest period violations where the employee seeks to recover the minimum wage for the time she was entitled to receive, but the employer did not provide, a rest period.

IV. Scope of the Class

¶ 39 Devereux next challenges two of the district court's rulings that impact the scope of the class. First, Devereux argues that the

court erred by declining to determine that Devereux did not act willfully as a matter of law. Such a determination would have shortened the applicable statute of limitations. Second, Devereux argues that the court applied the wrong accrual date for Pilmenstein's claim. If successful, these arguments would reduce the number of Devereux employees who are eligible to join the class. We disagree with both arguments, however.

A. Willfulness

¶ 40 As noted above, the parties jointly asked the court to decide under C.R.C.P. 56(h) whether, as a matter of law, Devereux acted willfully by failing to provide rest periods. Devereux argued that the two-year statute of limitations in section 8-4-122 of the Wage Claim Act should apply. Pilmenstein responded that a three-year limitation period should apply because Devereux "willfully" failed to provide its DCPs with the required rest periods. *See* § 8-4-122, C.R.S. 2020 ("[A]ll actions brought for a willful violation of this article shall be commenced within three years after the cause of action accrues and not after that time.").

¶ 41 Specifically, in its initial brief on this issue filed in the district court, Devereux argued that it had not acted willfully, as a matter of

law, because it had reasonably relied on the opinion letters in concluding it was exempt from the MWOs. In Pilmenstein's initial brief filed in the trial court, she asserted that Devereux acted willfully, as a matter of law, because Devereux "failed to exercise even the slightest degree of diligence."

¶ 42 Whether an employer acted willfully by failing to pay wages is a mixed question of fact and law. *See Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1137 (10th Cir. 2000). Where the factual issues predominate, appellate courts review a district court's willfulness determination for clear error. *Id.* Because the factual issues predominate in our review of this case, we review the district court's ruling for clear error. We find none.

¶ 43 The district court determined that it could not resolve the willfulness issue on summary judgment because there were "genuine issues of material fact as to whether [Devereux] willfully violated [the rest period requirement in the MWOs]. The trier of fact, not the Court, must decide this issue."

¶ 44 Devereux argues on appeal that no disputed material facts prevented the court from determining on summary judgment that Devereux had not acted willfully as a matter of law. Devereux does

not dispute that it failed to comply with the MWOs' rest period requirement but contends that its noncompliance was justified because it was premised on the exemption described in the opinion letters. For this reason, Devereux argues that the district court erred by finding that disputed issues of material fact precluded a ruling on summary judgment that Devereux did not act willfully and, thus, the district court should have applied the two-year statute of limitations as a matter of law.

¶ 45 We disagree. Whether Devereux relied on the opinion letters when it failed to provide its DCPs with the rest periods required by the MWOs is a disputed factual issue, not a legal one. In deposition excerpts filed together with the C.R.C.P. 56(h) motion, Devereux's director testified that he "believe[d]" Devereux did not comply with the rest period requirements because of the purported exemption. But, when pressed to testify based only on his personal knowledge, he admitted that he could not say whether Devereux relied on the opinion letters and did not know why Devereux did not comply with the MWOs.

¶ 46 Therefore, it is not clear from the record whether Devereux relied on the opinion letters in deciding not to comply with the rest

period requirement. Thus, there are disputed issues of material fact as to whether Devereux acted willfully in not providing its DCPs with rest periods. For this reason, the district court properly declined to decide the willfulness issue on summary judgment, and we decline to do so on appeal.

¶ 47 In so deciding, we express no opinion as to which statute of limitations applies to private rights of action under the Minimum Wage Act. The parties' briefs do not address this issue. Unlike the Wage Claim Act, the Minimum Wage Act does not include a section addressing the "limitation of acts." And the limitation section of the MWOs expressly applies to the deadline for registering written complaints with the CDLE's Division of Labor. Nothing in the MWOs addresses the limitations period applicable to private rights of action.

B. Accrual Date

¶ 48 Finally, Devereux argues that the district court applied an incorrect accrual date in certifying the class. Because the facts relevant to the accrual date are undisputed, we review the district court's determination de novo. *See Kovac v. Farmers Ins. Exch.*, 2017 COA 7M, ¶ 13, 401 P.3d 112, 114 ("When a claim accrues

under a statute of limitations is an issue of law. We review de novo a trial court's application of the statute of limitations where the facts relevant to the date on which the statute of limitations accrues are undisputed.") (citation omitted).

¶ 49 Although, as explained above, section 8-6-118 of the Minimum Wage Act provides that an "employee is entitled to recover in a civil action the unpaid balance of the full amount of such minimum wage . . . ," the Minimum Wage Act does not specify *when* a minimum wage employee must be paid the minimum wage. The broad language of the Wage Claim Act, however, addresses when wages and compensation must be paid to an employee and when an employee must be paid the minimum wage.

¶ 50 Specifically, under section 8-4-122 of the Wage Claim Act, an action for unpaid wages accrues "on the date that each set of wages first became due and payable." *Hernandez v. Ray Domenico Farms, Inc.*, 2018 CO 15, ¶ 14, 414 P.3d 700, 704. The "wages or compensation" become due and payable "on regular paydays no later than ten days following the close of each pay period." § 8-4-103(1)(a).

