CHRISTOPHER MENDOZA, an individual, on behalf of himself, and all other persons similarly situated, Plaintiff, vs. NORDSTROM, INC., a Washington Corporation authorized to do business in the State of California, and DOES 1 through 100, Inclusive, Defendants. MEGAN GORDON, an individual, on behalf of herself, and all other persons similarly situated, Plaintiff-Intervenor, vs. NORDSTROM, INC., a Washington Corporation authorized to do business in the State of California, and DOES 1 through 100, Inclusive, Defendants.

Case No.: SACV 10-00109-CJC(MLGx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

2012 U.S. Dist. LEXIS 188379

September 21, 2012, Decided
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SUBSEQUENT HISTORY: Question certified by *Mendoza v. Nordstrom, Inc., 2015 U.S. App. LEXIS 2551 (9th Cir., Feb. 19, 2015)*

COUNSEL: [*1] For Christopher Mendoza, an individual, on behalf of himself and all other persons similarly situated, Plaintiff: David R Markham, LEAD ATTORNEY, The Markham Law Firm, San Diego, CA; Andre E Jardini, Hilary M Goldberg, Knapp Petersen & Clarke, Glendale, CA; James M Treglio, Laura M Cotter, R Craig Clark, Clark Law Firm, San Diego, CA.

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For Nordstrom Inc, a Washington Corporation authorized to do business in the State of California, Defendant: Julie A Dunne, Lara Katyana Strauss, LEAD ATTORNEYS, Littler Mendelson, San Diego, CA; Dawn S Fonseca, Littler Mendelson PC, San Diego, CA.

JUDGES: CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

OPINION BY: CORMAC J. CARNEY

OPINION

MEMORANDUM OF DECISION

I. INTRODUCTION

This case requires the Court to interpret and apply the California Labor Code statutes pertaining to the prohibition against an employee being required to work more than six consecutive days without a day of rest. Plaintiffs Christopher Mendoza and Megan Gordon contend that their [*2] former employer, Defendant Nordstrom, Inc. ("Nordstrom"), violated *Sections 551* and *552* of the California Labor Code (hereafter, "day of rest statutes") by permitting them to work more than six consecutive days without a day of rest. Nordstrom denies that it violated the day of rest statutes on four separate

and independent grounds: (1) Plaintiffs did not work more than six consecutive days during Nordstrom's defined workweek of Sunday through Saturday; (2) they voluntarily chose to work more than six consecutive days and were not forced to do so as is required for a violation of the day of rest statutes; (3) Plaintiffs' employment was exempt from the day of rest statutes because the nature of their employment with Nordstrom reasonably required that they work seven or more consecutive days, and; (4) Plaintiffs did not work more than six hours on one or more of the consecutive days as is required for a violation of the day of rest statutes. The Court conducted a two-day bench trial to allow the parties the opportunity to present their evidence and arguments. After carefully considering that evidence and those arguments, the Court finds in favor of Nordstrom for two reasons. First, Plaintiffs [*3] worked less than six hours on one or more of their consecutive days of work, and, as a consequence, they were not entitled to a day's rest. Second, Plaintiffs *voluntarily worked* more than six consecutive days. Nordstrom did not require or cause them to do so. The day of rest statutes only prohibit an employer from requiring or causing an employee to work more than six consecutive days. An employee can waive that protection if he or she wants to, which is exactly what Mr. Mendoza and Ms. Gordon did here. [1]

1 For the reasons addressed later in this Memorandum, the Court rejects the two other grounds relied upon by Nordstrom for denying violations of the day of rest statutes.

II. BACKGROUND

Nordstrom is a retail department store with employees and locations throughout California. In creating work schedules for its employees, Nordstrom defines a "workweek" as the period of time between Sunday and Saturday, and typically schedules its hourly-paid employees to work no more than five days during each workweek. Nordstrom does, however, permit employees to waive their days off and choose to work for more than six consecutive days. In some instances, Nordstrom requires certain employees to work [*4] for more than six consecutive days where Nordstrom believes the nature of the work reasonably requires it. For work on a seventh consecutive day, or for any work that exceeds eight hours in a day or forty hours in a week, Nordstrom's employees are paid an established overtime rate.

Mr. Mendoza worked for Nordstrom from March 30, 2007 until August 15, 2009. Shortly after beginning his career as a "barista" in the espresso bar at Nordstrom's San Francisco Center store, Mr. Mendoza transferred to Nordstrom's Horton Plaza store in San Diego, where he continued to work as a barista at the "E-Bar." (Trial, Day 1 ("Tr. 1"), 19:23, 22:4-16.) As a barista, Mr. Mendoza's duties included food service, customer service, and cash handling. (*Id.* at 20:4-11.) The barista position also required Mr. Mendoza to become familiar with recipes for various drinks, both hot and cold, and how to operate a cash register and coffee maker. (*Id.* at 60:11-13.) In April 2009, Mr. Mendoza was promoted to sales representative in the cosmetics department at Horton Plaza, where his new responsibilities included customer service, sales, cash handling, and cleaning. (*Id.* at 27:5-13.)

