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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHRISTINA ESPINOZA, Plaintiff and Appellant, v. EAST WEST BANK, Defendant and Respondent.	B267943 (Los Angeles County Super. Ct. No. BC502166)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu Berle, Judge. Affirmed.

Law Offices of Ellen Lake and Ellen Lake; Girardi & Keese, V. Andre Sherman, and Edwin Aiwazian for Plaintiff and Appellant.

Landegger Baron Law Group, Alfred J. Landegger, Oscar E. Rivas and Brian E. Ewing for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Christina Espinoza, appeals from an August 25, 2015 order denying her class certification motion in a wage and hour case. Plaintiff brought the action against defendant, East West Bank, on behalf of herself and other assistant branch managers. Plaintiff contends the trial court erred by relying on declarations from 22 current assistant branch managers submitted by defendant. Plaintiff asserts the declarations should have been excluded because they were obtained in violation of rule 3-600(D) of the Rules of Professional Conduct.[1] In addition, plaintiff argues the declarations are unreliable because they were not translated into Chinese. Plaintiff asserts the declarations should have been translated for those declarants who required an interpreter during their deposition. We conclude the trial court did not abuse its discretion in relying on these declarations.

Further, plaintiff contends the trial court abused its discretion by denying her class certification motion. Plaintiff claims the trial court used improper criteria when ruling on the class certification motion. In addition, plaintiff argues the trial court's predominance finding is not supported by substantial evidence. Plaintiff also challenges the finding that class treatment is not a superior method of adjudication. Finding no abuse of discretion, we affirm the order denying class certification.

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[1] Further rule references are to the Rules of Professional Conduct.

II. BACKGROUND

A. First Amended Complaint

On March 4, 2013, plaintiff filed a complaint against defendant. On May 28, 2013, plaintiff filed the operative first amended complaint. The first amended complaint alleges a class action on behalf of plaintiff and other former and current California assistant branch managers from March 4, 2009, to the entry of judgment. Defendant allegedly misclassified plaintiff and other assistant branch managers as salaried exempt employees when they were nonexempt, non-managerial employees. Plaintiff alleges 10 causes of action for: unpaid overtime (Lab. Code[2], §§ 510, 1198); unpaid meal period premiums (§§ 226.7, 512, subd. (a)); unpaid rest period premiums (§ 226.7); unpaid minimum wages (§§ 1194, 1197, 1197.1); final wages not timely paid (§§ 201, 202); wages not timely paid during employment (§ 204); non-compliant wage statements (§ 226, subd. (a)); failure to keep requisite payroll records (§ 1174, subd. (d)); unreimbursed business expenses (§§ 2800, 2802); and violations of Business and Professions Code section 17200 et seq.

[2] Future statutory references are to the Labor Code unless otherwise noted.

B. Plaintiff's Class Certification Motion

On June 30, 2014, plaintiff moved for class certification. The class is comprised of approximately 172 former and current assistant branch managers who work at defendant's 98 California bank branches. Plaintiff contended defendant violated state law by classifying all of its assistant branch mangers as exempt. Plaintiff asserted class treatment was appropriate because all assistant branch managers performed the same tasks. In addition, all assistant branch managers were required to follow defendant's standard policies and procedures, which deprived them of discretion and independent judgment. Defendant also classified all assistant branch managers as exempt without any investigation or basis. Further, plaintiff argued defendant's expectations about the requirements of the assistant branch manager job could be determined on a classwide basis.

In support of her class certification motion, plaintiff submitted declarations from seven former assistant branch managers. They spent between 70 to 95 percent of the time performing non-managerial tasks including: working as a teller; taking deposits and making cash withdrawals; selling the bank's products and services; meeting sales goals; generating sales leads and sales; calling existing customers and answering their calls; cold-calling potential customers; providing customer service including meeting and greeting customers; opening personal and business checking and saving accounts; completing balance transfers; printing over-draft and "hold" reports and notifying affected customers; receiving cash shipments; conducting inventory; cleaning; opening and closing the branch; and organizing safety deposit boxes. They spent a significant portion

of their time doing the same work as hourly employees because defendant did not staff enough hourly-paid workers in their respective branches. They spent the remaining 5 to 30 percent of their time performing managerial tasks such as coaching, training and supervising hourly employees.

Defendant did not instruct these assistant branch managers to spend more than 50 percent of their time on managerial work. The assistant branch managers did not have authority to hire or fire employees. Further, they could not formally discipline employees without the approval of defendant's Human Resources Department. These assistant branch managers were required to follow defendant's policies, procedures and guidelines and could not deviate from them.

Plaintiff presented deposition excepts from nine other assistant branch managers. They testified they performed a finite list of duties set forth in the job description for assistant branch manager. The job description lists the following as essential duties: develop and maintain work schedules for branch staff; enforce audit and internal control policies; assist branch manager with sales and service training, product training and staff development activities; supervise cross-selling activities; manage the recruitment, hiring, training, retention and development of subordinate branch staff; and determine the needs of customers and provide appropriate assistance. The assistant branch managers were required to adhere to defendant's policies, procedures and guidelines. Further, five of the nine assistant branch managers testified they spent a majority of their time performing non-managerial tasks such as providing customer service.

Plaintiff also submitted the deposition testimony of Clara Tse. Defendant designated Ms. Tse as the person most knowledgeable concerning the putative class members' job duties. Ms. Tse testified the duties of the assistant branch managers are set forth in two job descriptions. Defendant expected all assistant branch managers to provide excellent customer service and to manage the branch. Ms. Tse did not think the different customer base, size, or location of the various branches affected how much time assistant branch managers spent on managerial duties. Assistant branch managers were expected to follow defendant's policies, guidelines and checklists.

