



SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

FILED
ALAMEDA COUNTY

MAY 16 2014

CLERK OF THE SUPERIOR COURT

By *[Signature]* Deputy

NICOLE LOPES, individually, and on behalf of other members of the general public similarly situated, and aggrieved employees,

Plaintiff,

v.

KOHL'S DEPARTMENT STORES, INC., a Delaware Corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No. RG08380189
Consolidated with
Case No. RG11597341

ORDER GRANTING CLASS
CERTIFICATION

The Motion of plaintiffs Nicole Lopes, Isaac Bobadilla and Brian Paradis, individually and on behalf of other members of the public similarly situated and aggrieved employees ("Plaintiffs") For Class Certification ("Motion") came on regularly for hearing on May 16, 2014 in Department 21 of this Court, the Honorable Wynne S. Carvill presiding. Plaintiffs appeared by Laura L. Ho, Raúl Pérez, Melissa Grant, Adrew P. Lee and Patrick J. Clifford and defendant Kohl's Department Stores, Inc. ("Defendant") appeared by Al M. De La Cruz and Tracie

L. Childs.

After full consideration of the moving papers, the opposition thereto, the authorities cited by the parties, as well as arguments presented at the hearing, and the matter having been submitted for decision, and good cause appearing,

IT IS HEREBY ORDERED that the Motion is GRANTED for the reasons that follow.

BACKGROUND:

The first of these consolidated cases, *Lopes v. Kohl's Department Stores, Inc.* ("*Lopes*"), was filed in this county on April 4, 2008. The second, *Bobadilla v. Kohl's Department Stores, Inc.* ("*Bobadilla*"), was originally filed in San Diego County on January 31, 2011. A Notice of Related Case was filed on February 1, 2011. The *Lopes* case was designate as a complex case by order dated August 17, 2011, and the *Bobadilla* case was transferred from San Diego County to Alameda County and consolidated for all purposes with the *Lopes* case by stipulation and order entered on August 31, 2011. *Lopes* was designated as the lead case.

At the court's direction, Plaintiffs filed a consolidated class action complaint (styled "First Amended Consolidated Class Action Complaint & Enforcement Under The Private Attorneys General Act, California Labor Code §§ 2698, et seq.") on March 22, 2012 ("Complaint"). The Complaint includes 11 separate causes of action against defendant Kohl's Department Stores, Inc. ("Defendant"), 4 of which are expressly brought only by plaintiffs Bobadilla and Paradis [i.e., 7)

Failure to Pay Vested Vacation Wages, 8) Unpaid Reporting Time Pay, 9) Failure to Provide Seating, and 10) Failure to Pay Minimum Wages]. Applicable to all Plaintiffs are causes of action for 1) Unpaid Overtime, 2) Wages Not Timely Paid Upon Termination, 3) Wages Not Timely Paid During Employment, 4) Unpaid Meal Period Premiums, 5) Unpaid Rest Period Premiums, 6) Non-Compliant Wage Statements, and 11) Violation of California Business & Professions Code §§ 17200, et seq.

Plaintiffs now move for certification of a class to pursue the 1st, 2nd, 4th, 5th and 6th causes of action, as well as the 11th cause of action to the extent it is based on the alleged Labor Code violations asserted in the 1st, 2nd, 4th, 5th and 6th causes of action.

In response to the court's inquiries, Plaintiffs provided a satisfactory explanation for why the 3rd, 7th, 8th, 9th and 10th causes of action are not included in this Motion, and what they intend to do with these causes of action. The parties also provided adequate information to the court regarding multiple related actions against Defendant, including the efforts of certain Plaintiffs in this case to intervene in related cases, to support the court's conclusion to proceed with the instant Motion.

SUMMARY OF PLAINTIFFS' ARGUMENTS:

In their opening papers, Plaintiffs suggest the following class definition:

"All hourly, non-exempt employees ("Associates") of [Defendant] in the

State of California from April 4, 2004 through the date of class certification."

Plaintiffs seek to pursue claims on a class wide basis that fall into three categories. The theory of liability for the first category of claims (denominated "regular rate of pay" claims) is that Defendant did not correctly calculate the rate of pay upon which payments for overtime and missed meal and rest break premiums were based. Plaintiffs allege that Defendant did not include "shift premiums", "credit incentives", "email address incentives", "star of the month" bonuses, and Associate "recognition" payments in the rate of pay calculation, instead using only the "base" hourly rate.