Throughout his time as an employee of [*5] Nordstrom, Mr. Mendoza continually sought to work additional hours beyond those scheduled by Nordstrom. As part of securing additional work, Mr. Mendoza "made it be known" to his supervisors and co-workers that he wanted to work, and he consistently made himself available to do so. (*See id.* at 45:9-14, 46:4-8, 51:1-24.) When opportunities arose, Mr. Mendoza testified that he consistently accepted additional work. (*See, e.g., id.* at 64:13-18 ("I make a lot of people aware, I'm available. You can come to me, but I'll decide if I can't [sic] or can't."). Mr. Mendoza also did not limit himself to work at just Horton Plaza, and on at least two occasions accepted offers to work at Nordstrom's nearby Fashion Valley store. (*Id.* at 59:5-8, 59:17-60:10.) Mr. Mendoza also actively sought additional work, on one occasion requesting his manager's permission to work "inventory" at another Nordstrom store in nearby Mission Valley. (*Id.* at 48:1-7.) According to Mr. Mendoza, his desire to work beyond his regular schedule was motivated by the financial incentive of additional compensation and the maintenance of certain health benefits. (*Id.* at 53:5-16; Mendoza Depo. 160:25-161:16.)

On three separate [*6] occasions during his tenure with Nordstrom, Mr. Mendoza worked for more than six consecutive days. [2] He worked eleven consecutive days from Monday, January 26, 2009 through Thursday, February 5, 2009, seven consecutive days from Monday, March 23, 2009 through Sunday, March 29, 2009, and eight consecutive days from Tuesday, March 31, 2009 through Tuesday, April 7, 2009. (*See* Mendoza Tr. Br. at

2, 4; Jardini Decl. Exhs. 18, 20.)

> 2 The parties agree that Mr. Mendoza worked six or more consecutive days on only three occasions during the relevant statute of limitations period, dating back to December 22, 2008. (*See* Mendoza Tr. Br. at 2, 4; Nord. Mendoza Post-Tr. Br. at 5.)

During the first occasion of work exceeding six consecutive days, January 26- February 5, 2009, Mr. Mendoza was originally scheduled not to work on Saturday, January 31 and Sunday, February 1. (Tr. Exhs. 108, 298.) However, on January 31, Mr. Mendoza's supervisor asked Mr. Mendoza if he would be willing to cover for a sick employee at Nordstrom's nearby Fashion Valley store, and he accepted. (Tr. 1, 60:8-10.) Similarly, on February 1, Mr. Mendoza was asked by a co-worker if he would cover her shift, and again, he accepted. [*7] (Tr. 1, 63:21-24.) During the course of this eleven-day period, Mr. Mendoza worked as many as 11.783 hours in a day, and on two days, worked less than six hours. (Tr. Exh. 297.) On the second occasion, March 23-29, 2009, Mr. Mendoza was scheduled off on March 27 and 28, but was offered and accepted an additional shift after a co-worker became sick. (Tr. 1, 67:12-21; Def. Closing Br. at 15.) Over the course of this seven day period, Mr. Mendoza worked as many as 7.316 hours in a day, and fewer than six hours on three days. (*Id.*) Finally, on the third occasion, March 31 through April 7, 2009, Mr. Mendoza worked for eight consecutive days, despite being scheduled off on April 3 and 4. (Tr. 1, 69:4-14.) Similar to the first two instances, Mr. Mendoza chose to work on his otherwise scheduled days off after being offered additional shifts. (*Id.* at 69:18-20.) Over the course of these eight days, Mr. Mendoza worked as many as 9.783 hours in a day, and fewer than six hours on five of eight days. (Tr. Exh. 301.)

Ms. Gordon's tenure with Nordstrom lasted from July of 2010 to February of 2011. (Tr. 1, 91:5). Employed in the fitting room at Nordstrom's Beverly Connection "Rack" location, Ms. Gordon's [*8] responsibilities consisted of customer service, assisting shoppers, opening fitting rooms, returning clothes, sorting and organizing clothes, and answering phones. (*Id.* at 87:18-19, 88:3, 21-23, 89:8-11.) The fitting room staff included approximately three to four Nordstrom employees at any one time. (*Id.* at 90:6.) During the seven months Ms. Gordon was employed by Nordstrom, she was typically scheduled to have Tuesday and Thursday off from work each week. (*Id.* at 91:10.) However, on one occasion, Ms. Gordon worked from Friday, January 14 through Friday, January 21, 2011. (Tr. Exh. 295.) [3] During this period, Ms. Gordon worked as many as 7.6 hours in a day, and close to five hours on two days. (*Id.*)

> 3 Despite not "punching" in for work, Ms. Gordon was paid for eight hours of work ostensibly performed on Wednesday, January 19, 2011. (Tr. 1, 106:9-19.) As Ms. Gordon's day of rest claim fails for independent reasons, the Court need not, and does not, make a determination as to whether Ms. Gordon actually worked on January 19, 2011.

Mr. Mendoza initiated this action against Nordstrom on December 22, 2009. Ms. Gordon intervened on April 18, 2011. They both assert claims against Nordstrom for [*9] violations of *Sections 551* and *552* of the California Labor Code, the day of rest statutes. They bring their claims seeking civil penalties under California's Private Attorneys General Act of 2004.