Defendant classified all assistant branch managers as exempt employees. But defendant did not conduct any survey or study to determine how much time assistant branch managers spent on their various job duties. Defendant also kept no records of the hours that assistant branch managers worked at their respective branches.

Further, plaintiff presented declarations from three expert witnesses offering opinions concerning the tasks of class members. Dr. Jon A. Krosnick has conducted surveys in numerous employment cases. Dr. Krosnick believed a survey could yield reliable and useful data in the case. Dr. Krosnick proposed using a survey to determine: the total time spent working; the proportion of time spent performing nonexempt duties; the proportion of individuals who performed nonexempt tasks more than 50 percent of the time; the work hours that merit overtime, meal break, and rest break pay if these individuals were classified as nonexempt employees; and unreimbursed business-related expenses.

Plaintiff also retained Miles Locker, the former chief counsel for the Department of Labor Standards Enforcement, to provide guidance to Dr. Krosnick in designing the survey. Mr. Locker would assist Dr. Krosnick in classifying the various job duties of assistant branch managers as either exempt or nonexempt. Mr. Locker believed nonexempt tasks included: selling products or services; identifying the needs of customers for bank products and services; providing customer assistance; cross-selling products and services; opening and closing bank accounts; performing routine teller transactions; verifying and taking deposits; making customer phone calls; clerical work; sending and receiving cash shipments; and preparing various transaction reports.

In addition, plaintiff submitted a declaration from Dr. Richard Drogin, a statistician. Dr. Drogin concluded, "[A] properly designed and implemented random sampling plan would be an appropriate statistical technique for obtaining representative evidence about the nature of the Assistant Branch Services Manager position, tasks performed, and time spent on various tasks." Dr. Drogin proposed selection of a random sample of class members after class certification and at the end of the opt-out period. Random sampling would provide evidence to determine: the employer's realistic expectations; the uniform requirements of the job; and an estimate of the percentage of class members who spend over 50 percent of their time performing nonexempt tasks. In addition, random sampling could be used to estimate classwide aggregate damages after trial on classwide liability.

C. Defendant's Opposition to the Class Certification Motion

In opposition, defendant argued individual issues predominate because each assistant branch manager's duties and time spent on tasks varied. Defendant contended: assistant branch managers did not perform the same duties; assistant branch managers' duties and the amount of time spent on those tasks varied over time; and assistant branch managers had varying levels of discretion to make independent decisions including hiring and termination of employees.

Defendant submitted deposition excerpts from 14 former and current assistant branch managers, including plaintiff. In addition, defendant submitted declarations from 22 current assistant branch managers. The declarations and deposition excerpts submitted by defendant show variation in how assistant branch managers performed their job.

The assistant branch managers supervised customer service representatives and customer service supervisors. The number of staff they supervised varied from 4 to 21 employees. They spot coached and trained employees. The time spent on coaching employees varied from once every two months to at least half of the day. Some assistant branch managers supervised the tellers' cross-selling of bank products while others cross-sold to customers up to 10 to 15 times per day. The time spent handling customer grievances ranged from one to two complaints in six months to several complaints per day.

Assistant branch managers spent varying amounts of time reviewing reports from 10 minutes to 4 hours each day. They spent differing amounts of time performing overrides, ranging from 3 to 20 overrides per day. One assistant branch manager, Michelle French, had no authority to waive customer fees. But other assistant branch managers waived fees up to five times per day. Two assistant branch managers, Johnny Chai and Monica Line, testified they rarely opened new accounts. Mr. Chai testified he opened one to two new accounts per week at the Rosemead branch. Ms. Line testified she opened a new account every 6 to 10 months. Among assistant branch managers who regularly opened new accounts, the time spent on this task varied from 1 hour per day to 20 hours per week. Further, some assistant branch managers worked on mortgages, which plaintiff did not list as a job responsibility. Among assistant branch managers who handled mortgages, the time spent on this task varied from 1 hour per day to 10 hours per week.

Some assistant branch managers had their own cash drawer and worked as tellers some of the time, ranging from once a month up to four times a day. Other assistant branch managers did not have a cash drawer but would take deposits when the customer lines become too long. Seven assistant branch managers did not work as tellers.

Some assistant branch managers were involved in hiring and disciplining employees. Other assistant branch managers did not participate in the hiring process. And some assistant branch managers drafted performance evaluations while others did not perform this task.

Some assistant branch managers, including plaintiff, were in charge of the branch when the branch manager was out or there was no branch manager. The amount of time the branch managers spent outside their respective branches varied from two hours per week, a few days per week, to half of the time. Plaintiff's branch manager was out of the branch two to three times per week. Another assistant branch manager, Benny Hyunh, declared, "The [b]ranch [m]anger at our location also runs another nearby branch and is only in my [b]ranch when I am not there or when a floater is not covering for me." A third assistant branch manager, Kwok Wan, was in charge of his branch 30 hours per week. Mr. Wan's branch manager spent more time at another branch.

Defendant retained Dr. Brian Kriegler, a statistician, to review the declarations and depositions of Dr. Drogin and Dr. Krosnick. Dr. Kriegler agreed both surveying and random sampling are commonly accepted methods that are informative in addressing issues pertaining to liability and damages. Dr. Kriegler opined, "These issues include, for example, the understanding of people's job requirements, the proportion of people who spent at least half of their time at work performing non-exempt tasks, and the average amount of overtime per employee work week." Dr. Kriegler concluded, "I concur with both [Drs. Drogin and Krosnick] . . . that, if a representative sample revealed (e.g. half) of [assistant branch managers] were misclassified, then it follows that approximately the same proportion of people in the population were also misclassified. (Fn. omitted.)" However, Dr. Kriegler observed Dr. Drogin and Dr. Krosnick had not designed or performed a pilot study to determine the extent to which the job tasks varied among the

class members. Further, Dr. Kriegler criticized how Dr. Drogin and Dr. Krosnick were unable to distinguish non-sampled class members who were misclassified from those who were not.