The second category of claims (denominated "rest period" claims) is based on the allegation that Defendant had a uniform written rest break policy that prohibits Associates from leaving Defendant's store locations during their rest breaks, including during overnight shifts when Defendant locks the store entrances.

The third category of claims is based on allegations that the wage statements issued by Defendant to all Associates from 2004 to 2009 failed to identify Defendant's address, all applicable hourly rates in effect during the pay period, the number of hours worked at those rates, and the total hours worked during individual pay periods, and the new statements issued thereafter continued to fail to accurately state the total hours worked. In addition, Plaintiffs assert that both forms of wage statements contained inaccurate information because of the

alleged failure to correctly calculate the regular rate of pay and failure to pay missed rest break premiums.

PLAINTIFFS' EVIDENCE:

In support of their Motion, Plaintiffs submitted transcript excerpts from the depositions of Defendant's corporate designees, including documents such as Associate Handbooks, Personnel Policies and acknowledgement forms, exemplar wage statements, an Earnings Code Key, and a "Fact Book" about Defendant downloaded from its website. Plaintiffs also submitted transcript excerpts from their own depositions, their own declarations, and the declaration of 19 other putative class members ("Plaintiffs' Declarants").

Plaintiffs also submitted the Declaration of data analysis expert Robert L. Fountain demonstrating that analysis of Defendant's time and payroll records can be used both to determine the putative class' right to recovery and to calculate individual and aggregate damages.

Among the evidentiary documents submitted by Plaintiffs was Exhibit 12 to the deposition of Deborah Perez, included in Exhibit G to the Declaration of Andrew P. Lee, which was lodged conditionally under seal. Since no motion or application for a sealing order has been filed by Defendant, this document will be unsealed. (California Rule of Court ("CRC") 2.551(b)(3)(B).) A copy of the unsealed document is attached to this order as Exhibit A.

With their reply, Plaintiffs submitted additional transcript excerpts from the

depositions of certain of Defendant's corporate representatives, and transcript excerpts from the depositions of certain of Defendant's Declarants (defined below).

SUMMARY OF DEFENDANTS' OPPOSITION ARGUMENTS:

Defendant argues in opposition that Plaintiffs' proposed class definition is "impossibly over-inclusive" and that class certification may be denied on that basis alone.

Regular rate of pay claims -

As to the regular rate of pay claims, Defendant argues first that the proposed class period extends to far at both ends. A class action against Defendant was settled in San Diego County in 2006, *Meints v. Kohl's Department Stores, Inc.*, San Diego County Superior Court case no. GIC 842807 ("*Meints*"), so the class period should not start until then, and Defendant revised its rate of pay calculation in early 2012, so the class period should end then.

Defendant also argues that Associates would suffer no harm from its rate calculations unless they worked overtime or received a meal or rest break premium in the same pay period as they received some form of incentive payment, which rarely happened. In Defendant's view, the determination of which Associates did suffer such harm would require individualized inquiries that would defeat commonality. As to the missed meal period premiums that have been paid to Associates working the overnight shifts, Defendant asserts that such payments

were unnecessary to begin with, because the Associates who received such payments were all subject to an on-duty meal period agreement and were paid for their meal periods.

Defendant also asserts that the manner in which the associate of the month ("AOM") awards are administered differs from store to store, and that at least some of these AOM awards fall within the scope of 29 U.S.C. §207(e)(1) & (2) as gifts or discretionary bonuses. Defendant argues that each award would have to be examined separately, further defeating commonality, and also asserts that Plaintiffs have failed to establish that a large enough number of Associates even received cash AOM awards to establish numerosity.

Finally, Defendant asserts that the regular rate of pay claims are subject to a "de minimis" defense, the trial of which will also necessitate individualized inquiries.

Rest break claims -

As to the rest break claims, Defendant first argues that the claims now articulated by Plaintiffs are different from those set forth in the operative Complaint, and should not be considered for that reason.

Defendant also asserts that the theory of the alleged wrong is invalid, because requiring employees to stay on site during paid rest breaks does not constitute a statutory or wage order violation.

Finally, Defendant argues that the on-the-premises rest break policy was not

uniformly enforced.

Wage statement claims -

Defendant argues that the statute of limitations ("SOL") for claims under LC §226(e) is one year, so the class period must be circumscribed accordingly.

Defendant further argues that Plaintiffs' arguments and evidence do not establish that the wage statements did not comply with the applicable statutory requirements and that recovery under LC §226(e) would necessitate a showing of "injury" by each individual Associate.