¶ 51 Based on these authorities, we agree with Pilmenstein that her claim accrued on the first regular payday after she first worked without a required rest period in 2015.

¶ 52 In response, Devereux summarily asserts that Pilmenstein's claim did not accrue until February 2, 2017, when she contacted Devereux about its failure to provide rest periods. We do not consider this argument, however, because it is undeveloped and unsupported. *See Am. Fam. Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 2015 COA 135, ¶ 42, 370 P.3d 319, 329.

¶ 53 That Pilmenstein asserted her right to be compensated for the unprovided rest periods in February 2017 did not change the fact that Devereux owed Pilmenstein additional pay on her next regular payday following her first unprovided rest period. As explained above, the foundation of Pilmenstein's case is that Devereux should have paid her for an additional ten minutes of work every time she was denied a required rest period. Her claim therefore accrued when Devereux first failed to pay her an additional ten minutes for an unprovided rest period.

V. Pilmenstein's Request for Attorney Fees

¶ 54 Based on the language of the parties' joint motion for entry of a stipulated final judgment, Pilmenstein requests that we remand the case to the district court for a determination of Pilmenstein's entitlement to recover her attorney fees and, if so, the amount of such fees. We agree that the joint motion provides that, if Devereux "does not prevail on appeal," the district court "may determine," among other relief, "reasonable attorney's fees . . . ."

¶ 55 We enforce the parties' agreement. On remand, the district court should consider whether Pilmenstein is entitled to an award of attorney fees and, if so, the amount of such fees, consistent with the language of the parties' joint motion and the final judgment.

VI. Conclusion

¶ 56 The district court's judgment is affirmed. The case is remanded to the district court for further proceedings consistent with this opinion.

JUDGE RICHMAN concurs.

JUDGE PAWAR specially concurs.

JUDGE PAWAR, specially concurring.

¶ 57 I write separately because I disagree with the majority's reasoning, but not its ultimate conclusion, on the issue of whether Abigail Pilmenstein has a private right of action for the rest break violations. The majority holds that Pilmenstein's stipulation to a damages amount based on the legal minimum wage, executed at the end of the district court litigation, changed the nature of her claim from one authorized by the Wage Claim Act to one solely authorized by the Minimum Wage Act. As the majority puts it, by virtue of this stipulation, the parties "reached a consensus that this was a minimum wage case." *Supra* ¶ 35. The stipulation did no such thing. Not least of all because the stipulation itself states that, in Pilmenstein's view, this is not a minimum wage case: "Pilmenstein maintains rest periods that have not been provided to employees should be paid at the employees' agreed hourly rates [i.e., not the legal minimum wage]."

¶ 58 Because Pilmenstein's claim has always sought unpaid wages in excess of the legal minimum, I conclude that this is not a Minimum Wage Act case. Rather, Pilmenstein's claim is and always has been authorized by the Wage Claim Act.

I. The Wage Claim Act and The Minimum Wage Act

¶ 59 As the majority explains, the Minimum Wage Orders (MWOs) implement both the Wage Claim Act and the Minimum Wage Act. Colo. Minimum Wage Order No. 32, Authority, 7 Code Colo. Regs. 1103-1 (effective Jan. 1, 2016-Jan. 1, 2017); *Brunson v. Colo. Cab Co., LLC*, 2018 COA 17, ¶ 3. And I agree with the majority that every violation of the MWOs' rest break provision resulted in ten minutes of unpaid wages for that Direct Care Provider (DCP). The question therefore becomes which statute — the Minimum Wage Act or the Wage Claim Act — authorizes a private right of action to recover those unpaid wages.

¶ 60 The answer to this question turns on whether the wage a plaintiff seeks to recover is equal to or above the legal minimum wage. A claim seeking to recover only the legal minimum wage may be brought under either the Minimum Wage Act or the Wage Claim Act. But a claim seeking to recover wages in excess of the legal minimum wage can be brought under only the Wage Claim Act.

¶ 61 The Minimum Wage Act, section 8-6-118, C.R.S. 2020, authorizes a private right of action to recover the balance of the full "legal minimum wage applicable to [an] employee." The MWOs,

section 18, contain identical language. Therefore, the Minimum Wage Act and the MWOs authorize a private right of action for a claim seeking to recover only the legal minimum wage.

¶ 62 In contrast, the Wage Claim Act authorizes a private right of action for any unpaid wages, including wages based on unprovided rest breaks, regardless of whether the wage is at or above the legal minimum. Section 8-4-110(2), C.R.S. 2020, of the Wage Claim Act expressly authorizes a private right of action for a violation of any regulation prescribed pursuant to the Wage Claim Act: "Any person claiming to be aggrieved by violation of any provisions of this article or regulations prescribed pursuant to this article may file suit in any court having jurisdiction over the parties without regard to exhaustion of any administrative remedies." The MWOs' rest break provision is just such a regulation because it implements section 8-4-103(1)(a), C.R.S. 2020, of the Wage Claim Act.