In addition, Dr. Kriegler reviewed the declarations from former and current assistant branch managers that were submitted by the parties. From the 22 declarations submitted by defendants, Dr. Kriegler created two exhibits showing the varying amounts of time spent on the different tasks. A third exhibit showed variation among all declarants concerning how they spent the majority of their work day. Some assistant branch managers reported spending a majority of their time: assisting customers; performing audits; supervising or coaching employees; or overseeing branch operations. Other assistant branch managers, in declarations submitted by plaintiff, indicated the majority of their work day was spent on non-managerial tasks.

D. Plaintiff's Motion to Strike Defendant's Declarations

On March 27, 2015, plaintiff filed objections to the 22 declarations submitted by defendant. Plaintiff argued defendants' attorneys violated rules 3-310 and 3-600(D). Plaintiff also objected to defendant's failure to have the declarations translated into Chinese for those assistant branch managers who required interpreters during their depositions.

On May 15, 2015, plaintiff moved for an order limiting defense communications with class members and striking the 22 declarations submitted by defendant. Plaintiff again argued defendant's attorneys violated rule 3-600(D). Plaintiff contended: defendant's attorneys gathered the declarations without informing putative class members of the details underlying the

lawsuit; the declarants were not informed their declarations could be used by defendant to limit or extinguish class members' rights to relief; and the putative class members were not told that defense counsel represented only defendant's interests which potentially conflicted with the declarants' interests.

In opposition, defendant submitted a declaration from Brian E. Ewing, defendant's attorney. He and other lawyers interviewed current assistant branch managers in April, May and June 2013 at defendant's branches or corporate offices. Mr. Ewing stated: "Attorneys from my office used a template introduction to explain that we were attorneys for [defendant] and did not represent them. We informed them that a class action lawsuit had been filed against [defendant] and that they might become part of the class. We informed them that we were gathering information to evaluate the claims alleged in the lawsuit. We informed them that the interview was voluntary and they could leave at any time. We informed them that [defendant] would not take any action against them because of what they said during the interview, or if they chose to leave the interview. Every [assistant branch manager] was informed of these points before being interviewed."

Later, defendant's attorneys obtained declarations from assistant branch managers in February and March 2014. The declarations were obtained during meetings at defendant's branches or corporate offices. Mr. Ewing stated: "Attorneys from our office again used a template introduction to explain the process to [assistant branch managers] at the start of the meeting when we met with each [assistant branch manager] who was asked to sign a declaration. We informed them that their participation was voluntary, that they could leave the meeting or

not sign the declaration at any time and for any reason. We explained to them that a lawsuit was ongoing, that they were potential members of the class in the lawsuit, and that the lawsuit claimed they were owed overtime and denied meal and rest breaks because they were misclassified as exempt employees, and owed reimbursements for business expenses. We told them that we represented [defendant], and not them, in the lawsuit, and we told them they could consult a lawyer before signing the declaration. We told them they were signing the declaration under oath and to review it and make sure it was correct. We told them not to sign the declaration unless everything in it was true. We told them to make any changes that needed to be made to the declaration. We explained to them that we would use their declaration to defend [defendant] in the lawsuit, and that signing the declaration may limit their rights in the lawsuit. We told them [defendant] would not retaliate against them, or reward them, for staying in the meeting or leaving the meeting, or for signing the declaration or not signing it."

According to Mr. Ewing, the assistant branch managers spent between 5 to 30 minutes reviewing their declarations. Some assistant branch managers took their declarations home. Thereafter, they sent back signed declarations to defendant's attorneys. Mr. Ewing added, "Many [assistant branch managers] requested changes to their declarations, and their declarations were revised to reflect their changes before they signed them."

On July 14, 2015, the trial court held a hearing on plaintiff's motion for an order limiting defense communications and striking the declarations. The trial court ruled: "The Court finds that evidence of [misconduct] has not been found and therefore denies the motion with respect to both orders. [¶] The motion is denied without prejudice to Plaintiff arguing issues of communications at the time of the hearing on the motion for class certification."

E. Trial Court's Denial of Plaintiff's Class Certification Motion

On August 25, 2015, the trial court denied plaintiff's class certification motion. The trial court found plaintiff satisfied the requirements of ascertainability, numerosity, typicality and adequacy of representation. But the trial court ruled plaintiff failed to show common questions of law and fact predominated over individual issues. The trial court stated: "In the present case, defendant has produced evidence indicating while it may be possible to create an exhaustive list of those tasks collectively performed by [assistant branch managers], each [assistant branch manager] in fact performed some combination of these tasks in a highly individualized manner. [¶] As such, a determination as to whether each task performed by an [assistant branch manager] is properly classified as exempt or nonexempt would not be dispositive as inquiries would be necessary as to the individual activities of each [assistant branch manager] and how much time was spent on each task and how each task was performed by the individual, whether there's standard performance or there's some unique performances. . . . [¶] [¶] In the present case, defendant[] provide[s] evidence

suggesting that there's no blanket misclassification that has occurred and that individualized inquiries would be necessary in order to determine the specific task each [assistant branch manager] performed." The trial court also found, "[I]ndividualized inquiries would be necessary in order to determine whether each [assistant branch manager] exercised independent judgment and discretion and possessed hiring or firing authority sufficient to warrant exempt status." Further, the trial court found plaintiff failed to show defendant's realistic job expectations were amenable to classwide adjudication.