Class representatives and class counsel -

To its discredit, Defendant has devoted a substantial portion of its opposition and evidentiary presentation to an attempt to discredit the ability of plaintiff Isaac Bobadilla and some of Plaintiffs' counsel to adequately represent the interests of the class. As to Bobadilla, the basis for Defendants' challenge has nothing whatsoever to do with the claims in this case, and as to Plaintiffs' counsel the basis for Defendants' challenge is based solely on hearsay documents from a different case, with no cogent explanation as to why allegations of unethical conduct in a completely unrelated matter would have any bearing on the adequacy of representation analysis in this case. The court rejects these arguments out of hand.

DEFENDANT'S EVIDENCE:

Defendant's evidentiary presentation includes the declaration of Defendant's

Territory Human Resources Manager for California, Rafael Bayona, with a copy of an "on-duty" meal period agreement for overnight shifts attached; the declaration of Defendant's payroll manager, Donna Meyers, with exemplar copies of wage statements attached; the declaration of Defendant's Vice President of Human Resources; and the declaration of defense counsel Al De La Cruz, with an unexecuted Joint Stipulation of Settlement in the *Meints* case (that does not bear an "endorsed filed" stamp) and various documents that purport to support Defendants' inadequacy of counsel argument as exhibits. Also included are transcript excerpts from the depositions of certain of Defendant's corporate designees and the depositions of Lopes and Bobadilla. Finally, Defendant has submitted the declarations of eleven store managers and 17 putative class member employees ("Defendant's Declarants"). However, two of Defendant's Declarants later withdrew their declarations. (Declaration of Alexandria Witte, filed on April 30, 2014 and Supplemental Declaration of Alexandria Witte, filed on May 2, 2014.)

PLAINTIFFS' MOTION TO STRIKE:

After Defendant's opposition was filed, Plaintiffs sought to depose Rafael Bayona regarding the contents of his declaration in support of the opposition. Defendant refused to produce him, apparently because he had already been deposed. Plaintiffs assert that Mr. Bayona's first deposition was as a corporate designee, and that they were entitled to a further deposition by virtue of Defendant's decision to offer him as a fact witness. The court agrees. However, the

court does not agree that the appropriate remedy would be to strike Mr. Bayona's declaration. The Motion to Strike is DENIED. Should Plaintiffs decide to depose Mr. Bayona during the merits discovery phase they will be permitted to do so within defined parameters.

EVIDENTIARY OBJECTIONS:

Plaintiffs also submitted 13 evidentiary objections to portions of the Declaration of Rafael Bayona, as well as 7 evidentiary objections to the Declaration of Donna Meyers. Formal objections to evidence are unnecessary in the context of motions for class certification. (See, e.g., *Gonzales v. Millard Mall Services, Inc.*, 281 F.R.D. 455, 459-460 (S.D. Cal. 2012) [citing, inter alia, *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 519 (C.D. Cal. 2011)].) All of Plaintiffs' evidentiary objections are OVERRULED as going to weight, rather than admissibility. This ruling is not determinative of the admissibility of the same or similar evidence in any other context.

LEGAL STANDARDS:

Class actions in California are governed by Code of Civil Procedure §382, authorizing such suits "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (*Fireside Bank v. Sup. Ct.* (2007) 40 Cal.4th 1069, 1078; *City of San Jose v. Sup. Ct.* (1974) 12 Cal.3d 447, 458.) "[T]he party advocating class treatment must demonstrate [a] the existence of an ascertainable

and sufficiently numerous class, [b] a well-defined community of interest, and [c] substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004 at p. 1021 [citing *Fireside Bank* at p. 1089; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; and *City of San Jose* at p. 459].) The community of interest requirement embodies three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Ibid.*)

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants'" (*Brinker* at p. 1021 [citing *Collins v. Rocha* (1972) 7 Cal.3d 232, 238, and *Sav-On Drug Stores, Inc. v. Sup. Ct.* (2004) 34 Cal.4th 319, 326]), the answer to which "hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.'" (*Ibid.*) Generally, "if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Id.* at p. 1022 [citing *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916].) Class certification is, however, "essentially a procedural [question] that does not ask

whether an action is legally or factually meritorious" (*Brinker* at p. 1023 [citing *Sav-On* at p. 326 and *Linder* at p. 439]), and "the focus in a certification dispute is on what type of questions - common or individual - are likely to arise in the action, rather than on the merits of the case." (*Sav-On* at p. 327.)

Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. (*Linder* at p. 435.) In addition, the trial court may assess the advantages of alternative procedures for handling the controversy. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 660-662.) The court is vested with discretion in weighing the concerns that affect class certification. (*Sav-On* at p. 336.) "[B]ecause group action also has the potential to create injustice, trial courts are required to 'carefully weigh respective benefits and burdens and to allow maintenance of the class-action only where substantial benefits accrue both to litigants and the courts.'" (*Linder* at p. 435.) It is, of course, plaintiff's burden to support each of the above factors with a factual showing. (*Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462.)

With these standards in mind, the court turns to the issues presented.

DISCUSSION and RULING:

In response to Defendant's opposition arguments, Plaintiffs presented alternative definitions in their reply:

"Regular Rate Class - All former and current hourly, non-exempt employees of Kohl's in California from April 4, 2004 through the date of class certification who were paid, during the same weekly pay period, both: 1) shift premiums, credit incentives, email incentives, or Associate of the Month bonuses in addition to their base hourly rate of pay; and 2) overtime wages or meal and/or rest period premium pay."

"Rest Period Class - All former and current hourly employees of Kohl's in California from April 4, 2004 through the date of class certification who worked a shift of three and one half hours or greater."

"Wage Statement Class" - All former and current hourly, non-exempt employees of Kohl's in California from April 4, 2007 through the date of class certification who in any one pay period had listed on their wage statements any hours in addition to "regular hourly earnings."

The court agrees that these proposed definitions are an improvement. However, in order to facilitate the mailing of a single notice, in the court's view the appropriate definition would be framed in terms of a class of all Associates, with Regular Rate, Rest Period, and Wage Statement subclasses.

As to Plaintiffs' Regular Rate theory of liability, Defendant's opposition arguments have no merit. As to the appropriate beginning date of the class period, Defendant has not established that Plaintiffs' Regular Rate claims in this case fell within the scope of the release in the *Meints* case, and as to the appropriate end

date of the class period, Defendant's evidence of the changes to its rate of pay calculations in 2012 does not include all of the categories of incentive pay that underlie Plaintiffs' theory of recovery. Nor has Defendant demonstrated that store to store variation in administration of AOM awards or their assertion of a de minimis defense would tip the balance towards individual issues. It is undisputed that Defendant's uniform policy is to use Associates' "base" rate of pay rather than their regular rate of pay to determine overtime wages and meal and rest break premiums. The court agrees with Plaintiffs that the legality of this practice is an overarching common issue. (See, e.g., *Faulkinbury v. Boyd & Assoc.* (2013) 216 Cal.App.4th 220, 235.) The remainder of Defendant's arguments on Regular Rate issues fall clearly into the category of merits determination that cannot be resolved in the context of a motion for class certification.

As to Plaintiffs' Rest Break claims, the court rejects Defendant's argument that they are not properly pled in the operative complaint. The allegation that Defendant requires Plaintiffs to work during rest periods is adequate for this purpose. Nor has Defendant demonstrated that store to store variations in enforcement of the uniform written policies result in predominance of individualized issues. The remainder of Defendant's arguments on the Rest Break claims falls clearly into the category of merits determinations.

However, there is apparent merit to the argument that the Rest Break claims fell within the scope of the release in the *Meints* settlement, and Plaintiffs do not

argue otherwise in their reply. Although the court cannot tell from the current record exactly when the *Meints* settlement took effect, it appears that that date should determine to beginning of the class period for the Rest Break claims.

Finally, as to the Wage Statement claims, Plaintiffs' revised proposed sub class definition reflects Plaintiffs' apparent concession that the class period does not begin until April 4, 2007. However, Defendant's argument that the necessity of individualized showings of injury should prevent class certification has no merit. Whether Labor Code section 226(e)(2)(B) [as amended, effective January 1, 2013] is subject to retroactive application simply constitutes an additional common issue.

RULING:

The Motion is GRANTED.

The court HEREBY CERTIFIES the following class:

"All non-exempt or hourly employees of Kohl's Department Stores, Inc. ("Kohl's Associates") who worked in California at any time during the period from April 4, 2004 until the date of class certification."

The court further CERTIFIES the following sub classes:

"Regular Rate Sub Class - All Kohl's Associates who worked in California at any time during the period from April 4, 2004 through the date of class certification who were paid, during the same weekly pay period, both: 1) shift premiums, credit incentives, email incentives, or Associate of the Month bonuses in addition to their base hourly rate of pay; and 2) overtime wages or meal and/or

rest period premium pay."

"Rest Period Sub Class - All Kohl's Associates who worked in California at any time during the period from the end date of the class period in the *Meints* settlement through the date of class certification who worked a shift of three and one half hours or longer." The court will expect the Rest Period Sub Class definition to be augmented with a date certain for the end of the *Meints* settlement class period for inclusion in the class notice.