On June 19 and 21, 2012, the Court conducted a bench trial on Plaintiffs' claims. At the trial, Mr. Mendoza asserted that on three separate occasions he was forced to work more than six consecutive days without a day of rest. Similarly, Ms. Gordon asserted that on one occasion she was required to work more than six consecutive days without a day of rest. Nordstrom made four arguments in its defense. Nordstrom first argued that neither Mr. Mendoza nor Ms. Gordon ever worked more than six consecutive days in a Nordstrom defined workweek, and therefore, were not entitled to a day of rest. Nordstrom further argued that since each of Plaintiffs' allegedly offending work periods contain days in which they worked less than six hours, Nordstrom was exempt from having to provide them with a day of rest. Nordstrom also argued that it never required either Plaintiff to work more than six consecutive days, but rather each permissibly chose to waive their day of rest. Finally, Nordstrom argued that the [*10] nature of Mr. Mendoza's and Ms. Gordon's work was such that Nordstrom could reasonably require either of them to work more than six consecutive days. This Memorandum sets forth the Court's final findings of fact and conclusions of law on the parties' claims and defenses.

III. ANALYSIS

The parties' claims and defenses essentially raise issues of interpretation regarding California's day of rest statutes. The proper interpretation of a statute is an issue of law. *See Newman v. Chater, 87 F.3d 358, 361 n.2 (9th Cir. 1996)*. Statutory construction requires ascertaining the intent of the legislature and adopting the construction that best effectuates the law's purpose. *Doe v. Brown, 177 Cal. App. 4th 408, 417, 99 Cal. Rptr. 3d 209 (2009)*. It begins with the statute's plain language, which should be given its ordinary and usual meaning. *Id.* Unless the language is ambiguous, the plain meaning governs. *Id.* If the language is ambiguous, "the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes." *People v. Jefferson, 21 Cal. 4th 86, 94, 86 Cal. Rptr. 2d 893, 980 P.2d 441 (1999)*. It is also appropriate to consider "a variety of extrinsic aids, including [*11] the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." *Id.* (internal quotation marks omitted).

A. Working More Than Six Days in Seven

Plaintiffs' day of rest claims rely on *California Labor Code Sections 551* and *552*. *Section 551* provides that "[e]very person employed in any occupation of labor is *entitled* to one day's rest therefrom in seven." *Cal. Lab. Code § 551* (emphasis added). *Section 552* safeguards that entitlement by prohibiting employers from "*caus*[*ing*] [their] employees to work more than six days in seven." *Id. § 552*. *Section 558* provides for civil penalties when an "employer or other person acting on behalf of an employer" violates these provisions. *Id. § 558(a)*; *see also id. § 553* (providing that "[a]ny person who violates this chapter is guilty of a misdemeanor").

The language of the day of rest statutes is not ambiguous. Their plain meaning is to prohibit employers from causing employees to work seven consecutive days, *i.e.*, more than six days, without a day off. And the language provides no indication that compliance is [*12] properly measured by anything other than the number of consecutive days an employer causes an employee to work. The evidence presented at trial established that Mr. Mendoza worked seven or more consecutive days on three occasions in 2009, and Ms. Gordon worked eight consecutive days in January of 2011. [4] The Court concludes that Plaintiffs worked more than six consecutive days without a rest break as envisioned by *Sections 551* and *552*.

> 4 As previously mentioned, the Court makes no determination as to whether Ms. Gordon did in fact work on January 19, 2011. However, for purposes of its analysis, the Court assumes that during the offending work period Ms. Gordon worked for eight consecutive days.

Nordstrom, however, contends that Plaintiffs did not work more than six consecutive days within the meaning of *Sections 551* and *552*. According to Nordstrom, *Sections 551* and *552* are applied, and days are measured, during the employer's own defined, seven-day workweek, not a rolling period of any seven consecutive days. Nordstrom's defined workweek is Sunday through Saturday. Since neither Mr. Mendoza nor Ms. Gordon worked Sunday through Saturday, and both received at least one day off during each [*13] of the relevant Nordstrom workweeks, Nordstrom concludes that there was no violation of the day of rest statutes. The Court strongly disagrees.

The plain and clear purpose of *Sections 551* and *552* is to prevent an employer from requiring its employee to work more than six consecutive days. Nothing in the day of rest statutes indicates that the California Legislature intended to limit the period during which the days must be consecutively worked. Mr. Mendoza worked on one occasion for eleven consecutive days. If Nordstrom's interpretation were adopted, an employer could require an employee like Mr. Mendoza to work these demanding hours, give him a day off, and then force him to work another eleven consecutive days. This unconscionable one day's rest in twelve work schedule could be repeated in perpetuity. The California Legislature surely never intended to provide such a loophole or invite such employer abuse.

Nordstrom relies on *Section 500(b)* to support its interpretation of *Sections 551* and *552*. Nordstrom's reliance on *Section 500(b)* is entirely misplaced. Nordstrom is correct in that *Section 500(b)* does define "workweek" and "week" as "any seven consecutive days, starting with the [*14] same calendar day each week." But *Section 500(b)* and the terms defined therein appear nowhere in *Sections 551* and *552*. The California Legislature clearly knew how to limit the scope of a provision of the Labor Code. Indeed, the definitions of *Section 500(b)* are explicitly referenced in other

provisions of the Labor Code. *See Cal. Lab. Code §§ 510, 511, 513*. Yet the California Legislature decided not to refer to *Section 500(b)*'s definitions of "workweek" or "week" in *Sections 551* and *552*. Consequently, the Court cannot now insert Nordstrom's limitation into *Sections 551* and *552*. *See Cal. Civ. Proc. Code § 1858* (advising courts construing statutes to "ascertain and declare what is in terms or in substance contained therein, [and] not to insert what has been omitted, or to omit what has been inserted"); *Neumarkel v. Allard, 163 Cal. App. 3d 457, 461, 209 Cal. Rptr. 616 (1985)*. Such a limitation is one that the California Legislature did not, and never intended to, enact.