¶ 63 Section 8-4-103(1)(a) requires employers to pay employees their wages for their time worked. § 8-4-103(1)(a) (Wages earned by an employee "shall be due and payable . . . on regular paydays no later than ten days following the close of each pay period" unless the employee and employer agree otherwise.). For every four hours

worked, the MWOs' rest break provision adds another ten minutes to the total hours worked and for which an employee must be paid his or her wage. Because the rest break provision defines the time an employee works and must be paid for, it implements section 8-4-103(1)(a)'s general requirement that employers pay employees for the time worked. And because the rest break provision implements a provision of the Wage Claim Act, an employee alleging a violation of the rest break provision can bring a private damages claim under section 8-4-110(2) (authorizing a private damages claim for any violation of the Wage Claim Act or regulation that implements it).

¶ 64 In sum, the Wage Claim Act authorizes a private right of action for unpaid wages regardless of the wage the employee seeks to recover. All that matters is that the employee seeks to recover unpaid wages to which the employee is entitled. The Minimum Wage Act and section 18 of the MWOs authorize a more limited private right of action — one that seeks to recover only the legal minimum wage for unpaid hours worked, nothing more.

II. Only the Wage Claim Act Authorized Pilmenstein's Claim

¶ 65 From the beginning of this case and through this appeal, Pilmenstein's claim sought her and the other DCPs' regular wages, at least some of which were higher than the legal minimum. Her claim is therefore authorized only by the Wage Claim Act.

¶ 66 Pilmenstein's complaint contained no mention of the Minimum Wage Act or the legal minimum wage. Instead, it requested relief under the Wage Claim Act, citing repeatedly to various provisions of that Act. The prayer for relief specifically requested "[m]onetary damages compensating Pilmenstein and each Class Member, *at his/her hourly rate*, for each 10-minute rest break that was not provided." (Emphasis added.) Because Pilmenstein's claim sought wages in excess of the legal minimum wage, it was outside the scope of the Minimum Wage Act and section 18 of the MWOs. It was instead authorized only by the Wage Claim Act.

¶ 67 The parties' stipulation did not change that. At the conclusion of the litigation in the district court, after the court had issued its legal rulings under C.R.C.P. 56(h), and for the sole purpose of getting to a final judgment that would allow Devereux to appeal, the parties compromised and stipulated to a damages amount based on

the legal minimum wage. But the parties' stipulation went only to the amount of damages. The parties did not stipulate that Pilmenstein's claim was a Minimum Wage Act claim. In fact, the opposite is true. The parties' joint motion for a stipulated final judgment stated that Pilmenstein's claim was brought under the Wage Claim Act and the MWOs' rest break provision. Even more specifically, the joint motion stated that despite using the legal minimum wage to calculate damages, Pilmenstein "maintains rest periods that have not been provided to employees should be paid at the employees' agreed hourly rates." Only "for the purposes of the stipulated judgment has [Pilmenstein] agreed to apply the Colorado minimum wage."

¶ 68 The majority reasons that stipulations are a form of judicial admission and are binding on the party who makes them. That may be true. But Pilmenstein's statement in the joint motion for a stipulated judgment maintaining that she and all DCPs are entitled to compensation based on their agreed-upon wage, not the legal minimum, is no less of a stipulation than her acceptance of a damages amount. Reading the entire stipulation as a whole, viewing each of its individual provisions in context, it is clear to me

that Pilmenstein's acceptance of a damages amount based on the minimum wage did not change the fact that her claim has always alleged — and still does — that every DCP is entitled to their agreed-upon wage for unprovided rest breaks under the Wage Claim Act.[1]

¶ 69 For all these reasons, the parties' stipulation had no effect on the fact that Pilmenstein's claim, because it sought wages in excess of the legal minimum, was authorized by the Wage Claim Act and not the Minimum Wage Act.

¶ 70 Likewise, the district court's purported reliance on the Minimum Wage Act to authorize Pilmenstein's claim should be immaterial for us. As the majority correctly states, whether a

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[1] The majority also holds that Pilmenstein is judicially estopped from seeking damages above the minimum wage. But Pilmenstein is not seeking additional damages — she is the appellee and seeking only to affirm the stipulated final judgment. Be that as it may, I agree with the majority that if she were to seek additional damages she would not be allowed to do so, but not because the stipulation changed the nature of her claim. Pilmenstein cannot seek additional damages simply because she agreed to accept the amount of damages that she did, subject to Devereux's right to appeal. Her agreement to accept a damages amount calculated using the minimum wage did not signal her agreement that this was now a minimum wage case, especially when the stipulation clearly states the opposite.

private right of action exists is a legal issue we review de novo. And we can affirm on any ground supported by the record, regardless of whether it was rejected, or even considered, by the district court. *See Taylor v. Taylor*, 2016 COA 100, ¶ 31. I would affirm the district court's ruling that Pilmenstein had a private right of action for rest break violations. And I would do so based only on the Wage Claim Act, regardless of what ground the district court relied on.

¶ 71 I would therefore conclude that only the Wage Claim Act, not the Minimum Wage Act or section 18 of the MWOs, authorizes Pilmenstein's claim. I concur in all other parts of the majority opinion.