STATE OF MISSOURI)
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CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

NOAH D. WINTER,

Plaintiff,

vs.

LUGANO2, LLC,

Defendant.

Cause No. 1322-CC09024

Division No. 4

ORDER

The Court has before it Defendant Lungano2, LLC's Motion for Summary Judgment, Plaintiff Noah D. Winter's Motion for Class Certification, and Defendant's Motion to Strike Affidavit of Justin Cissell. The Court now rules as follows.

In this ostensible class action lawsuit Mr. Winter asserts a single claim under the Missouri Minimum Wage Law (Wage Law) § 290.500, *et seq.*[1] The action arises out of Lugano's alleged failure to pay overtime or fully pay for hours worked or both. Mr. Winter asserts that Lugano violated the law by improperly classifying him and other salaried assistant managers of Lugano's Jimmy John's restaurants as exempt executives and failing to pay them overtime compensation. Mr. Winter's principal allegation is that hourly assistant managers and salaried assistant managers have essentially the same duties, and that hourly assistant managers who wants to work more than forty (40) hours per week are placed on a salary as salary assistant managers so that Lugano can avoid paying those employees overtime wages to which they would otherwise be entitled under Missouri law.

Defendant's Motion to Strike Affidavit of Justin Cissell

In support of Mr. Winter's opposition to Lugano's motion for summary judgment, Mr. Winter has filed the affidavit of one Justin Cissell, a former hourly paid assistant manager for Lugano. Lugano moves to strike this affidavit on the ground that Mr. Cissell was not named in discovery as someone who had factual knowledge relevant to this case, and because discovery is now closed under the operative discovery schedule. In response, Mr. Winter argues that Lugano objected when Mr. Winter sought to discover the identity of former assistant managers; that Cissell voluntarily came to

[1] Plaintiff has dismissed Counts II and III.

counsel for Mr. Winter only very recently; that his testimony is largely duplicative of Mr. Winter's testimony; and that Lugano will not suffer any prejudice to its case if Cissel's affidavit is allowed for these motions.

The Court has reviewed the record and agrees with Mr. Winter. The motion to strike is denied.

Defendant's Motion for Summary Judgment

Lugano moves for summary judgment on the ground that undisputed facts establish that Mr. Winter "was employed by [Lugano] as an employee exempt from the overtime pay requirements of FLSA and the Missouri minimum wage law" as a bona fide executive under Section 541.100(a).

Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. Allen v. Continental Western Ins. Co., 436 S.W.3d 548, 551-52 (Mo.banc 2014). Only genuine disputes as to material facts preclude summary judgment. Id. at 552. A material fact in the context of summary judgment is one from which the right to judgment flows. Id. A defending party may establish a right to summary judgment by, among other things, demonstrating that there is no genuine dispute as to the existence of the facts necessary to support defendant's properly pleaded affirmative defense, in this case, the affirmative defense that Mr. Winter was an exempt employee. Id.

Mr. Winter alleges that Lugano violated the Missouri Minimum Wage Law by improperly classifying Mr. Winter as exempt from overtime while he was employed by Lugano, and that Mr. Winter and a class of similarly situated current and former employees are owed overtime compensation for all hours worked in excess of forty during each workweek of their employment with Lugano. The MMWL generally sets forth the wage and hour requirements for the state of Missouri, and establishes a rule that requires employers to compensate any employee "at a rate not less than one and one-half times the regular rate at which he is employed" for the time worked in excess of forty hours per week. RSMo. § 290.505. There are a number of exceptions to this rule, however, and the MMWL incorporates all of the overtime exemptions contained in the federal Fair Labor Standards Act ("FLSA"). § 290.505(3)[2]; 29 U.S.C. section 201 *et seq.* The one at issue in this case excludes "any employee employed in a bona fide executive . . . capacity." Id. § 213(a)(1). An employer seeking to establish that an employee is an exempted "executive" must show, (1) the employee's salary is at least $455 per week ($23,660 per year), (2) the employee's "primary duty" is management, (3) the employee "customarily and regularly directs the work of two or more other employees," and (4) the employee "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other

[2] Section 290.505(3), provides that "the overtime requirements of [§ 290.505(1)] shall not apply to employees who are exempt from federal minimum wage or overtime requirements including, but not limited to, the exemptions ... specified in 29 U.S.C. Sections 207 and 213 [the Fair Labor Standards Act], and any regulations promulgated thereunder."

change of status of other employees are given particular weight." 29 C.F.R. § 541.100(a) (2009). Each of these requirements must be met for the exemption to apply.