B. Employees May Waive Their Seventh Day of Rest

Nordstrom's defense depends, in part, on whether an employee may choose to waive his or her right to a seventh day of rest, and work additional days, without triggering a statutory violation [*15] by the employer. *Sections 551* and *552 entitle* an employee to one day's rest in seven, *see Cal. Lab. Code § 551*, and prohibit an employer from *causing* an employee to work for more than six consecutive days, *id. § 552*.

The day of rest statutes protect workers from exploitation by ensuring that they are provided with a day of rest. The language of *Sections 551* and *552* plainly require that an employer make a day of rest available to their employees, but do not require an employee to actually take a day off. So long as the employer does not force an employee to work more than six consecutive days, an employee is free to waive his or her day of rest. This interpretation is supported by the recent California Supreme Court decision in *Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 139 Cal. Rptr. 3d 315, 273 P.3d 513 (2012)*, which found employees capable of waiving their meal breaks without their employer incurring liability. The statutory framework and relevant legislative history of the day of rest statutes are also consistent with this interpretation. The evidence presented at trial established that in each instance on which Plaintiffs worked for more than six consecutive days, they voluntarily chose to waive [*16] their day of rest, free of any coercion by Nordstrom. This being the case, the Court concludes that Nordstrom did not violate the day of rest statutes when Plaintiffs worked for more than six consecutive days.

At trial, Plaintiffs argued that employees cannot waive their day of rest. According to Plaintiffs, the day of rest statutes are violated whenever an employer requires or permits an employee to work for more than six consecutive days. Under Plaintiffs' interpretation, the *Brinker* decision does not support an employee's ability to waive their day of rest, but rather is limited to when an employee should be under the control of their employer after reporting to work. To Plaintiffs, the meal break statutes at issue in *Brinker* are readily distinguishable from the day of rest statutes in that they use distinctly different language. Even assuming the day of rest statutes may be waived, Plaintiffs argued Nordstrom "actively encourage[d] employees to work seven or more consecutive days" by "exploit[ing] its employees' desire to earn a decent living." (Mendoza Tr. Br. at 12.)

Similar to the day of rest requirements in this case, the court in *Brinker* examined whether employees were capable [*17] of waiving their meal breaks without their employers incurring liability. *Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 139 Cal. Rptr. 3d 315, 273 P.3d 513 (2012)*. The meal period provisions at issue provided that "[a]n employer may not employ an employee for a work period of more than five hours per day without *providing* the employee with a meal period of not less than 30 minutes . . . . ," *Cal. Lab. Code § 512(a)* (emphasis added), and that "[n]o employer shall *require* any employee to work during any meal or rest period . . . ." *Cal. Lab. Code § 226.7* (emphasis added). In interpreting these two provisions, the *Brinker* court held that an employer satisfies its duty with respect to meal breaks simply by providing a meal period to its employees. *Brinker Rest. Corp., 53 Cal. 4th at 1040*. Specifically, the court found that:

> The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so . . .

Id. at 1040-41. The court in *Brinker* further noted that:

> [T]he employer is not obligated to police meal breaks and ensure no [*18] work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does *not* thereby place the

> employer in violation of its obligations . . .
> .

Id (emphasis added). In so finding, the *Brinker* court made clear that an employer's obligation is merely to provide a meal break, and not to "police" their employees to ensure they actually take a 30-minute break. *Id. at 1040*. If an employee voluntarily chooses to work through a meal period, their employer is not liable for violating the meal period statute. *Id.* So long as the employee is not compelled to do so, they may waive their meal break. *Id.*

The day of rest laws use strikingly similar language in reference to a seventh day of rest as do the meal break statutes in *Brinker*. The meal break statute requires an employer to *provide* a meal break, while *Section 551* makes all employees *entitled* to a day of rest. The Court finds that "provide" indicates the need to make available, while "entitled" suggests the right to be furnished with. Use of either term achieves the same result. Similarly, the use of the term "require" in the meal break [*19] statute is substantially similar to "cause" in *Section 552*. When the *Brinker* court considered the implication of "provide" in the meal break statute, and "require" in the corresponding premium statute, it concluded that employers must make meal periods available but need not ensure that they are taken. In essence, the *Brinker* court found that waiver of a meal break is permitted. Similarly, here, the Court interprets the day of rest statutes to require employers to make a seventh day of rest available but not to ensure that it is taken. So long as the decision is free of coercion, whether implicit or explicit, an employee may waive his or her seventh day of rest.

Interpreting the day of rest statutes to permit waiver is also consistent with the statutory framework in which they are located. *Section 510* mandates that employees who work a seventh consecutive day be compensated at the applicable overtime rate. *Cal. Lab. Code § 510* (". . . the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.") Similarly, the California Industrial Welfare Commission's ("IWC") [*20] Wage Order No. 7-2001 (hereafter, "Wage Order No. 7"), dealing specifically with the mercantile industry, states that "[e]mployment beyond eight [] hours in any workday or more than six [] days in any workweek is permissible provided the employee is compensated for such overtime . . . ." *Cal. Code Regs., tit. 8, § 11070(3)(A)*. Both *Section 510* and Wage Order No. 7 specifically contemplate employees working more than six consecutive days.

