UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
****CORRECTED****
CIVIL MINUTES - GENERAL

Case No.	CV 06-3032 PSG (FMOx)	Date	August 19, 2008
Title	Deanna M. Kimoto, *et al.* v. McDonald's Corps., *et al.*		

Present:	The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: **(In Chambers) Order GRANTING Defendant's Motion to Deny Class Certification, deeming MOOT Plaintiff's *Ex Parte* Application for an Order Continuing Hearing on Defendant's Motion to Deny Class Certification and Plaintiff's Motion for Class Certification to be Heard Concurrently, and deeming MOOT Plaintiff's Motion for Class Certification**

Before this Court are Defendant's Motion to Deny Class Certification, Plaintiff's *Ex Parte* Application for an Order Continuing Hearing on Defendant's Motion to Deny Class Certification and Plaintiff's Motion for Class Certification to be Heard Concurrently, and Plaintiff's Motion for Class Certification. On August 18, 2008, the Court heard argument on Defendant's Motion to Deny Class Certification. After consideration of the parties' arguments and papers, the Court hereby GRANTS Defendant's motion, and deems MOOT Plaintiff's *Ex Parte* Application and Motion for Class Certification.

I. BACKGROUND

Deanna M. Kimoto ("Plaintiff") commenced this action by filing a class action complaint against McDonald's Corporation ("Defendant" or "McDonald's") and other Doe defendants in state court, alleging claims for compensation for missed meal and rest periods including waiting time penalties (Cal. Labor Code §§ 203, 226.7 and 558, and Wage Order 5-2001); wages due including waiting time penalties (Cal. Labor Code §§ 201-203 and 1194.2, and Wage Order 5-2001); failure to comply with itemized employee wage statement provisions and to maintain records at a centralized location (Cal. Labor Code §§ 226, 558 and 1174); and unfair competition (Cal. Bus. & Prof. Code, §§ 1700 *et seq.*). On May 17, 2006, Defendant removed

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the case to federal court.

Defendant McDonald's presently owns and operates approximately 158 restaurants in California (Tossi Dec., ¶ 4.) From November 14, 2005 though February 25, 2006, Plaintiff worked as an hourly, non-exempt crew member at the McDonald's in Clovis, California. (UF, ¶ 1.) The Complaint alleges that during the Class Period, defined as "four years prior to the filing of this action through the trial date . . . ." (Comp. ¶ 3), McDonald's engaged in a concerted practice of not providing Plaintiff and class members their wages in full or meal and rest periods as required by the Wage Orders and Cal. Labor Code §§ 226.7 and 512. (Comp. ¶ 10.) The Complaint alleges that members who performed work during time they were entitled to take meal and rest periods, are entitled to compensation and wages, and in some cases, overtime pay. (Comp. ¶¶ 25-27.) The Complaint further alleges that Defendant's failure to provide lawful meal and rest breaks resulted in inaccurate wage statements provided to employees, in violation of Cal. Labor Code § 226(a). (Comp. ¶ 30.) Plaintiff seeks to represent the following Plaintiff Class:

> All persons who at any time after four (4) years prior to the filing of the action through the date of trial were non-exempt employees of the Defendants in California.

(Comp. ¶ 11.) The Plaintiff Class contains two subclasses:

> Wage Sub-Class: All Plaintiff Class member who were not fully paid wages as required by the applicable Wage Order(s) of the Industrial Welfare Commission, regulations or statutes.
>
> Meal and Rest Period Sub-Class: All Plaintiff Class member who were not provided lawful meal and rest periods as required by the applicable Wage Order(s) of the Industrial Welfare Commission, regulations or statutes.

(Comp. ¶ 12.)

On October 17, 2006, the Court stayed the action pending the California Supreme Court's decision in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 56 Cal.Rptr.3d 880

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(2007).[1] A decision in *Murphy* was issued on April 16, 2007, and on July 5, 2007, the Court vacated the stay. On July 22, 2008, Defendant moved to deny class certification and set the hearing date for August 18, 2008. On Thursday, August 14, 2008, the last day to file motions pursuant to the Court's scheduling order, Plaintiff filed a motion to certify the class. (Dock. No. 86.) On Friday, August 15, 2008, Plaintiff filed an *ex parte* application asking the Court to continue the Defendant's motion to deny certification and hear both parties' motions concurrently. (Dock. No. 96.) These motions are now before the Court.