The Court need not recite here the parties' lengthy statements of purportedly undisputed material facts. It is enough to say that the Court has reviewed the numerous summary judgment facts submitted and finds that the great majority are disputed. Mr. Winter concedes that he was paid $480.77 per week ($25,000 per year), "just barely" over the threshold minimum $455 per week, and that this salary was later raised to $27,500 per year. And it appears that Mr. Winter concedes that to the extent he did any management duties they included directing the work of two or more other full-time employees or their equivalent. The parties hotly dispute the second element, whether Mr. Winter's "primary duty" was management[3], and the fourth element, whether Mr. Winter's suggestions or recommendations as to hiring, firing, and disciplining employees, was given "particular weight." The Court finds there to be genuine questions of material fact as to these matters, which should be decided by the jury. Accordingly, Lugano's motion for summary judgment will be denied.

Plaintiff Noah D. Winter's Motion for Class Certification

Mr. Winter seeks certification of a class consisting of:

> All employees of Defendant Lugano2, LLC who at any time from August 5, 2011 to the date of this class is certified by the court who were employed as salaried Assistant Managers and who worked more than 40 hours in any workweek.

"Missouri law is clear that class certification hearings are procedural matters in which the sole issue is whether the plaintiff has met the requirements for a class action." Wright v. Country Club of St. Albans, 269 S.W.3d 461, 465 (Mo. App. E.D. 2008)(citing Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712, 715 (Mo. banc 2007)). "The trial court has no authority to conduct even a preliminary inquiry into whether the plaintiff has stated a cause of action or will prevail on the merits." Id. "[T]he class certification decision is independent of the ultimate merits of the lawsuit." Green v. Fred Weber, Inc.,

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[3] See this pertinent opinion issued on December 9, 2015, after the parties filed their memoranda in the present case: Marzuq v. Cadete Enterprises, Inc., 807 F.3d 431 (1st Cir. 2015). The plaintiffs in the Marzuq were store managers of two Dunkin' Donuts franchises. They were also the *only* managers. The trial court concluded that the plaintiffs were "in charge" of the restaurant during their shifts, and, citing Donovan v. Burger King Corp., 675 F.2d 516, 521 (2nd Cir. 1982)(a case relied upon by Lugano here), granted summary judgment for the store's owner. The First Circuit reversed, holding that: (1) in determining whether the executive exemption applied to store managers who spent much of their time on nonexempt work, a case-specific inquiry addressing the factors specified in 29 C.F.R. § 541.700 (2009) was necessary to resolve the question of whether management was their primary duty; and (2) disputed factual issues regarding such matters as the time spent on exempt work and whether the supervisory role had been overwhelmed by non-managerial tasks precluded summary judgment for the employer because a factfinder would need to determine the number of hours that the managers regularly worked, the percentage of time that they were engaged in nonexempt work, and the portion of that nonexempt time in which they were concurrently performing managerial duties.

254 S.W.3d 874, 878 (Mo. banc 2008). In a class certification determination, the named plaintiffs' allegations are accepted as true." Hope v. Nissan N. Am., Inc., 353 S.W.3d 68, 74 (Mo.App. W.D. 2011)(citing Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215, 227 (Mo.App. E.D. 2007).

The determination of class certification under Rule 52.08 lies within the trial court's sound discretion. Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 735 (Mo. banc 2004). "Because class certification can be modified as the case progresses, courts should err in favor of, and not against, certifying a class." Doyle v. Fluor Corp., 199 S.W.3d 784, 787-88 (Mo.App. E.D. 2006).