Understanding the day of rest statutes to permit employees to waive their seventh day of rest is also consistent with the regulatory history of the rest day provisions. Since 1893 the day of rest statutes have never contained a prohibition on employees choosing to work more than six consecutive days. In 1893, the day of rest statutes required that "[e]very person employed in any occupation of labor shall be entitled to one day's rest therefrom in seven; and it shall be unlawful for any employer of labor to cause his employes [sic], or any of them, to work more than six days in seven . . . ." S.B. 72, 1893 Sen. (Ca. 1893). Today, the day of rest statutes contain substantially similar language.

However, beginning in 1917, the IWC began to issue Mercantile [*21] Wage Orders in an attempt to limit the day of rest statutes to protect women and children, stating "[n]o person, firm or corporation shall employ or suffer or permit a woman or minor to work in the mercantile industry more than eight hours in any one day or more than forty-eight hours in any week." (Def. Appx. Tab 8 [Cal. Indust. Welf. Comm'n Order (1917)].) In 1943, the IWC amended the Mercantile Wage Order to state that:

> Every woman and minor shall have one day's rest in seven. Sunday shall be considered an established day of rest for all women and minors unless a different arrangement is made by the employer for the purpose of providing another day of the week as the day of rest.

(*Id.* Tab 12 [Cal. Indust. Welf. Comm'n. Order (1943)].) But then, between 1947 and 1963, the Mercantile Wage Orders began to ease these protections, and ultimately, in 1968 and 1976, the Mercantile Wage Orders were amended to eliminate the mandatory rest day language as to women and children. (*See id.* Tabs 13-18 [Cal. Indust. Welf. Comm'n Orders (1968, 1976)].) Specifically, the 1968 Mercantile Wage Order stated that "[e]mployment beyond eight [] hours in any one day or more than six [] days in any one week [*22] is permissible only under the following conditions . . . The employee is compensated for such overtime . . . ." (*Id.* Tab 17.) And in 1976, the Mercantile Wage Order stated that "[e]mployment beyond eight [] hours in any one workday or more than

six [] days in any one workweek is permissible provided the employee is compensated for such overtime . . . ." (*Id.* Tab 18.) In stark contrast with the Mercantile Wage Orders, the day of rest statutes have never contained a prohibition against working more than six consecutive days. It was for this reason, and in an effort to protect women and children from extreme labor conditions, that the Mercantile Wage Orders were necessary. But in the last half-century, as working conditions for women and children have improved, a corresponding change has occurred in the Mercantile Wage Orders, culminating in Wage Order No. 7. Interpreting the day of rest statutes to permit waiver of a day of rest is consistent with their history, and consistent with the evolution of the Mercantile Wage Orders.

1. Mr. Mendoza Was Not Required to Work More Than Six Consecutive Days

Section 552 unambiguously prohibits employers from *causing* their employees to work more than [*23] six days in seven. *See Cal. Lab. Code § 552*. As used in *Section 552*, "cause" indicates a level of force or coercion that was simply not present in the relationship Mr. Mendoza had with Nordstrom. After reviewing the testimony and evidence presented at trial, it is clear that Nordstrom did not cause Mr. Mendoza, either explicitly or implicitly, to work more than six consecutive days on the three occasions in question. Rather, Mr. Mendoza was an employee who desired additional work and who actively sought it out.

Mr. Mendoza asserts that Nordstrom caused him to work for more than six consecutive days by exploiting his desire to earn a decent living, by making promotion within Nordstrom contingent upon additional work, and by giving him positive feedback on his performance evaluations after working beyond his scheduled hours. (Mendoza Tr. Br. at 12-13.) But the facts indicate otherwise.

At trial, Mr. Mendoza testified that while at Nordstrom he outwardly encouraged others to come to him with the offer of additional work, stating, "I made a lot of people aware, I'm available. You can come to me, but I'll decide if I can't [sic] or can't." (Tr. 1, 64:16-18). Indeed, Mr. Mendoza was so motivated [*24] to secure additional work that he sought the permission of his supervisor to travel to a nearby Nordstrom's store to participate in their monthly inventory duties. (*Id.* at 48:1-7.) And when offered additional work, such as on the three occasions in question, Mr. Mendoza readily accepted.

On the first occasion in question, Mr. Mendoza did not take his scheduled days off. Rather, on January 31, Mr. Mendoza accepted an offer from his manager to work at the "E-Bar" at Nordstrom's Fashion Valley location. (Tr. Exh. 107, 297; Tr. 1, 57:20-23, 59:14-18, 60:8-10, 192:11-24.) At trial, Mr. Mendoza testified that his manager called and asked him if he would be willing to cover for an employee that had called in sick. (Tr. 1, 59:17-18) (A: I can recall Larry calling me on the phone. I was at home. He said we need someone at Fashion Valley. And I accepted.) Mr. Mendoza clarified that it was his choice whether to work on this previously scheduled day off. (Tr. 1, 60:8-10) (Q: And you understood you could have said no to that shift when Mr. Dare offered it to you; isn't that correct? A: He said it was my choice.) On the following day, February 1, Mr. Mendoza was also scheduled off but again accepted [*25] additional work. (Tr. 1, 63:16-64:8.) When questioned as to February 1, Mr. Mendoza testified that his coworker asked him to cover her shift, and he accepted. (Tr. 1, 63:21-24, 64:8) (A: So when I got called I was available and I took it.) Indeed, Mr. Mendoza confirmed that the only reason he worked more than six consecutive days during this period was his decision to forgo his scheduled day of rest and work an additional day. (Tr. 1, 64:24-65:3) (Q: Mr. Mendoza . . . had you not agreed to pick up the shift on February 1, 2009 for Jessica, you would not have ended up working more than six consecutive days; isn't that correct? A: Because I took the shift, yeah, there's extra days.)