II. LEGAL STANDARD

The decision whether to certify a class is committed to the discretion of the district court within the guidelines of Federal Rule of Civil Procedure 23. *See Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003). A court may certify a class if a plaintiff has met the four prerequisites of Rule 23(a), and at least one of the alternative requirements of Rule 23(b). *See* Fed. R. Civ. P. 23; *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Plaintiff has the burden to establish that the Rule 23(a) and Rule 23(b) requirements have been met. *Zinser v. Accufix Research Inst., Inc..*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Rule 23(a) sets forth four prerequisites to class certification: (1) the class is so numerous that joinder of all members individually is "impracticable"; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representative are typical of the claims or defenses of the class; and (4) the class representative will fairly and adequately protect the interests of all members of the class. Fed. R. Civ. P. 23(a). If all four prerequisites of Rule 23(a) are satisfied, a plaintiff must also establish that one or more of the grounds for maintaining the suit are met under Rule 23(b), including: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. *See* Fed. R. Civ. P. 23(b).

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[1]In *Murphy*, the California Supreme Court address the question of whether the "additional hour of pay" remedy for violations of § 226.7 was a penalty or a wage. *Murphy*, 40 Cal.4th at 1120. The distinction was important because under California Code of Civil Procedure, a three-year statute of limitations applies to wages, while a one-year statute of limitation applies to penalties. Cal. Civ. P.§§ 338(a), 240 (a). The *Murphy* court held that the "additional hour of pay under § 226.7 constitutes a wage or premium pay, and thus is governed by a three-year statute of limitations." *Id.*

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"[D]istrict courts must conduct a rigorous analysis into whether the prerequisites of Rule 23 are met before certifying a class." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). In determining the propriety of a class action, the court is bound to take the substantive allegations of the complaint as true. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). However, the court must also consider the nature and range of proof necessary to establish those allegations. *Id.* at 901.

I. DISCUSSION

Defendant sets forth numerous grounds for denying class certification, including that: (i) Plaintiff cannot satisfy the typicality or adequacy requirements of Rule 23(a) concerning her meal and rest period claims; (ii) Plaintiff cannot satisfy the commonality and superiority requirements of Rule 23(b)(3) concerning her meal, rest period, wage statement and overtime claims; (iii) Plaintiff lacks standing to pursue her wage statement claims; and (iv) Plaintiff is barred from seeking certification because she failed to comply with the 90-day requirement of Local Rule 23-3 or Rule 23's requirement that the plaintiff seek certification at an "early practicable time." Fed. R. Civ. P. 23(c)(1)(A).

A. Timing of Certification Motion

As an initial matter, the Court addresses the timing of Plaintiff's motion for class certification. Under Rule 23(c)(1)(A), the Court must determine by order whether to certify the action as a class action at "an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A).

Here, the Court set the discovery cutoff date for July 14, 2008. (Dock. No. 43.) However, Plaintiff did not file her motion for certification until one full month later, on August 14, 2008 - the last date to file a motion of any kind in this action. Given that trial is just two months away, the Court does not find this to be "an early practicable time" under Rule 23(c)(1)(A). Although Plaintiff correctly contends that the Court's scheduling order *permitted* this late filing of her motion, nothing in any of the Court's orders authorized Plaintiff to bypass her obligation under Rule 23(c)(1)(A). Furthermore, the Court notes that back in October 2007, the parties filed a Joint Request for Clarification proposing August 4, 2008 as the class certification hearing date. (Dock. No. 51.) The Court denied the joint request, thus indicating that an August 2008 hearing date on a motion for class certification would be inappropriate. By filing her motion at this late date, Plaintiff has ignored both the Court's order and Rule

23(c)(1)(A). Nevertheless, while Plaintiff's failure to comply with Rule 23(c)(1)(A) in and of itself warrants denying class certification, the Court will proceed to address the merits of the issue.

B. Commonality under Rule 23(a)(2) and Rule 23(b)(3)

Because a central issue disputed by the parties is whether Plaintiff has shown common questions of law or fact sufficient to meet her burden under Rule 23(a)(2) and shown that these common questions predominate over individual questions under Rule 23(b)(3), the Court will address this issue first.[2]

To fulfill the commonality prerequisite of Rule 23(a)(2), plaintiffs must establish that there are questions of law or fact common to the class as a whole. Fed. R. Civ. P. 23(a)(2). The Ninth Circuit has construed Rule 23(a)(2) permissively. *See Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). Individual variation among plaintiffs' questions of law and fact does not defeat underlying legal commonality, because "the existence of shared legal issues with divergent factual predicates is sufficient" to satisfy Rule 23. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). However, where as here, a plaintiff seeks class certification under Rule 23(b)(3), the plaintiff must satisfy a more stringent standard by showing that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). To determine if common questions of fact predominate, the court "examine[s] the issues framed by the pleadings and the law applicable to the causes of action alleged." *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal.App.4th 908, 916 (2001).

Here, the applicable law is set forth in both the California Labor Code and in Wage Orders promulgated by the Industrial Welfare Commission ("IWC"). The IWC is a quasi-legislative body authorized by statute to promulgate orders regulating wages, hours, and conditions of employment for employees throughout California. *Nordquist v. McGraw-Hill Broadcasting Co., Inc.*, 32 Cal.App.4th 555, 562, 38 Cal.Rptr.2d 221 (1995). Pursuant to this authority, the IWC has promulgated seventeen different "wage orders" that apply to various groups of employees. Cal. Code Regs. tit. 8, §§ 11010- 11170. The Ninth Circuit has stated that

[2]In her Opposition to Defendant's motion and in her Motion for Class Certification, Plaintiff only seeks certification pursuant to Rule 23(b)(3), and does not mention the other two grounds for maintaining a class action under Rule 23(b)(1) or (b)(2).

IWC wage orders are "quasi-legislative regulations that are to be interpreted in the same manner as statutes." *Watkins v. Ameripride Services*, 375 F.3d 821, 825 (9th Cir. 2004).

Plaintiff bases her meal, rest period and wage claims on Cal. Labor Code §§ 512(a) and 226.7. Section 512 provides:

> An 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, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

Cal. Labor Code §§ 512(a).

Section 226.7 provides:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

Cal. Labor Code § 226.7.

Subdivision 12 of Wage Order 5-2001 provides, in relevant part:

> (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily time is less than three and on-half (3½) hours. Authorized rest period time shall be counted, as hours worked, for which

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> there shall be no deduction from wages.
>
> (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided

Cal. Code of Reg., title 8, §11050(12)(A).

To start, the parties dispute their interpretation of the California law. Citing persuasive authority, Defendant contends that the phrase "authorize and permit . . . rest periods" and "provide an employee a rest period" in Wage Order 5-2001 means to *make the period available* if he or she wants to take one, but not to ensure that such rest periods are taken. *See White v. Starbucks Corp.*, 497 F.Supp.2d 1080, 1086 (N.D.Cal. 2007) ("[T]he court agrees that the words 'authorize' and 'permit' only require that the employer make rest periods available"); *Lanzarone v. Guardsmark Holdings, Inc.*, 2006 WL 4393465, *6 (C.D.Cal. 2006) ("Under California law, rest periods need only be authorized and permitted, they need not be enforced or actually taken."); *Brown v. Federal Express Corp.*, 249 F.R.D. 580, 585 (C.D.Cal. 2008) ("It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time.") Plaintiff argues that "Defendant's cited authority for the notion that breaks must be offered but not ensured, is unsupported by the facts of this case." (Opp'n at 18.) The question has not yet been decided by the California Supreme Court.

When interpreting state law, federal courts are bound by decisions of the state's highest court. *In re Kirkland,* 915 F.2d 1236, 1238 (9th Cir. 1990). In the absence of such a decision, a federal court should apply the rule that it believes the state supreme court would adopt if faced with the same issue. *See Arizona Electric Power Cooperative, Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995). For example, in *Starbucks Corp.*, the district court held that the California Supreme Court, if faced with the issue, "would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that he was forced to forego his meal breaks as opposed to merely showing that he did not take them regardless of the reason." *Starbucks Corp.*, 497 F.Supp.2d at 1088-89. On July 22, 2008, the California Court of Appeal, Fourth Appellate District, issued a decision consistent with Defendant's view in *Brinker Restaurant Corp. v. Superior Court*,--- Cal.Rptr.3d ----, 2008 WL 2806613 (Cal.App. 4 Dist., July 22, 2008).

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The named plaintiffs in *Brinker*, employees of Brinker Restaurant Corporation which operated restaurants such as Chili's Grill & Bar, Romani's Macaroni Grill and Maggiano's Little Italy, asserted three types of wage and hour violations - rest break violations, meal period violations, and off-the-clock/time shaving violations. *Id.* at *2-3. The trial court certified the class, finding that common alleged issues of meal and rest violations predominated, even though "a determination that [Brinker] need not force employees to take breaks may require some individualized discovery." *Id.* at *9.

The court of appeal disagreed, explaining that in a wage and hour case, in order to determine if common issues of fact predominated, the trial court was required "to determine the elements of the plaintiffs' claims. *Id.* at 10. The trial court, however, did not reach the issue of what law applied to the claims. *Id.* By not resolving the applicable law, a "threshold issue," the trial court abused its discretion. *Id.* The court of appeal further explained that had the court properly determined the applicable law, it would have denied class certification:

> Had the [trial] court properly determined that (1) employees need be afforded only one 10-minute rest break every four hours "or major fraction thereof" (Reg. 11050(12)(A)), (2) rest breaks need be afforded in the middle of that four-hour period only when "practicable," and (3) employers are not required to ensure that employees take the rest breaks properly provided to them in accordance with the provisions of IWC Wage Order No. 5, only individual questions would have remained, and the court in the proper exercise of its legal discretion would have denied class certification with respect to plaintiffs' rest break claims because the trier of fact cannot determine on a class-wide basis whether members of the proposed class of Brinker employees missed rest breaks as a result of a supervisor's coercion or the employee's uncoerced choice to waive such breaks and continue working. Individual questions would also predominate as to whether employees received a full 10-minute rest period, or whether the period was interrupted. *The issue of whether rest periods are prohibited or voluntarily declined is by its nature an individual inquiry.*

Id. at *15 (emphasis added). Based on this reasoning, the *Brinker* court vacated the previous class certification order and denied, with prejudice, certification of plaintiffs' rest, meal period and off-the-clock subclasses. *Id.* at *25.

The Court concludes that this recent decision in *Brinker* provides a good indication of

how the California Supreme Court would resolve the issue. If the issue were before it, the California Supreme Court would adopt Defendant's construction of the meal and rest period provisions. Having resolved this legal question for purposes of Defendant's motion, it is apparent that Plaintiff has failed to identify any theory of liability that present common questions that predominate.

Plaintiff's theory appears to be that the McDonald's was too busy to give employees a meaningful opportunity to take break. Assessing whether a McDonald's employee was *authorized* by his or her manger to take a rest or meal period would require an individualized, highly fact-specific inquiry to determine whether a divergent method applied in a particular restaurant, by particular managers, to particular shifts, to particular crew members.

Plaintiff nonetheless argues that common questions predominate because she seeks only to represent those employees who, like herself, were subjected to "late" breaks. What matters, contends Plaintiff, is not whether or how the employees were authorized to take breaks, but ***when*** the breaks were provided. (Opp'n at 17.) To support her claims, Plaintiff has submitted a sampling of time punch meal and rest break data for McDonald's non-exempt California restaurant employees from March 2006 through March 1, 2008 (Lamb Dec., ¶¶ 3-4; Compendium, Ex. 2), and time punch summary reports of various employees. (Compendium, Ex. 3.)

Plaintiff attempts to avoid *Brinker* by redefining the Class. However, even considering Plaintiff's newly defined class, the Court finds that individual questions would still predominate. The Court cannot infer from the summary reports of various employees a company-wide policy of not authorizing meal or rest periods. First, there is no financial incentive for an employee to clock in and out for a ten-minute rest period, since that employee will get paid regardless. Thus, without other evidence, the Court cannot assume that the employees accurately recorded the timing of their breaks. This is especially true in light of Defendant's evidence - declarations by store managers - that often an employee will take a rest period without punching in and out, despite being instructed to do so (Id., Arias Dec., ¶ 20; Allen Dec., ¶ 24; Lee Dec., ¶ 19; Alania Dec., ¶ 12); and that often, employees fail to clock out for meal periods when taken. (Id., Fajardo Dec., ¶ 16; Gutierrez Dec., ¶ 20; Hernandez Dec., ¶ 15.) Second, these time records actually demonstrate the individual nature of the inquiry. Some of the employees clocked out for their full 30 minute meal periods or ten-minute breaks most of the time, and some appear to have clocked out only part of the time. Moreover, Defendant has submitted evidence showing that authorizations to take rest periods and meal breaks vary from manager to manager, and also vary from store to store. (Defendant's Appendix of Evidence, Alania Dec., ¶¶ 12-13; Allen

Dec., ¶¶ 13-14; Gutierrez Dec., ¶ 13; Arias Dec., ¶¶ 10-11,13; Jones Dec., ¶¶ 12-13; Miguel Dec., ¶ 15; Romero Dec., ¶ 8; Lee Dec., ¶ 13; Hernandez Dec., ¶ 12; Garcia Dec., ¶¶ 15-16).

Based on the evidence provided, an employee may have taken a lawful ten-minute break during the first four hour period of a shift, but simply forgot to punch out. On the other hand, the evidence might also show that in a particular case the store manager instructed an employee to help a customer rather than take the ten-minute break. Such an instruction could be viewed as the employer not "providing" a meal break; however, it is an individual question that cannot be resolved class wide. Accordingly, the Court finds that individualized issues predominate because liability cannot be established without individual trials for each class member. Because the Court concludes that certification of the Meal and Rest Period Sub-Class is inappropriate on this ground, the Court does not address the parties' other arguments regarding certification.

Lastly, with respect to Plaintiff's class claims regarding inaccurate wage statements, failure to pay overtime, and unfair competition, these claims are wholly derivative of Plaintiff's meal and rest period claims. Therefore, certification of the Wage Sub-Class fails as well.

IV. CONCLUSION

Because the Court hearing on Defendant's motion to deny certification went forward on August 18, 2008, Plaintiff's *Ex Parte* Application for an Order Continuing Hearing on Defendant's Motion to Deny Class Certification and Plaintiff's Motion for Class Certification to be Heard Concurrently is MOOT.

For the foregoing reasons, the Court GRANTS Defendant's Motion to Deny Class Certification. Accordingly, Plaintiff's Motion for Class Certification is MOOT.

IT IS SO ORDERED.

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