The trial court also found plaintiff failed to show a class action was superior to separate lawsuits by individual class members. The trial court explained, "[G]iven the individualized inquiries that the court has found would predominate in this matter with regard to the specific duties and responsibilities of the [assistant branch managers,] and how much time was devoted to those specific duties, . . . individual [class] members would present unique arguments and evidence tailored to their particular facts of their employments."

III. DISCUSSION

A. Declarations Submitted By Defendant Are Admissible

1. Overview

Plaintiff challenges the admissibility of the 22 declarations from current assistant branch managers that were filed by defendant in opposition to the class certification motion. The trial court denied plaintiff's motion to strike the declarations, finding no evidence of misconduct. We review the trial court's evidentiary ruling for an abuse of discretion. (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 841-842; *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 513 (*Mora*).)

2. Rule 3-600(D)

Plaintiff argues the declarations are inadmissible because they were obtained in violation of rule 3-600(D) which provides in part: "In dealing with an organization's . . . employees . . . a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent."

Plaintiff retained an experienced attorney, William M. Balin, to review deposition testimony submitted as part of her evidentiary objections and offer an opinion on the rule 3-600(D) issue. Mr. Balin concluded defendant's counsel violated rule 3-600(D). In his declaration, Mr. Balin stated, "In my opinion, defense counsel's actions violated [rule] 3-600, subdivision (D), in that defense counsel did not identify the client ([defendant]) to the employees when it was apparent that their potential claims were adverse to [defendant], and because defense counsel created a situation in which their employees communicated what would otherwise be confidential information without disclosing that they intended to use that information and evidence adversely to the employees' interests, that is, in ways designed to attack and defeat the employees' potential claims." Mr. Balin opined defendant's lawyers should have advised the assistant branch managers that: the attorneys represented defendant; there was pending litigation; defendant's interests were adverse to the employees; the purpose of the interviews and declarations was to gather evidence; any statements given by employees were not confidential and would be used to defeat potential claims; employees were under no obligation to speak to defense counsel; the refusal to do so would not negatively affect their employment status; employees had a right to consult with a lawyer before agreeing to the interview; and employees had a right to be represented by an attorney of their own choosing at the interview. Mr. Balin concluded, "Because defense counsel took none of these prophylactic steps, in my opinion, they violated their duties to the employees and violated rule 3-600."

By denying plaintiff's motion to strike the declarations, we infer the trial court credited the declaration of Mr. Ewing, defendant's attorney. Mr. Ewing stated: "Attorneys from our office again used a template introduction to explain the process to [assistant branch managers] at the start of the meeting when we met with each [assistant branch manager] who was asked to sign a declaration. We informed them that their participation was voluntary, that they could leave the meeting or not sign the declaration at any time and for any reason. We explained to them that a lawsuit was ongoing, that they were potential members of the class in the lawsuit, and that the lawsuit claimed they were owed overtime and denied meal and rest breaks because they were misclassified as exempt employees, and owed reimbursements for business expenses. We told them that we represented [defendant], and not them, in the lawsuit, and we told them they could consult a lawyer before signing the declaration. We told them they were signing the declaration under oath and to review it and make sure it was correct. We told them not to sign the declaration unless everything in it was true. We told them to make any changes that needed to be made to the declaration. We explained to them that we would use their declaration to defend [defendant] in the lawsuit, and that signing the declaration may limit their rights in the lawsuit. We told them [defendant] would not retaliate against them, or reward them, for staying in the meeting or leaving the meeting, or for signing the declaration or not signing it."

The prophylactic steps recommended by Mr. Balin were taken by defendant's attorneys. The declarants were informed that: the attorneys represented only defendant; they were potential class members in the ongoing misclassification case; their participation was voluntary; they could consult with a lawyer before signing; the declarations would be used by defendant in the lawsuit; and signing their declaration may limit their rights in the lawsuit. Without abusing its discretion, the trial court could reasonably rule defense counsel's communications with the declarants complied with rule 3-600(D). Defendant's attorneys explained they represented defendant and not the declarants as required by rule 3-600(D). Further, defendant's lawyers followed rule 3-600(D) by informing the assistant branch managers they were potential class members and their declarations would be used in defense of the lawsuit. The trial court did not abuse its discretion in denying plaintiff's motion to strike the declarations.

3. Translation of declarations

Plaintiff challenges the admissibility of the declarations because they were not translated into Chinese. Plaintiff asserts 12 of the declarants needed an interpreter during their depositions. Some declarants testified their ability to read English was comparable to their ability to understand and speak English. From this testimony, plaintiff concludes eight of the declarants needed an interpreter to understand both written and verbal English. Plaintiff contends the declarations should have been translated because some declarants were primarily Cantonese or Mandarin speakers.

But defendant points to four declarant who testified indicating they understood their declarations even though they needed an interpreter at their depositions. Furthermore, the trial court could reasonably conclude the eight declarants, who might need their declarations translated, could consult with an attorney and review the declarations at home. According to Mr. Ewing, the declarants were asked to review their declarations and make any changes needed to the declarations. The declarants were told they could consult with a lawyer before signing their declarations. Some assistant branch managers brought their declarations home and sent back signed declarations to defendant's attorneys later. Mr. Ewing stated, "Many [assistant branch managers] requested changes to their declarations, and their declarations were revised to reflect their changes before they signed them." No abuse of discretion occurred.

B. Merits of Class Certification

1. Standard of review for class certification

The party seeking class treatment must show: an ascertainable and sufficiently numerous class; a well-defined community of interest; and substantial benefits from certification that render proceeding as a class superior to the alternatives. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 529-530 (*Ayala*); *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) The "community of interest" requirement encompasses three factors: predominant common questions of law or fact; class representatives with

claims or defenses typical of the class; and class representatives who adequately represent the class. (*Ayala, supra*, 59 Cal.4th at p. 530; *Brinker, supra*, 53 Cal.4th at p. 1021.)

The certification question is a procedural one that does not focus on the merits of the case. (*Brinker, supra*, 53 Cal.4th at p. 1023; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327 (*Sav-On Drug Stores*).) In evaluating predominance, our Supreme Court explained, "[A court] must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Brinker, supra*, 53 Cal.4th at p. 1024; accord, *Ayala, supra*, 59 Cal.4th at p. 533.) "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.' [Citations.]" (*Brinker, supra*, 53 Cal.4th at p. 1021; accord, *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28 (*Duran*).) In addition, the trial court must consider whether individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. (*Duran, supra*, 59 Cal.4th at pp. 28-29; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 922-923; *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 378 (*Martinez*).)

The trial court found plaintiff satisfied the requirements of ascertainability, numerosity, typicality and adequacy of representation. But the trial court ruled plaintiff failed to show common questions of law or fact predominated over individual issues. In addition, the trial court concluded class treatment was not superior to other means of resolving the claims because individual questions predominated over common issues.

We review the class certification ruling for an abuse of discretion. (*Ayala, supra*, 59 Cal.4th at p. 530; *Brinker, supra*, 53 Cal.4th at p. 1022.) Trial courts are afforded great discretion in granting or denying certification because they are ideally situated to evaluate the efficiencies and practicalities of permitting group action. (*Brinker, supra*, 53 Cal.4th at p. 1022; *Sav-On Drug Stores, supra*, 34 Cal.4th at p. 327.) Generally, the trial court's ruling will not be disturbed unless it is unsupported by substantial evidence or rests on improper criteria or erroneous legal assumptions. (*Ibid.*; *Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 435-436.) In *Ayala*, our Supreme Court explained: "We review the trial court's actual reasons for granting or denying certification; if they are erroneous, we must reverse, whether or not other reasons not relied upon might have supported the ruling. [Citation.]" (*Ayala, supra*, 59 Cal.4th at p. 530; accord, *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 399; *Martinez, supra*, 231 Cal.App.4th at p. 373.)

2. Employee exemptions to overtime compensation

Section 510, subdivision (a) generally requires overtime pay for employees working in excess of 8 hours in a workday or 40 hours in a workweek. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 324; *Mies v. Sephora U.S.A., Inc.* (2015) 234 Cal.App.4th 967, 976 (*Mies*); *Martinez, supra*, 231 Cal.App.4th at p. 373.) In addition, nonexempt employees are entitled to meal and rest periods during the workday under sections 226.7 and 512, subdivision (a). (*Brinker, supra*, 53 Cal.4th at p. 1018; *Mies, supra*, 234 Cal.App.4th at p. 976.)

However, certain employees are exempt from these protections under the foregoing statutory provisions and the Industrial Wage Commission regulations. (§§ 515, subd. (a) [exemption from overtime pay], 226.7, subd. (e) [exemption from meal and rest periods]; *Mies, supra*, 234 Cal.App.4th at p. 976.) Section 515, subdivision (a) provides in part, "The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid . . . for executive, administrative, and professional employees, if the employee is primarily engaged in the duties that meet the test of the exemption, [and] customarily and regularly exercises discretion and independent judgment in performing those duties . . . ." (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 324; *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 978-979 (*Dailey*).) Because exemptions are affirmative defenses, the employer bears the burden of proving an employee is properly designated as exempt. (*Duran, supra*, 59 Cal.4th at p. 26; *Martinez, supra*, 231 Cal.App.4th at p. 375; *United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1010.)

Defendant argues the executive and administrative exemptions apply to its assistant branch managers. Industrial Welfare Commission Wage Order No. 4-2001 (Wage Order No. 4) governs exemptions for professional, technical, mechanical and other similar occupations. (Cal. Code Regs., tit. 8, § 11040, subd. 2(O) [includes professional, managerial and supervisorial occupations]; *Dailey, supra*, 214 Cal.App.4th at p. 979: *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 145 (*Soderstedt*).) Under Wage Order No. 4, an executive exemption applies to any employee: "[¶] (a) Whose duties and responsibilities involve the management of an enterprise in which he/she is employed . . .; and [¶] (b) Who customarily and regularly directs the work of two or more other employees therein; and [¶] (c) Who has authority to hire or fire other employees or whose suggestions and recommendations as to hiring or firing and as to advancement and promotion . . . will be given particular weight; and [¶] (d) Who customarily and regularly exercises discretion and independent judgment; and [¶] (e) Who is primarily engaged in duties which meet the test of exemption. . . . [¶] (f) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in . . . Section 515(c) as 40 hours per week." (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(1); *Dailey, supra*, 214 Cal.App.4th at p. 979.)

Further, Wage Order No. 4 establishes an administrative exemption, which applies to any employee: "[¶] (a) Whose duties and responsibilities involve . . . [¶] (I) The performance of office or non-manual work directly related to management policies or general business operations of his/her employer . . .; [and] . . . [¶] (b) Who customarily and regularly exercises discretion and independent judgment; and [¶] (c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity . . .; or [¶] (d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or [¶] (e) Who executes under only general supervision special assignments and tasks; and [¶] (f) Who is primarily engaged in duties which meet the test of exemption. . . . [¶] (g) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in . . . Section 515(c) as 40 hours per week." (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2); *Soderstedt, supra*, 197 Cal.App.4th at pp. 145-146.)

To determine whether an employee is primarily engaged in exempt duties, Wage Order No. 4 provides: "The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order . . . . Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first

and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement." (Cal. Code Regs., tit. 8, § 11040, subds. 1(A)(1)(e) and 1(A)(2)(f); *Soderstedt, supra*, 197 Cal.App.4th at p. 146; see *Martinez, supra*, 231 Cal.App.4th at p. 374.) The term "primarily" is defined as "more than one-half the employee's worktime." (§ 515, subd. (e); Cal. Code Regs., tit. 8, § 11040, subd. 2(N); *Martinez, supra*, 231 Cal.App.4th at p. 374.)

3. The trial court did not use improper criteria

Plaintiff argues the trial court based its denial of class certification on improper criteria. The trial court ruled plaintiff failed to show defendant's realistic job expectations were amenable to classwide adjudication. Plaintiff contends Ms. Tse's testimony indicates defendant's realistic expectations and the actual requirements of the job are uniform and amenable to class treatment. Further, plaintiff asserts the trial court improperly ruled on the merits by crediting defendant's evidence. We respectfully disagree.

The central dispute is whether assistant branch managers are properly designated as exempt employees under the executive and administrative exemptions. Resolution of this dispute involves determinations of: duties performed by employees; time employees spend on each task; employer's realistic expectations; and realistic requirements of the job. (Cal. Code Regs., tit. 8, § 11040, subds. 1(A)(1)(e) and 1(A)(2)(f); *Mies, supra*, 234 Cal.App.4th at p. 978; *Dailey, supra,* 214 Cal.App.4th at p. 989.)

Actual job requirements and employer's realistic expectations generally are susceptible of common proof. (*Duran, supra*, 59 Cal.4th at p. 27; *Sav-On Drug Stores, supra*, 34 Cal.4th at p. 337; *Martinez, supra*, 231 Cal.App.4th at p. 382.) But here, the parties presented conflicting evidence as to whether defendant's realistic expectations and the job requirements are amenable to class treatment. The trial court considered the conflicting evidence and concluded individual issues predominated as to defendant's job expectations. The trial court may credit defendant's evidence in determining whether the class certification requirements have been met. (*Sav-On Drug Stores, supra*, 34 Cal.4th at pp. 331, 334; *Mies, supra*, 234 Cal.App.4th at p. 981; *Dailey, supra,* 214 Cal.App.4th at p. 991; *Mora, supra*, 194 Cal.App.4th at p. 508; *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 734 (*Arenas*).) In doing so, the trial court did not improperly evaluate the merits of the case. (*Brinker, supra*, 53 Cal.4th at p. 1025 ["To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must resolve them."]; *Mies, supra*, 234 Cal.App.4th at p. 985; *Dailey, supra,* 214 Cal.App.4th at p. 991; *Soderstedt, supra*, 197 Cal.App.4th at pp. 151-152 [consideration of administrative exemption defense was not improper ruling on merits].) The trial court did not use improper criteria when ruling on the class certification motion.

4. Substantial evidence supports the trial court's predominance finding

Plaintiff challenges the trial court's finding that common questions of law and fact did not predominate over individual issues. The trial court found individualized inquiries would be necessary to determine whether assistant branch managers were exempt. The individual issues include: assistant branch managers' duties and time spent on each task; the exercise of independent judgment and discretion; and hiring or firing authority. Predominance is a factual question that is reviewed for substantial evidence. (*Brinker, supra*, 53 Cal.4th at p. 1022; *Sav-On Drug Stores, supra*, 34 Cal.4th at pp. 328-329.) We presume in favor of the certification order including facts the trial court could reasonably deduce from the record. (*Brinker, supra*, 53 Cal.4th at p. 1022; *Sav-On Drug Stores, supra*, 34 Cal.4th at p. 329.) Our Supreme Court has stated, "'[Q]uestions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve.' (*Thompson v. City of Long Beach* (1953) 41 Cal.2d 235, 246.)" (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 334.)

Plaintiff argues the trial court's predominance finding is not supported by substantial evidence. Plaintiff contends common questions suited for class treatment include: defendant's treatment of all assistant branch managers as exempt; the finite list of tasks; classification of each task as exempt or nonexempt; defendant's realistic expectations and actual requirements; and whether defendant's uniform policies

and procedures allow for the exercise of discretion and independent judgment.

Court have recognized the actual job requirements and employer's expectations are susceptible of common proof. (*Duran, supra*, 59 Cal.4th at p. 27; *Sav-On Drug Stores, supra*, 34 Cal.4th at p. 337; *Martinez, supra*, 231 Cal.App.4th at p. 382.) But inquiries into the actual work performed by assistant branch managers and how they spend their worktime can generate individual issues. (*Duran, supra*, 59 Cal.4th at p. 27; *Sav-On Drug Stores, supra*, 34 Cal.4th at pp. 336-337; *Mies, supra*, 234 Cal.App.4th at p. 985; *Soderstedt, supra*, 197 Cal.App.4th at p. 148.) Our Supreme Court has stated, "Although common proof may be possible if there are uniform job requirements or policies, an employer's liability for misclassification under most Labor Code exemptions will depend on employees' individual circumstances." (*Duran, supra*, 59 Cal.4th at pp. 36-37; see Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group, 2016) ¶ 19:771.2, p. 19-139.)