On the second occasion, Mr. Mendoza chose to work on both of his scheduled days off after agreeing to fill in for a sick coworker. (Tr. 1, 67:9-14.) [5] When questioned, Mr. Mendoza made clear that filling in for his coworker was exclusively his choice, stating "It was my choice to work if I wanted to." (*Id.* at 67:17.) In fact, Mr. Mendoza had previously told this particular coworker that he was always willing to take over shifts that she was willing to give up. (*Id.* at 68:7.)

> 5 The trial testimony regarding Mr. [*26] Mendoza's work between March 23 and 29 is conflicting. While both parties agree that Mr. Mendoza worked for seven consecutive days during this time, the reason Mr. Mendoza worked on Saturday, March 28 remains unclear. (*See* Dkt.

> No. 217 [Pre-Trial Conference Order § E, ¶ 12].) Mr. Mendoza stated at trial that while he was previously scheduled to have both March 27 and 28 off, he ultimately worked on both days. (Tr. 1, 67:9-10.) When questioned by Nordstrom's counsel as to why he worked on Sunday, March 28, Mr. Mendoza confirmed that he worked that day after agreeing to cover for a sick colleague. However, in its Trial Brief, Nordstrom points out that this line of questioning inadvertently referenced March 28, and was actually intended to reference March 27. (*See* Nordstrom Tr. Br. at 15 n. 39.) But whether Mr. Mendoza picked up a shift on March 27 or 28, why Mr. Mendoza worked on one of the two days remains unexplained. Regardless, the parties agree that Mr. Mendoza worked for seven consecutive days, and Mr. Mendoza conceded that his decision to work an additional shift caused him to work more than six consecutive days. What is more, Mr. Mendoza's day of rest claim as to this particular [*27] period fails for the independent reason that it includes three days with fewer than six hours worked.

Finally, on the third occasion, Mr. Mendoza again chose to forgo his scheduled days off in favor of working additional days. When Mr. Mendoza's colleague asked him to fill in for him, Mr. Mendoza accepted. (Tr. 1, 69:12-20.) Similar to the first two instances, Mr. Mendoza confirmed that he understood that work on his previously scheduled days off was his choice to make. (*Id.* at 69:18-20) (Q: And when Mr. Glukoff asked you to pick up that shift; you knew you could say no; is that correct? A: Yeah, I could say no if I didn't want to go.)

Mr. Mendoza argues that Nordstrom's coercion goes beyond financial exploitation, and this is obvious in the positive performance evaluations he received. Specifically, Mr. Mendoza points to the category of these evaluations titled "Work Scheduled Shifts," and notes that on March 6, 2008, he received a "meets expectation" in this category. (Mendoza Tr. Br. at 13-14; Jardini Decl. Exh. 11.) But on February 12, 2009, after working for eleven consecutive days, Mr. Mendoza received an "exceeds expectation" rating for the same category, (*id.*), and, shortly thereafter, [*28] was promoted to the cosmetics counter. (Mendoza Tr. Br. at 13-14.) According to Mr. Mendoza, the positive reinforcement he received is akin to forcing employees to work, as it is an indication that promotion or advancement at Nordstrom is dependent on working beyond what the employee is scheduled. (*Id.* at 14-15.)

At trial, the "exceeds expectations" rating Mr. Mendoza received was explained by his manager as nothing more than literally having exceeded expectations. According to Mr. Mendoza's manager:

> My expectation is five days a week, and when people are sick, people needed a day off, people from another store needed coverage, Chris would pick up those shifts because he wanted to pick up those shifts. And so my expectation is to work five days that you are scheduled that I schedule, and anything extra is an exceeds the expectation.

(Tr. 1, 217:21-218:2.) As his manager stated, Mr. Mendoza was scheduled for a particular amount of time each week, and when he exceeded that, he was rewarded with a rating of "exceeds expectations." Such positive reinforcement for exceeding what was originally expected of him is not the coercion contemplated by the day of rest statutes use of the term "cause."

Moreover, [*29] Nordstrom did not condition Mr. Mendoza's promotion to the cosmetics counter on his working additional shifts. (Tr. 1, 212:22-25; Tr. 2, 34:19-35:3.) Indeed, even after Mr. Mendoza was promoted he continued to seek additional shifts. (Tr. 1, 52:5-20.) When asked why he continued to seek additional work following his promotion, Mr. Mendoza stated, "I can only maintain my benefits at working 33 hours a week. So it has to be consistent. I wanted to keep everything I had while I was there." (*Id.* at 52:18-20.) Mr. Mendoza was not forced or coerced into accepting additional shifts; he reasonably sought additional work to earn more money and maintain his benefits.

2. Ms. Gordon Was Not Required to Work Eight Consecutive Days

Ms. Gordon contends that she felt compelled to work on the one occasion in which she worked for more than six consecutive days. After considering Ms. Gordon's trial testimony, as well as that of Nordstrom's Human Resources Area Manager, the Court concludes that Nordstrom did not force Ms. Gordon to work more than six consecutive days.