"Before considering the criteria established by Rule 52.08 it is first necessary to determine whether the class exists and is capable of legal definition." State ex rel. Coca-Cola Co. v. Nixon, 249 S.W.3d 855, 861 (Mo. banc 2008). "If a class is not properly defined, the circuit court must deny certification." Id. "A class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." Nixon, 249 S.W.3d at 861 (citing Oshana v. Coca-Cola Co., 472 F.3d 506, 514 (7th Cir. 2006)). In addition, "[t]he class definition must be sufficiently definite so that it is administratively feasible to identify members of the class." Nixon, 249 S.W.3d at 862.

"Before the trial court can certify a case for class action, pursuant to Rule 52.08, all the requirements of the rule must be satisfied." Dale v. DaimlerChrysler Corp., 204 S.W.3d 151, 164 (Mo.App. W.D. 2006). The prerequisites for class certification are: (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the class exist, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. State ex rel. American Family Mutual Ins. Co. v. Clark, 106 S.W.3d 483, 486 (Mo. banc 2003)(citing Rule 52.08(a)). "The party seeking class action certification bears the burden of proof." Craft v. Philip Morris Cos., 190 S.W.3d 368, 379 (Mo.App. E.D. 2005)(citing Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994)).

Numerosity

Rule 52.08(a)(1) requires that the class be so numerous that joinder is impracticable. "Joinder of all members is impracticable for purposes of the rule when it would be inefficient, costly, time-consuming and probably confusing." Dale, 204 S.W.3d at 167. "In making this determination, the courts have not developed arbitrary or rigid rules to define the required size of a class; instead, the determination must be made on a case-by-case basis." Id.

"A plaintiff does not have to specify an exact number of class members to satisfy the numerosity prerequisite for class certification, but must show only that joinder is impracticable through some evidence or reasonable, good faith estimate of the number of purported class members." Dale, 204 S.W.3d at 167. "To support a finding of the

numerosity prerequisite of Rule 52.08(a)(1), the trial court can accept common sense assumptions." Id. Here, joinder of all of Defendants' employees in Missouri who were salaried assistant managers, which number apparently exceeds forty, would be impracticable. See Conso. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995)("numerosity is presumed at a level of 40 members"). Therefore, the numerosity requirement is satisfied.

Commonality

Rule 52.08(a)(2) requires the presence of common issues of law or fact. Commonality is not required on every question raised in a class action, and the requirement is met when the legal question "linking the class members is substantially related to the resolution of the litigation." Paxton v. Union National Bank, 688 F.2d 552, 561 (8th Cir. 1982); See also DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1174 (8th Cir. 1995); Bradford v. AGCO Corp., 187 F.R.D. 600, 603 (W.D. Mo. 1999).

Mr. Winter contends that multiple common issues of law and fact exist, including:

i. Whether Lugano misclassified the salaried assistant managers as exempt;

ii. Whether the salaried assistant managers fall within the executive exemption;

iii. Whether the salaried assistant managers fall within the administrative exemption;

iv. Whether Lugano failed to pay class members wages and overtime required under RSMo. § 290.505;

v. Whether Lugano failed to fully and adequately record the hours worked by class members as required by § 290.520; and

vi. Whether the proper wage rate calculation or formula should be for the hours worked in excess of 40 hours per week.

The Court believes Mr. Winter has met the commonality requirement. This case involves allegations of the widespread and systematic classification of hourly employees as "salaried" for the sole purpose of avoiding having to pay them overtime that would otherwise be due to them under Missouri law. These are issues common for the members of the class.

Typicality

Rule 52.08(a)(3) requires the claims and defenses of the representative to be typical of the class. In general, the typicality element requires that a class representative "must be part of the class and must possess the same interest and suffer the same injury

as the class members." Harris v. Union Electric Co., 766 S.W.2d 80, 86 (Mo. banc 1989). However, this does not mean members' claims must necessarily be identical with one another. Id. "If the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory, factual variations in the individual claims will not normally preclude class certification." Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215, 223 (Mo.App. W.D. 2007). Typicality is meant to preclude class certification of those actions involving legal or factual positions of the class representative "which are markedly different from those of other class members." Id.

