small business MONTHLY

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Urban Renewal Through Retail

The City of Oakland attempts to invigorate some East Oakland neighborhoods by creating new retail districts on city property.

By Bernice Yeung

That there's nowhere to shop in Oakland is a common gripe with at least a grain of truth to it. Ever try to buy a head of lettuce near the Coliseum or furnish an apartment without leaving the city limits? Established commercial districts notwithstanding, Oakland has long struggled to convince its residents to spend money within its borders. *Story inside*

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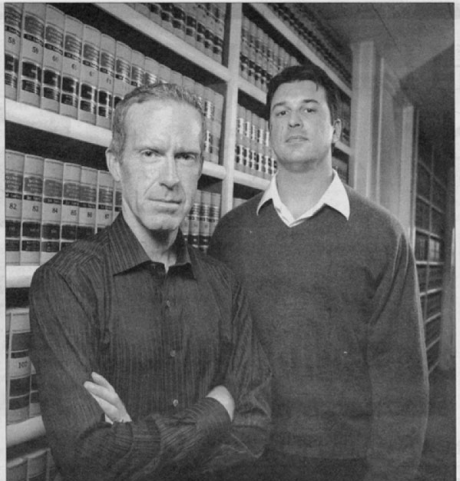
Running a Business With 26 CEOs

At Arizmendi Oakland, there are no bosses, management hierarchies, or pay differentials. It's challenging — and liberating.

Employee Breaks Are a Growth Area in the Law

Class-action lawsuits over workplace labor practices have become a rewarding subspecialty for labor law firms. And the East Bay is ground zero.

By Michelle Quinn



Scott Cole and Matthew Bainer of Scott Cole & Associates. Chris Duffey

James Watson has worked as a security guard throughout the East Bay since 1997. The 78-year-old East Oakland resident is currently stationed at the downtown Oakland headquarters of the East Bay Municipal Utility District, working from 7 a.m. to 3 p.m. on weekends and as a replacement on weekdays. But handing signed an agreement with his security firm to be on duty at all times during his shifts, Watson must eat at his post. In a previous assignment, working at a wastewater facility in West Oakland, Watson kept a jar near his station so that he could urinate while on duty, rather than walk several blocks to the bathroom.

Watson said he initially refused to sign the agreement, and then was taken off the work schedule by his employer, Cypress Security, a San Francisco security services firm. Company officials told him he would work again only when a job became available in a multiguard location, he said. Eventually, Watson relented and signed the agreement, and was then assigned more work. "I felt this company was really out of line, taking advantage of employees any way they see fit," Watson said.

So today he is one of three plaintiffs in *Kassem v. Cypress*, a lawsuit against his employer. The suit, filed in San Francisco in October 2008, claims that Watson and others were forced, as a condition of their employment, to sign an "on-duty meal period agreement," which requires employees to stay on duty while eating lunch.

Under state law, employees working an eight-hour shift are guaranteed two fifteen-minute paid breaks and a thirty-minute unpaid lunch break. Since the employer's payroll system would probably deduct thirty minutes for lunch, if a worker skips lunch and keeps working, an employee is working without pay during that time.

Some employers present employees with a document that says they agree to work through their meals. The potential upside for an employee like Watson is that he gets paid to eat during the state-prescribed thirty-minute meal break that is typically deducted from his time card. But the downside, some lawyers say, is that the agreement undercuts state workplace requirements set in place for the health and safety of employees. Consequently, these lawyers say, these agreements often are used in ways that violate labor law. Matthew Bainer, a lawyer with Scott Cole & Associates, the Oakland law firm representing Watson and his colleagues, said that employees are not necessarily supposed to "do it all" for their employers.

Lawsuits involving agreements such as the one that Cypress Security asked Watson and his colleagues to sign have become a growth area for firms like Scott Cole & Associates. For years, labor lawyers say, legislative and court decisions chipped away at employee protections and the ability of lawsuits to become class actions. For hungry law firms, wage-and-hour cases became one of the areas in which they could still make money, an endeavor that was greatly helped by several pivotal court decisions that made it easier for employees to file and win cases. In a unanimous decision in 2005, the US Supreme Court required an employer to pay meat-packing employees for time to put on special clothing. In 2007, a California Supreme Court decision in a case involving Sav-on Drug Stores allowed wage-and-hour cases to more easily be declared class actions.