During Ms. Gordon's eight consecutive days of work, she voluntarily traded her January 19, 2011 shift with a coworker's January 17, 2011 shift. [*30] (*See* Tr. 1, 112:24- 113:1, 197:18-19.) (A: Basically her and I, we were supposed to switch shifts, but she never showed up.) [6] On January 19, after Ms. Gordon's coworker failed to show up for the adjusted shift, Ms. Gordon reported to work. (*Id.*) (A: So they called me to come in because she never showed up for the shift.) According to Ms. Gordon, she reported to work on January 19 because she believed it was her responsibility to cover a shift for which she had originally been scheduled and was left unattended. (Gordon Tr. Br. at 6.) Ms. Gordon also testified that she felt compelled to come to work on January 19, because of her previous attendance problems. (Gordon Tr. Br. at 6; Tr. 1, 93:12-16, 124:19-25.)

> 6 As previously noted, it is unclear whether Ms. Gordon did in fact work on January 19, 2011. Because Ms. Gordon's claim fails on other grounds, the Court need not determine which of the varying explanations Ms. Gordon has offered for why she worked on January 19, 2011, is true. However, for purposes of analyzing whether Nordstrom forced Ms. Gordon to work more than six consecutive days, the Court addresses Ms. Gordon's most recent explanation for her work on January 19, 2011.

The [*31] testimony Nordstrom presented at trial, however, established that Nordstrom does not have a policy of requiring employees to cover "no show" shifts. (Tr. 2, 221:14- 24.) Rather, the employee who accepts the new shift is responsible. (*Id.*) While Ms. Gordon may have believed otherwise when she came into work on January 19, she was also motivated by a concern with her previous attendance problems. (Tr. 1, 124: 21-25) (A: . . . If you switch with someone and they don't show up, you guys both get in trouble. And like I said, I wasn't on the best terms. I can't afford to get in trouble.) Regardless, Ms. Gordon voluntarily switched shifts with her coworker, and acknowledged that her erroneous belief in Nordstrom's "no show" policy was not the only reason she came into work on January 19, 2011. Simply stated, Nordstrom did not cause Ms. Gordon to work for more than six consecutive days.

Finally, it is worth noting that Plaintiffs submitted no evidence to suggest harsh or difficult working conditions at Nordstrom. During each of the instances in which Plaintiffs worked for more than six consecutive days, both frequently worked for less than six hours a day. Indeed, Mr. Mendoza actively sought [*32] additional work because of the ability to earn more money and maintain his health benefits, and Ms. Gordon voluntarily switched shifts with a coworker. In any event, Plaintiffs were not the victims of the harsh working conditions or exploitation that the labor laws were enacted to protect against.

C. The Nature of the Work Exception

The day of rest statutes mandate that employees be provided with one day off in seven, and not be forced to work for more than six consecutive days. However, *Section 554* provides an exemption to these requirements "when the nature of the employment reasonably requires that the employee work seven or more consecutive days." *See Cal. Lab. Code § 554(a)*. In such situations, *Section 554(a)* shields employers so long as the relevant employee accumulates rest days during these time periods and ultimately "receives days of rest equivalent to one day's rest in seven" during "each calendar month." *Id.*

Section 554 exempts employers from providing a day of rest where the nature of the work "reasonably requires" it. Examples of a reasonable application of *Section 554* in the mercantile industry [7] might include certain types of produce sellers who need to work extended schedules [*33] based on the perishability of their product, or certain employees with highly unique skills, specialized knowledge of a product, a relevant professional degree, or experience handling heavy machinery. Beyond the mercantile industry, certain types of farm workers may be required to work extended schedules if there is a narrow time window to bring a product to market, as may some fishermen, who by the nature of their business may be required to be at sea for more than six consecutive days. While not an exhaustive list, all of these examples include jobs where the employee's presence is essential, their skillset is unique, or their experience is specialized. Common to such positions is the difficulty employers may have in finding suitable replacements with limited notice. Should an employee with such unique skills or experience become unexpectedly absent, it would be reasonable for their employer to require another similarly trained employee to perform their essential duties. However, where the employee is not unique, whether because there are other available employees who can perform their duties, or because their duties are not

especially complex, essential, or specialized, it is not [*34] reasonable to require them to work more than six consecutive days.

> 7 Nordstrom, a retailer in the mercantile industry, is an employer for which *Section 554* could provide an exemption. Wage Order No. 7 defines the "mercantile industry" as "any industry, business, or establishment operated for the purposes of purchasing, selling, or distributing goods or commodities at wholesale or retail . . . ." *Cal. Code Regs., tit. 8, § 11070, 2(H)*. In its section titled "Hours and Days of Work," Wage Order No. 7 specifically describes the exemption of *Section 554* as it applies to members of the mercantile industry. *Id.* at *3(H)*.

At trial, Nordstrom argued that *Section 554* applies to the nature of Plaintiffs' employment, and therefore, absolves Nordstrom's liability for any day of rest claim. Specifically, Nordstrom argued that in the event of unexpected absences, the specialized training necessary for Mr. Mendoza's work at its E-Bar [8] could reasonably require him to work for more than six consecutive days. As to Ms. Gordon, Nordstrom argued that the unexpected absence caused by the "no-show," and the need for an employee qualified to handle the fitting room with knowledge of the department's protocols, [*35] could reasonably require her to work on more than six consecutive days. The Court disagrees.