Even if common issues may appear to warrant class treatment, the trial court must also conclude individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. (*Duran, supra*, 59 Cal.4th at p. 29; *Martinez, supra*, 231 Cal.App.4th at p. 378.) In *Duran*, our Supreme Court explained, "In wage and hour cases where a party seeks class certification based on allegations that the employer consistently imposed a uniform policy or de facto practice on class members, the party must still demonstrate that the illegal effects of this conduct can be proven efficiently and manageably within a class setting." (*Duran, supra*, 59 Cal.4th at p. 29; accord,

Martinez, supra, 231 Cal.App.4th at p. 378; *Dailey, supra,* 214 Cal.App.4th at p. 989.)

Plaintiff challenges the trial court's finding that assistant branch managers do their job in a highly individualized manner. The trial court reasoned, "[A] determination as to whether each task performed by an [assistant branch manager] is properly classified as exempt or nonexempt would not be dispositive as inquiries would be necessary as to the individual activities of each [assistant branch manager] and how much time was spent on each task and how each task was performed by the individual . . . ." Plaintiff claims in making this finding, the trial court ignores the testimony from assistant branch managers and Ms. Tse, whom defendant designated as the person most knowledgeable about job duties. Plaintiff asserts the trial court ignored extensive evidence of the uniformity of assistant branch managers' job requirements. According to plaintiff, defendant's evidence of variation in job duties and time spent on each task emphasizes minor, irrelevant differences while ignoring classwide similarities. To the extent plaintiff is asking us to reweigh the evidence, we cannot do so. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 338; *Mies, supra*, 234 Cal.App.4th at p. 984; *Dailey, supra,* 214 Cal.App.4th at p. 991.)

The parties presented conflicting evidence as to the job duties and the amount of time spent on these tasks. Plaintiff submitted declarations from 7 former assistant branch managers who stated they spent between 70 to 95 percent of their time performing non-managerial tasks. Plaintiff also presented deposition testimony from nine other assistant branch managers. Five of the nine assistant branch managers testified they spent a majority of their time performing non-managerial tasks such as

providing customer service. The nine deponents testified they performed a finite list of duties identified in the job description. In addition, Ms. Tse testified the job duties for assistant branch managers are listed in two job descriptions. Assistant branch managers are required to adhere to defendant's policies, procedures and guidelines. Furthermore, Ms. Tse testified different customer base, size or location of the various branches did not affect how much time the assistant branch managers spent on managerial duties.

But defendant presented evidence demonstrating the tasks were not uniform, and the time spent on each activity varied depending on the individual assistant branch manager. Some assistant branch managers have their own cash drawer and work as tellers some of the time. Other assistant branch managers do not have a cash drawer but will take deposits when the customer lines become too long. But another seven assistant branch managers do not work as tellers.

Further, there is substantial evidence of other differences in the job duties and time spent on each task. Some assistant branch managers supervised the tellers' cross-selling of bank products while others cross-sold to customers. While many assistant branch managers opened new accounts, Mr. Chai and Ms. Line testified they rarely performed this task. Many assistant branch managers could waive customer fees. However, one assistant branch manager, Ms. French, stated she did not have this authority. Further, plaintiff did not work on mortgages but some assistant branch managers handled these loans. Moreover, the declarations and deposition testimony showed assistant branch managers spent varying time on the following tasks: performing audits; spot coaching and training; supervising

other employees; handling customer complaints; reviewing reports; performing overrides; waiving customer fees; opening new accounts; and working as a teller.

Crediting defendant's evidence, the trial court could reasonably find individual issues predominated because assistant branch managers perform their job in a highly individualized manner. The trial court acted within its discretion in crediting defendant's evidence. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 331 ["[T]he trial court was within its discretion to credit plaintiffs' evidence on these points over defendant's, and we have no authority to substitute our judgment for the trial court's respecting this or any other conflict in the evidence."]; *Mies, supra*, 234 Cal.App.4th at p. 981; *Dailey, supra,* 214 Cal.App.4th at p. 991; *Mora, supra*, 194 Cal.App.4th at pp. 508-509.) Applying the deferential standard of review set forth in *Sav-On Drug Stores, supra*, 34 Cal.4th at page 334, we conclude the trial court's finding is supported by substantial evidence. (*Mies, supra*, 234 Cal.App.4th at p. 985; *Dailey, supra,* 214 Cal.App.4th at p. 997; *Mora, supra*, 194 Cal.App.4th at p. 509.) The evidence demonstrated individual differences among assistant branch managers as to the work performed and the time spent on each task.

Likewise, the evidence shows assistant branch managers exercised varying levels of discretion and independent judgment. Some assistant branch managers, including plaintiff, were in charge of the branch when the branch manager was out or there was no branch manager. Plaintiff, Mr. Hyunh and Mr. Wan testified their branch managers were absent from their branches for a substantial amount of time. When this occurred, the assistant manager acted as the branch manager.

Notwithstanding this evidence, plaintiff contends the exercise of discretion and independent judgment is a common question. Plaintiff argues defendant's strict policies, procedures and guidelines tightly circumscribed the assistant branch managers' ability to make decisions on overrides, fee waivers, cashing third party checks, and approving large transactions. But the trial court could reasonably conclude defendant's policies, procedures and guidelines simply channeled the exercise of discretion and judgment rather than eliminated it. (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1026; see *Soderstedt, supra*, 197 Cal.App.4th at p. 148 [employees still exercise discretion and independent judgment even when their decisions may be subject to review].) The trial court acted within its discretion in finding individual issues predominated even where the alleged misclassification involved application of uniform policies and procedures. (*Mies, supra*, 234 Cal.App.4th at p. 984; *Soderstedt, supra*, 197 Cal.App.4th at p. 153.)