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The East Bay in particular has become a popular venue for the filing of such lawsuits, which are known as "wage-and-hour" cases. Alameda County juries are perceived to be pro-employee, and numerous East Bay law firms have moved into this area of employment law.

From an outsider's perspective, such cases can seem nitpicky, often addressing narrow issues like employees' break time or the simple task of dropping off the office mail on the way home. The amount of money per employee can seem small.

But if a court certifies the case as a class-action lawsuit, then the calculators come out. For employees in the designated class, and every violation they experience, the settlement can be as much as one hour of wage per day or more during the period of the violation. For instance, Oakland's city council voted in December to pay $1.75 million in legal fees and vacation time to settle a suit brought by police officers who said they should have been paid for time they spent putting on their uniforms.

Lawyers who represent employees in such cases say their lawsuits often force employers to change their practices. "You are dealing with an economy that is changing a lot," said Teague Patterson, a lawyer with Beeson, Tayer & Bodine, which represents unions and employees. "You have a lot of economic displacement. The place you can squeeze the balloon is wages. That's what we're seeing. Wage-and-hour cases are push back now."

Law, Accounting & Professional Services

Another view is that wage-and-hour cases are low-hanging fruit for employee law firms, and thus result in a quicker payday for labor lawyers than many other kinds of suits, say lawyers for employers. Some businesses, particularly small ones, may not know or understand the numerous rules and laws, they say, and once in court, may find the claims hard to disprove, especially if their record-keeping is inadequate. The result is a nightmare for employers, said Alan Garber, the owner of the Garber Law Firm, an Oakland practice that focuses on defending businesses.

"When they get sued for even what may have been a totally innocent violation that was unbeknownst to them, or even one where the employer thought he or she was doing the employee a favor, the costs of defending these claims can be enormous," said Garber, who trains employers on devising policies regarding all aspects of employment law, including meal and rest breaks.

"Litigation over meal and rest periods is a full-blown industry," said Alex Hernaez, a lawyer with Fox Rothschild who represents Cypress but declined to otherwise address the claims made by Watson and his lawyers. "It's mind-numbing to people who are not familiar with the intricacies."

Scott Cole & Associates embodies the growth of this area in the law. The firm has seen its practice evolve from workplace discrimination to misclassification of employees as managers, a type of lawsuit known as exemption cases. "It's hard to walk through a mall and find a company that hasn't been hit by an exemption case," said Scott Cole, the company's founder and namesake.

Now, Cole's firm is part of the boom in wage-and-hour cases. In the past ten years, the five-lawyer Oakland firm has filed approximately one hundred class-action wage-and-hour cases. More recently, it has focused on meal and rest breaks. In 2007, it negotiated an $87 million settlement for UPS delivery employees for meal and rest violations, and in 2009, a $15 million settlement with Securitas Security Services USA for meal and rest violations on behalf of California-based security guards.

The firm has placed ads on BART to grab the attention of employees working off the clock. The ads target one arena in which vast numbers of American employees are probably providing uncompensated services to their employers: "This little piggy stayed home and checked e-mail and didn't get paid," the ads say. "That's wrong."

Cole said the use of on-duty meal agreements cuts across industries: retail, warehouse, fast food, gas stations, parking attendants, and security guards. Mostly they are used by employers so that they do not have to hire more workers, he said. In a few instances, they may be legal, although Cole and his colleagues were unable to come up with an example of such an agreement. Driving a human liver needed for transplant between hospitals? Possibly. But such agreements are often misused, he said, and by refusing to sign some employees have experienced oppressive conditions in their workplace.

Lawyers throughout the state are waiting on a decision from the California Supreme Court in the case of *Brinker Restaurant Corp. v. Superior Court*, which addresses whether employers must simply make it clear that an employee is entitled to a break or whether the employer must make sure the employee takes the break.

In the meantime, his firm has filed meal and rest-break claims against nine security companies. "Where there is a problem, it tends to be a practice throughout the industry," Bainer said. "Our aim is to remedy that practice." ●

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