> 8 The three occasions in which Mr. Mendoza worked for more than six consecutive days each occurred when Mr. Mendoza was employed at Nordstrom's E-Bar, prior to his promotion to the cosmetics counter. Therefore, the Court limits its analysis of *Section 554*'s application to Mr. Mendoza's barista responsibilities.

Working at the Horton Plaza E-Bar, Mr. Mendoza's duties were not sufficiently unique, specialized, or essential for Nordstrom to reasonably require him to work on more than six consecutive days. As a barista, Mr. Mendoza was responsible for basic services, including food sales, making hot and cold drinks, customer service, and operating a cash register. (*Id.* at 20:4-11, 60:11-13.) Mr. Mendoza's manager described the E-Bar as a "coffee cart" that was a "[v]ery small operation," with "an espresso machine, cash register, [and] pastry case" that "[o]ne or two people can man . . . ." (Tr. 1, 175:3-5.) As to whether Mr. Mendoza's services were unique, testimony showed that at least five other barista "trained" employees were available to Nordstrom at its Horton Plaza location. (Tr. 1, 22:19-23, [*36] 24:25-25:3, 221:21-23; Tr. 2, 19:4-5.) In the case of an unexpected absence, Mr. Mendoza's manager could also call upon Nordstrom employees from other nearby stores throughout the San Diego region. (Tr. 1, 223:1-12.) Specifically, there were nine other barista "trained" Nordstrom employees working at the Fashion Valley location, just five miles from Horton's Plaza, and at least one other employee at the University Town Center location. (Tr. 1, 23:11-12; Tr. 2, 19:1-10.) Indeed, on two occasions, Mr. Mendoza himself accepted shifts at Nordstrom's Fashion Valley location when E-Bar employees there became unexpectedly absent. (Tr. 1, 23:13- 14, 59:14-60:10.)

As a fitting room attendant, Ms. Gordon's employment with Nordstrom was no more unique or specialized. Ms. Gordon's responsibilities included customer service, assisting shoppers, opening fitting rooms, returning clothes, sorting and organizing clothes, and answering the phones. (*Id.* at 87:18-19, 88:3, 21-23, 89:8-11.) At the Beverly Connection's "Rack" location where Ms. Gordon worked, the fitting room staff included approximately three to four Nordstrom employees at any one time. (*Id.* at 90:6.) Moreover, all employees at the Rack [*37] location were experienced working in the fitting room. (*Id.* at 90:18-21.) Given the responsibility of a fitting room attendant, in the event of an unexpected absence, Nordstrom could surely call upon any employee of the requisite gender to work in the fitting room.

The unexpected absence of a Nordstrom's employee at its espresso bar or fitting room does not pose the sort of exigent circumstances that might otherwise reasonably require an employee to work for more than six consecutive days. Applying *Section 554* in the way Nordstrom suggests would permit employers to force employees to work in cases of mundane and routine employee absence. Such an application of *Section 554*'s exemption threatens to swallow the rule, and would significantly undermine the protections that the day of rest statutes are intended to provide.

D. The Exemption of *California Labor Code Section 556*

Section 556 exempts an employer from providing its employees with a seventh day of rest under two

circumstances, stating:

> *Sections 551* and *552* shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.

Cal. Lab. Code § 556. The wording [*38] of this exemption is clear. *Section 556* exempts employers from providing a seventh day of rest to their employees when the total hours of employment in a week do not exceed thirty hours, *or* when the hours worked on any day of that week do not exceed six hours.

In support of their day of rest claims, Plaintiffs [9] argue that *Section 556* is in place to exempt employers from having to provide part-time employees with a day of rest. (Mendoza Tr. Br. at 23.) This being the case, Plaintiffs urge the Court to interpret *Section 556* to require a seventh day of rest for any employee who works over thirty hours in a week, or more than six hours on any one day of the week. (Mendoza Trial Br. at 23.) Stated another way, an employee may only be denied a day of rest where that employee worked for fewer than thirty hours in a week, or less than six hours on every day of that week. (*Id.* at 23-27.)

> 9 Ms. Gordon specifically joined Mr. Mendoza's argument as to the interpretation of *Section 556*. (*See* Gordon Tr. Br. at 29-30.)

Plaintiffs' interpretation of *Section 556* is simply not supported by the statute. *Section 556* clearly states that it applies where an employee's hours dip below six hours "in any *one* [*39] *day*" of the week. Nothing in *Section 556* suggests that an employee must work less than six hours on every day of the week for the exemption to apply. An employee who works for less than six hours on any day of the week is not entitled to a seventh day of rest.

Accordingly, Mr. Mendoza's day of rest claim fails when *Section 556* is properly applied to it. On each of the three occasions in question Mr. Mendoza worked fewer than six hours on multiple days. On the first occasion, Mr. Mendoza worked for only 5.083 hours on January 30, and only 5.517 hours on January 31. Similarly, on the second occasion, Mr. Mendoza worked for fewer than six hours on March 26, 27, and 28. Finally, on the third occasion, Mr. Mendoza worked for less than six hours on April 1 and 2. *Section 556* is equally fatal to Ms. Gordon's day of rest claim. Ms. Gordon's claim is based upon the eight consecutive days she worked from January 14, 2011, through January 21, 2011. However, on both the first and last day of this eight day string, she worked for fewer than six hours.

IV. CONCLUSION

For the foregoing reasons, the Court finds in favor of Nordstrom on Mr. Mendoza and Ms. Gordon's day of rest claims.

DATED: September [*40] 21, 2011

/s/ Cormac J. Carney

CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE