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9 Healthcare Investments, Inc.

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF LOS ANGELES**

13 CHARLES KIMANI, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 HEALTHCARE INVESTMENTS, INC., a
18 California Corporation dba ROSECRANS
19 CARE CENTER; and DOES 1-100, inclusive,

20 Defendants.

CASE NO.: BC432360

Judge: Hon. Mary Strobel
Dept.: 32

21 **NOTICE OF RULING ON**
22 **PLAINTIFF'S COURT-ORDERED**
23 **SUPPLEMENTAL BRIEFING IN**
24 **SUPPORT OF PLAINTIFF'S**
25 **MOTION FOR CLASS**
26 **CERTIFICATION**

27 Hearing Date
28 Date: May 11, 2012
Time: 8:30 a.m.

Action filed: February 22, 2010

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that Plaintiff's Court-Ordered Supplemental Briefing in
3 Support of Plaintiff's Motion for Class Certification ("Motion") came on for hearing on
4 May 11, 2012 at 8:30 a.m. in department 32 of the above-referenced Court, Honorable
5 Mary Strobel presiding. K. Luan Tran and Caleb Liang of Lee Tran & Liang APLC
6 appeared on behalf of Defendant Healthcare Investments, Inc. Michael Malk of Michael
7 Malk, Esq., APC appeared on behalf of Plaintiff.

8 The Court ordered that Plaintiff's Motion is **DENIED** and adopted its tentative
9 ruling attached herein as Exhibit A.

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DATED: May 11, 2012

LEE TRAN & LIANG APLC

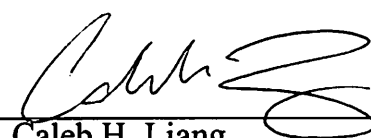
By 
Caleb H. Liang
Attorney for Defendant Healthcare
Investments, Inc.

EXHIBIT A

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

CHARLES KIMANI, individually and on behalf Of all other similarly situated,)	Case No. BC432360
)	
)	COURT'S
)	TENTATIVE RULING
)	
Plaintiff)	
vs.)	
)	
HEALTHCARE INVESTMENTS, INC. a California Corporation, dba ROSECRANS CARE CENTER; and DOES 1-100 inclusive)	
)	
Defendant)	

HEARING DATE: May 11, 2012 (continued from February 8, 2012)
DEPARTMENT: 32
JUDGE: Mary H. Strobel

SUBJECT: Motion for Class Certification
MOVING PARTY: Plaintiffs Charles Kimani, individually and on behalf of
all others similarly situated
RESP. PARTY: Defendant Healthcare Investments, Inc.

TENTATIVE RULING

Plaintiffs' Motion for Class Certification is DENIED.

SUMMARY

On February 22, 2011, Plaintiff Charles Kimani filed this class action case against Defendant Healthcare Investments, Inc. dba Rosecrans Care Center ("Defendant" or "HII") and Does 1-100 inclusive. The Complaint alleged various wage and hour violations on behalf of a class of persons employed by Defendant as Certified Nursing Assistants ("CNAs"), Licensed Vocational Nurses ("LVNs"), and Registered Nurses ("RNs").

The operative complaint is the Second Amended Complaint ("SAC"), which alleges claims for 1) Failure to Provide Timely, Off-Duty Meal Breaks; 2) Failure to Provide Mandated Rest Periods; 3) Failure to Pay All Overtime and Double-Time Wages Due; 4) Failure to Pay Compensation Due Upon Termination; 5) Failure to Issue Accurate Itemized Wage Statements; 6) Unpaid Wages For Time Worked; 7) Penalties Pursuant To Labor Code §2699, et seq.; and 8) Unfair/Unlawful/Fraudulent Business Practices. The SAC also added Cecilia Brief as a named plaintiff.

On July 12, 2011, the Court denied Plaintiffs' motion to disqualify defense counsel, strike declarations produced by Defendant and re-open depositions of putative class members. Plaintiffs' motion for class certification came for hearing before the Court on February 8, 2012. At that time, the Court denied certification as to the theories regarding failure to pay overtime, failure to provide first meal breaks and failure to provide rest breaks. The Court ordered further briefing regarding the theory that class members were denied compliant second meal breaks when they worked double shifts.

CLASS DEFINITION

All current and former Nursing Staff employed by Defendant Healthcare Investments, Inc. in California who worked two, consecutive eight-hour shifts at any time during the period from February 22, 2006 through the conclusion of this action.

DISCUSSION

Ascertainability

The newly proposed class definition is clear and uses objective language. It specifies that it applies only to Nursing Staff (RNs, LVNs, and CNAs) who worked a particular shift (two, consecutive eight-hour shifts) during a discrete time period. The employees who worked double shifts can be identified from Defendant's time records. Supp. Motion, Malk Decl., ¶ 12 and Exh. K. Therefore, the class is ascertainable.

Numerosity

The class is sufficiently numerous. Plaintiff has identified close to 40 nursing staff members who worked double shifts during the class period, based on only a sample of time cards produced by Defendant. Supp. Motion, Malk Decl., ¶ 12 and Exhs. A- K. More class may be identified from Defendant's complete time records. Although currently on the smaller side, a class of approximately 40 persons is sufficiently numerous.

Typicality

The named plaintiff must be a member of the class. *Petherbridge v. Altadena Federal Savings and Loan Association* (1974) 37 Cal.App.3d 193, 200.

Typicality looks to the nature of the claims or defenses, not the specific facts from which the claims or defenses arose or the relief sought. *Seastrom v. Neways, Inc.* (2007) 149 Cal. App. 4th 1496, 1502. The test of typicality is “whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Id.* However, the class representative's interests need not be identical to those of class members, only similarly situated. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.

Plaintiff Kimani withdraws his request to represent this class, as he never worked a double shift. Supp. Motion, p. 6, n. 8. Plaintiff Cecilia worked for Defendant as an LVN from April 2009 to the present. Motion, Malk Decl., Exh. W (“Brief Decl.”), ¶ 1. Plaintiff Brief alleges that she was not able to take a meal breaks until after the tenth hour of her double shift, in violation of Cal Labor Code section 512(a). This claim is also alleged on behalf of the class members. SAC, ¶ 21. As Plaintiff Brief is a member of the class and alleges the same claims brought on behalf of the class, she is a typical class member.

Adequacy

Defendant argues that Plaintiff Brief is an inadequate class representative. The parties sharply dispute the facts underlying a series of events in which Brief indicated she wished to withdraw as class representative. The Court need not reach the issue of Brief's adequacy, as the Court finds that common issues of law and fact do not predominate.

Commonality

Failure to Provide Second Meal Breaks

California law requires employers to provide employees with one 30-minute off-duty meal period for every five hours of time worked. Labor Code § 512(a); IWC Wage Order No. 9(11). If an employer fails to provide an employee with that meal period, the employee is entitled to an additional hour of pay. Labor Code § 226.7(b). Recently, the California Supreme Court clarified that the word “provide” means that “an employer must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work.” *Brinker Restaurant Corp. v. Superior Court* (2012) 2012 WL 1216356, *14.

Plaintiffs allege that class members who worked a double shift (16 hours) were not provided their meal breaks by the tenth hour of work, as required by California law. See Cal. Labor Code § 512(a). This theory is supported by the time cards produced by defendant, as the time cards do not reflect any clock in or clock out during the second shift at or before the tenth hour of work. Plaintiff offers the deposition testimony of one of the Nursing Staff supervisors, Franchelle Black, who testified that the second meal break would be taken before the fifth hour of the second shift. Motion, Malk Decl., Supp. Motion, Malk Decl., Exh. B (“Black Depo.”), pp. 29:20-30:6. Plaintiff also offers deposition testimony from putative class members who testified that they would take their second meal break in the hour before the fifth hour of their second shift. Motion, Vivero Depo., p. 36:10-22; Asi Depo., p. 36:8-13; Malk Decl., Exh. P (“Jones Depo.”), p. 50:12-17. Supp. Motion, Malk Decl., Exh. D (“Douglas Depo.”), pp. 19:24-20:5; Exh. E (“Elliott

Depo."), p. 23:1-14; Exh. H ("Sanchez Depo."), p. 23:3-19. Plaintiff argues that this evidence establishes a class-wide practice concerning when the second meal break was given.

In its supplemental opposition, Defendant presents evidence that double shifts are rare and unscheduled, and only occur when the regularly scheduled staff person unexpectedly called off from work. See Black declaration in support of Suppl. Opp.). Defendant offers evidence that nursing staff who worked a double shift always had the option of taking a break after the first shift in order to eat, go home and shower, drop kids off at the babysitter, or take care of any number of other personal errands. Suppl. Oppo., Luan Decl., Exh. C ("Class Member Decs."), ¶¶ 7-10. Defendant states that these breaks are not reflected in the payroll records because the class members are paid for this off-duty time. Suppl. Oppo., Black Decl., ¶ 6.

Plaintiff contends that this evidence contradicts the time cards produced by Defendant, previous deposition testimony, and declarations from putative class members. However, it does not appear in any of that testimony Plaintiff presents, the issue of whether Defendant allowed an employee who volunteered to work a second shift to take a break before starting the second shift was squarely addressed. If in fact Defendant allowed those employees to take a break before starting the second shift, Defendant has a defense to the alleged statutory violation. The Court does not find persuasive Plaintiff's argument that Defendant's supplemental evidence should be disregarded because Defendant's agents previously testified that Defendant's time cards are accurate. Defendant explains that in fact employees working the second shift were paid for the break they were

allowed between shifts. The time card thus reflects the time for which Defendant contends those employees were paid, even if it was break time before the second shift. Defendant contends that this policy of allowing a break before the second shift was applied to nursing staff who agreed to work double shifts, in consideration of the long hours they had agreed to take on. Supp., Oppo., p. 5:25-28.

Whether or not Defendant violated the Labor Code provision concerning the timing of the second meal period will thus require an individual inquiry as to whether the employee was offered a chance to take a break before the second shift began. That inquiry will apply to each employee and each double shift worked. Resolution of this issue cannot be determined through common proof. The court finds that common questions of law do not predominate with respect to this issue, and that a class action would not be the superior means of resolving the litigation.

Derivative Claims

The claims for failure to provide accurate wage statements, failure to pay all wages upon termination, unpaid wages and penalties are all based on the claim for failure to provide second meal breaks. For the reasons discussed above, certification is denied as to these claims as well.

PROOF OF SERVICE

1
2 **STATE OF CALIFORNIA)**
COUNTY OF LOS ANGELES)

3 I am employed in the county of Los Angeles State of California. I am over the age of 18
4 and not a party to the within action; my business address is: 601 S. Figueroa Street, Suite 4025,
Los Angeles, CA 90017.

5 On **May 11, 2012**, I served the foregoing document(s) described as:

6 **NOTICE OF RULING ON PLAINTIFF'S COURT-ORDERED SUPPLEMENTAL**
7 **BRIEFING IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS**
8 **CERTIFICATION** on the interested parties in this action.

9 By placing the original true copies thereof enclosed in sealed envelopes addressed
as follows:

<p>10 Michael B. Eisenberg, Esq. 11 Eisenberg & Associates 12 3580 Wilshire Blvd., Suite 1260 Los Angeles, CA 90010</p> <p>13 Fax: 213-382-4083 14 Email: mbe@laborlitigators.com</p>	<p>Michael Malk, Esq. The Malk Law Firm 1180 South Beverly Drive, Suite 610 Los Angeles, CA 90035</p> <p>Fax: 310-499-5210 Email: mm@malklawfirm.com</p>
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15 **BY MAIL** I placed such envelope in the mail at Los Angeles, California. The envelope
was mailed with postage thereon fully prepaid.

16 As follows: I am "readily familiar" with the firm's practice of collection and processing
17 correspondence for mailing. Under that practice it would be deposited with U.S. Postal
18 Service on that same day with postage thereon fully prepaid at Los Angeles, California in
the ordinary course of business. I am aware that on motion of the party served, service is
19 presumed invalid if postal cancellation date or postage meter date is more than one day
after date of deposit for mailing in affidavit.


20 **BY OVERNIGHT COURIER** I caused each envelope with fees prepaid shipped by
Federal Express.

21 **BY ELECTRONIC MAIL** I transmitted the above listed document(s) to the e-mail
22 address set forth above on this date.

23 Executed on **May 11, 2012**, at Los Angeles, California.

24 (State) I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

25
26 LYNETTE W. SUKSGUAN
Type or Print Name



Signature