Filed 9/19/12 Rodriguez v. Lakin Tire West CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HECTOR ROGELIO RODRIGUEZ et al., Plaintiffs and Appellants, v. LAKIN TIRE WEST, INC., Defendant and Respondent.	B233537 (Los Angeles County Super. Ct. No. BC400341)

APPEAL from orders of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed in part; reversed in part.

Rastergar & Matern, Farzad Rastegar and Thomas S. Campbell, for Plaintiffs and Appellants.

Jenner & Block LLP, Brent Caslin, Kelly Morrison and L. David Russell, for Defendant and Respondent.

I. INTRODUCTION

This is an appeal from orders denying a class certification motion. Plaintiffs, Hector Rogelio Rodriguez (Mr. Rodriguez) and Jaime Alejandro Rodriguez (Jaime)[1], were former employees of defendant, Lakin Tire West, Inc. They sued defendant on various theories for alleged violations of the Labor Code[2], the Business and Professions Code, and under the 2004 Private Attorneys General Act (§ 2699 et seq.). The trial court denied with prejudice plaintiffs' class certification motion concerning the failure to provide a meal period and for uniform service fees. The trial court denied without prejudice class certification of claims defendant violated its employees' rights by combining two 10-minute rest breaks into a single 20-minute break period. Defendant's provision of a single 20-minute rest break allegedly violates section 12 of Industrial Welfare Commission Wage Order No. 1-2001.

Plaintiffs appealed contending the trial court abused its discretion in denying certification of all the claims. Defendant has moved to dismiss the appeal as violating the one final judgment rule. We deny the dismissal request. We affirm the order denying class certification as to the bell system meal and rest break and the uniform service fees claims. We reverse the order denying class certification as to the combined 20-minute break period. In doing so, we hold that Mr. Rodriguez may act as the class representative in connection with the Subclass 1A combined 20-minute break period issue.

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[1] Hector and Jaime Rodriguez share the same surname. For purposes of clarity, we refer to Jaime by his first name.

[2] All further statutory references are to the Labor Code unless otherwise indicated.

II. PROCEDURAL HISTORY

A. The First Amended Complaint

Plaintiffs filed their initial class action complaint on October 20, 2008. The first amended complaint was filed on October 15, 2009. Plaintiffs alleged that they were employed by defendants at all pertinent times. Plaintiffs were bringing the action on behalf of defendant's current and former non-exempt employees. The first amended complaint sought relief from the alleged misconduct occurring during the preceding four years. Plaintiffs and the putative class members were all injured by defendant's illegal payroll practices and policies. This included: failing to provide uninterrupted meal breaks; failing to provide required rest periods; making improper weekly deductions for mandatory uniforms; failing to pay wages to former employees; and failing to maintain required records. The first amended complaint contained seven causes of action: failure to provide required meal periods (first); failure to provide required rest periods (second); unlawful collection or receipt of wages previously paid and failure to indemnify a uniform fee (third); failure to pay all wages due to terminated or resigning employees (fourth); failure to maintain required records (fifth); civil penalties under the Private Attorneys General Act (§ 2699 et seq.) (sixth); and unfair business practices (seventh). (Bus. & Prof. Code, § 17200 et seq.)

B. The Class Certification Motion

On September 9, 2010, plaintiffs filed a class certification motion. The certification motion ultimately requested certification of three claims which can be categorized as: a bell system which deprived employees of full meal and rest periods; a mandatory uniform service fee; and an unlawful combination of state mandated two 10-minute breaks into one 20-minute break. (We will describe the bell system in greater detail during our recitation of the parties' factual showings.)

Plaintiffs sought certification of meal and rest break and uniform classes. Class 1 consisted of all of defendant's current and former non-exempt California employees at the Santa Fe Springs warehouse. The Class 1 members were those subjected to defendant's "bell system" for meal and rest breaks. Plaintiffs requested certification of two subclasses for the Class 1 members. Subclass 1A consisted of former bell system employees who were not paid full compensation due upon discharge or resignation for four years before the filing of the complaint. Subclass 1B was made up of defendant's bell system employees who were employed within one year of the filing of the action to the present date. Class 2 consists of all former and current non-exempt employees who received uniforms and were charged a fee for them for a period of time within four years preceding the complaint's filing.