"Wage Statement Sub Class" - All Kohl's Associates who worked in California at any time during the period from April 4, 2007 through the date of class certification who in any one pay period had listed on their wage statements any hours in addition to "regular hourly earnings."

Plaintiffs Nicole Lopes, Rodolfo Bobadilla and Brian Paradis are HEREBY APPOINTED as class representatives.

Goldstein, Borgen, Dardarian & Ho, Capstone Law APC and Law Offices of Mark Yablonovich are HEREBY APPOINTED as class counsel.

All class members will receive written notice and be given the opportunity to exclude themselves ("opt-out") from the class. The court will require that the notice include a clear, plain language description of the exact nature of the claims that have been certified. Notice form, procedure and timing will be the subject of a separate order.

RELATED ACTIONS:

At the court's last count, there are at least four related employment cases currently pending against Defendant in other counties in California. Defendant is reminded of its responsibility to file a Notice of Related Case of any addition pending cases or new related case filed at any time during the pendency of the instant case. Defendant is also directed to file, under cover of an appropriate authenticating declaration, copies of any settlement agreements entered into by Defendant in any related California case, as well as copies of any orders of preliminary approval of such settlement agreements. Courtesy copies of such filings should also be delivered directly to Department 21.

May 16, 2014
Date

Wynne S. Carvill
Wynne S. Carvill
Judge of the Superior Court

EXHIBIT A

▪ July 21, 2008 ▪

▪ HTML ▪

Meal and Break Periods - Distribution Centers(204B)**Meal and Break Periods - Distribution Centers(204B)**

Revised Date:12/12/2006

Reviewed Date:02/06/2007

I. Eligibility

- A. Both part-time and full-time Associates are eligible for breaks and/or meal periods depending on the number of hours they work.

II. General

- A. An Associate shall not swipe in or out for a break but must swipe in and out for a meal period. (Some exceptions apply, see sections IV and V.)
- B. Associates **may not** leave their location when on a paid break.
- C. The schedule of meal and break periods during the day shall be determined by location management and communicated to the Associate.
- D. An Associate who decides not to take the allotted time for his/her breaks forfeits his/her right to the break.
- E. Meal and break time may not be held over from one day to the next. Meals and breaks may not be combined to extend or lengthen a meal or break period or saved until the end of the shift to shorten the work day. *Unpaid Meal times may not be extended without location management approval.*
- F. An Associate is required to take a meal period if eligible.
- G. In accordance with State and Federal wage-per-hour regulations, an Associate's meal period may not be deducted from the Associate's pay without the Associate's consent and verification. Consent and verification are given through "swiping" in the timekeeping system or written authorization from the Associate to deduct a meal period.

III. Break Schedule (Some exceptions apply, see section V.)

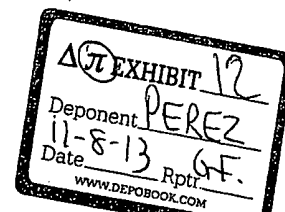
- A. An Associate who works less than four hours is not eligible for a paid break.
o Ex. 6:00pm-9:30pm (3.5 hours); 5:00pm-8:00pm (3 hours)
- B. An Associate who works at least four hours, but less than six hours, is eligible for one fifteen-minute paid break.
o Ex. 6:00pm-10:00pm (4 hours); 5:00pm-10:00pm (5 hours); 5:00pm-10:30pm (5.5 hours)
- C. An Associate who works at least six hours, but less than eight hours, will receive one twenty-minute break.
o Ex. 2:00pm-8:00pm (6 hours)
- D. An Associate who works at least eight hours, but less than 10 hours, will receive two twenty-minute paid breaks.
o Ex. 8:00am-4:00pm (8 hours); 2:00pm-10:30pm (8.5 hours)
- E. An Associate who works 10 hours or more will receive three twenty-minute paid breaks.
o Ex. 8:00am-6:00pm (10 hours); 12:00pm-10:30pm (10.5 hours)

IV. Meal Schedule

An Associate who works longer than originally **scheduled** will receive an unpaid meal period based on his/her **original** work schedule unless the amount of extra work time is determined by the location management at the beginning of the workday.

V. State Specific Variations

Confidential



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CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER GRANTING CLASS CERTIFICATION to be served and mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

Laura L. Ho
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I declare under penalty of perjury that the same is true and correct.
Executed on May 16, 2014.

By:



Yolanda Estrada, Deputy Clerk
Department 21