Here, the Mr. Winter is asserting the same claims, against the same Lugano, concerning the same salary classification, and involving the same allegations of loss of wages. The Court finds that Mr. Winter's claims are typical of the class.

Adequacy of Representation

"Rule 52.08(a)(4) requires that, as a prerequisite to class certification, the trial court must find that: 'the representative parties will fairly and adequately protect the interests of the class.'" Vandyne v. Allied Mortg. Capital Corp., 242 S.W.3d 695, 698 (Mo. banc 2008). "This prerequisite applies both to the named class representatives and to class counsel." Id. A proposed class representative satisfies the prerequisite if the following elements are met: (1) the plaintiff's attorney must be qualified, experienced, and able to competently and vigorously prosecute the suit, and (2) the interest of the class representative must not be antagonistic to or in conflict with other members of the class. Fielder v. Credit Acceptance Corp., 175 F.R.D. 313, 320 (W.D. Mo. 1997).

The Court believes that Mr. Winter has demonstrated that he, in conjunction with his attorneys, is capable of fairly and adequately representing the interests of class members in this action.

Rule 52.08(b)(3) Requirements

"A class that is certified under Rule 52.08(b)(3) must have questions of law or fact common to the members of the class [that] predominate over any questions affecting only individual members." Hale, 231 S.W.3d at 224; See also Dale, 204 S.W.3d at 175. "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question." Hale, 231 S.W.3d at 224. "It becomes a common question when that same evidence will suffice for each member to make a prima facie showing." Id. This is a more stringent test than the commonality requirement of Rule 52.08(a)(2). See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 609 (1997). The predominance requirement, however, "does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which 'predominate' over the individual issues." State ex rel. Am. Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483, 488 (Mo. banc 2003).

Lugano argues that Mr. Winter cannot establish that common issues "predominate" over individual issues, because the claims cannot be resolved without

conducting many fact-intensive mini-trials, and reconstructing each class member's work and pay history. The Court disagrees, and believes that common questions do predominate over individual issues. Factual variations in the individual claims will not normally preclude class certification if the claims arise from the same event or course of conduct as the class claims, and give rise to the same legal or remedial theory. Owner-Operator Indep. Drivers Ass'n v. New Prime, 213 F.R.D. 537, 543 (W.D. Mo. 2002).

"In addition to requiring that common questions of law and fact predominate, Rule 52.08(b)(3) requires that the court find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Hale, 231 S.W.2d at 229. "Among the factors that the court must consider in addressing superiority are the difficulties likely to be encountered in the management of a class action." Id. "The primary focus of the superiority analysis is the efficiency of the class action over other available methods of adjudication." Dale, 204 S.W.3d at 183.

The Court believes a class action is superior to other methods of adjudicating these claims, including joinder of the claims of multiple employees, because each case is worth a relatively small dollar amount individually.

THEREFORE, it is Ordered that Defendant Lugano2, LLC's Motion to Strike Affidavit of Justin Cissell, and its Motion for Summary Judgment both are hereby DENIED;

IT IS FURTHER Ordered as follows:

1. Plaintiff Noah D. Winter's Motion for Class Certification is GRANTED;

2. The Court certifies the class herein defined as:

   All employees of Defendant Lugano2, LLC who at any time from August 5, 2011 to the date of this class is certified by the court who were employed as salaried assistant managers and who worked more than 40 hours in any workweek;

3. Mr. Winter is appointed as class representative for the above named class;

4. The Court finds, pursuant to Rule 52.08(c)(2), that the best notice practicable under the circumstances is individual notice to all members who can be identified through reasonable effort, and notice by publication to all other class members; and

5. Within 60 days of the date of this order, class counsel and Lugano's counsel shall each submit to the Court for tis review and consideration their respective memorandums containing (a) a draft of the proposed Notice of Class Action, to be mailed directly to those class members who have been or can be

identified within a reasonable time; (b) a draft of the proposed Published Notice of Class Action; (c) suggestions as to the appropriate timing and length of time period for publication of the Published Notice, and number of sources of publication; and (d) any other issues the parties deem relevant to the issue of proper and adequate Notice.

SO ORDERED:

Julian L. Bush, Judge