5. Substantial evidence supports finding class treatment was not a superior method of adjudication

In determining the superiority of class treatment, the trial court must weigh the respective benefits and burdens and assess whether substantial benefits accrue to both litigants and it. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 435; accord, *Ayala, supra,* 59 Cal.4th at pp. 529-530; *Soderstedt, supra*, 197 Cal.App.4th at p. 156.) In *Duran*, our Supreme Court stated, "In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting

the proposed class." (*Duran, supra*, 59 Cal.4th at p. 29; accord, *Koval v. Pacific Bell Telephone Co.* (2014) 232 Cal.App.4th 1050, 1063.) The lack of superiority provides an alternative ground to deny class certification even when common questions of law and fact predominate over individual issues. (*Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1353; *Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 120.) Plaintiff bears the burden of establishing a class action will be superior to the alternatives. (*Ayala, supra,* 59 Cal.4th at pp. 529-530; *Brinker, supra*, 53 Cal.4th at p. 1021; *Soderstedt, supra*, 197 Cal.App.4th at p. 156.)

The trial court found plaintiff failed to satisfy her burden of showing class treatment is superior to separate lawsuits by putative class members. Plaintiff contends since the trial court's predominance finding is erroneous, the lack of superiority finding must be reversed. We respectfully disagree. Even assuming common issues predominate, the trial court could reasonably determine individual issues could not be fairly and efficiently managed within a class setting.

In *Duran*, our Supreme Court discussed the use of surveys and statistical sampling to prove class action claims. "[I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling. Statistical methods cannot entirely substitute for common proof, however. There must be some glue that binds class members together apart from statistical evidence. While sampling may furnish indications of an employer's centralized practices (see *Sav-On Drug Stores, supra*, 34 Cal.4th at p. 333), no court has 'deemed a mere proposal for statistical sampling to be an adequate evidentiary *substitute* for demonstrating the requisite commonality, or

suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist.' [Citation.]" (*Duran, supra*, 59 Cal.4th at p. 31; accord, *Martinez, supra*, 231 Cal.App.4th at p. 379; see *Tyson Foods, Inc. v. Bouaphakeo* (2016) 136 S. Ct. 1036, 1049 ["Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action."].) Our Supreme Court in *Duran* stressed, "[A] statistical plan for managing individual issues must be conducted with sufficient vigor." (*Duran, supra*, 59 Cal.4th at p. 31; accord, *Mies, supra*, 234 Cal.App.4th at p. 985.)

Plaintiff argues the trial court erred by ignoring Dr. Drogin's proposed statistical sampling and Dr. Krosnick's proposed survey to prove classwide liability. She contends Dr. Kriegler confirmed the validity of survey and statistical sampling methods proposed by Dr. Drogin and Dr. Krosnick. But Dr. Kriegler noted Dr. Drogin and Dr. Krosnick did not perform a pilot study to determine the extent to which the assistant branch managers' job tasks varied. Based on the 22 declarations submitted by defendant, Dr. Kriegler concluded assistant branch managers spent varying amounts of time on the different tasks.

The trial court did not specifically discuss Dr. Drogin's proposed statistical sampling and Dr. Krosnick's proposed survey in its summary of the parties' conflicting evidence. But this does not mean the trial court ignored Dr. Drogin's and Dr. Krosnick's opinions. (*Arenas, supra*, 183 Cal.App.4th at p. 735 ["We will not and do not presume that the trial court disregarded the evidence in the record."]; see *Dailey, supra*, 214 Cal.App.4th at p. 997 [where trial court does not address expert's proposal, appellate

court will presume the existence of every fact that can be reasonably deduced from the record in favor of certification order].)

Further, plaintiff challenges Dr. Kriegler's analysis of classwide evidence. Plaintiff contends Dr. Kriegler's evaluation of variability within the class is unreliable because he did not review any deposition testimony that contradicted these declarations. But we have no authority to reweigh the evidence by crediting Dr. Drogin's and Dr. Krosnick's opinions over defendant's evidence, including Dr. Kriegler's analysis. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 338; *Mies, supra*, 234 Cal.App.4th at p. 984; *Dailey, supra,* 214 Cal.App.4th at p. 991.)

In addition, the trial court could reasonably conclude plaintiff's proposed survey and statistical sampling were insufficient to prove classwide liability. Dr. Drogin and Dr. Krosnick indicated they will not conduct the survey and statistical sampling until after class certification and the end of the opt-out period. The trial court was not required to accept plaintiff's plan for managing individual issues where no survey and statistical sampling has been done. (*Duran, supra*, 59 Cal.4th at p. 31; *Mies, supra*, 234 Cal.App.4th at p. 985 [plaintiff's proposal to use statistical evidence to prove liability was undeveloped and substantiated]; *Dailey, supra*, 214 Cal.App.4th at p. 998 ["mere proposal for statistical sampling" not "an adequate evidentiary *substitute* for demonstrating the requisite commonality"]; *Mora, supra*, 194 Cal.App.4th at p. 510 ["[Plaintiff's expert] had not yet conducted a survey and his declaration describing the proper method for designing and implementing a scientific survey did nothing to refute the evidence presented by [defendant] that it did not operate its

stores or supervise its managers in a uniform and standardized manner."].) The trial court did not abuse its discretion in finding class treatment was not the superior method of adjudication.

IV. DISPOSITION

The order denying the class certification motion is affirmed. Defendant, East West Bank, shall recover its costs on appeal from plaintiff, Christina Espinoza.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

BAKER, J.

KIN, J. *

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.