Plaintiffs offered the following evidence in support of their certification motion. Defendant has a written meal and rest period policy. The written policy provides in part: "[Defendant] wants all employees to comply with all California laws. Each hourly paid employee is **required** to take a half-hour unpaid meal period (lunch or dinner) for each work shift or more than five hours to be taken approximately in the middle of the work shift or as scheduled by the supervisor (unless 6 hours will complete the entire days' work in which case the lunch may be waived by agreement with employees and employer). Employees are also provided and allowed a 10-minute rest period (break) for every four hours of work to be taken in the middle of the work period as far as practicable considering the needs and wants of the employees and the work. **Each supervisor of warehouse employees is responsible to be certain that employees know that all work stops during lunch and rest breaks and that employees may leave their work stations. If the bell is used and rings, all work must stop and not start until the second bell rings to start work**." The written policy further provides that employees may leave their work stations to use toilet facilities as necessary during the work shift. The policy also states: "If all work stops in the entire work area for lunch breaks, then employees do not need to clock in and out for the meal break. If all work does **not** stop, each employee must clock out for the meal period and back in after. Failure to do this is

a violation of company rules. Employees are not required to clock in an out for rest break time." The written policy provides: "Each workday, full-time nonexempt employees are provided with two rest periods of ten minutes in length. To the extent possible, rest periods will be provided in the middle of work periods. Since the time is counted and paid as time worked, employees must not be absent from their work stations beyond the allotted rest period time. [¶] All full-time employees are provided with one meal period of 30 minutes in length each workday. Supervisors will schedule meal periods to accommodate operating requirements. Employees will be relieved of all active responsibilities and restrictions during meal periods and will not be compensated for that time."

In deposition testimony, Randy Roth, an employee of defendant, testified there are approximately 105 non-exempt hourly employees at the Santa Fe Springs facility. The meal break occurs during the first half of the shift. The rest period occurs in the second half of the shift. The rest period is a single 20-minute break. This is in lieu of two 10-minute breaks. The reason there is a single rest period is that, about 25 years ago, the employees voted for a single 20-minute break. Defendant accommodated the employees' request to combine the rest periods.

Defendant uses a bell system to announce to its employees the start and end of meal and rest periods. For lunch, the first bell rings at minute 0. A second bell rings at minute 29. The second bell is a courtesy to the employees to let them know where they are in relation to their break time. The third bell rings at minute 32. The third bell means the employees need to be back at their workstation preparing to go to work. Similarly, the rest period bell sequence is: the first bell rings at minute 0; a second bell rings at minute 19; and a third bell rings at minute 22. Defendant also has an agreement with employees whereby they agree to have deductions made from their wages of $18.00 plus weekly charges of $4.65 for uniform expenses. Both named plaintiffs agreed to have the uniform wage deductions.

Mr. Rodriguez, one of the proposed class representatives, worked for defendant from 2000 until the first month of 2007. According to Mr. Rodriguez, the bell would

actually ring about five minutes prior to the end of the meal or rest period. This always occurred during the years between 2004 and 2007. Employees had to be back at the work station when the third bell rang. Therefore, Mr. Rodriguez's lunch period was 25 minutes and his break period was 15 minutes. Mr. Rodriguez did not talk to anyone in the office about signing up for the uniform service. Mr. Rodriguez did not talk to anyone about whether the uniform was required. Mr. Rodriguez did not know whether it was required. However, he knew that defendant would charge an employee whether he or she wore the uniform. He sometimes worked overtime before or after his shift.

Jaime began working for defendant in 2004. While he was employed by defendant, the lunch break was only 25 minutes and the rest break was only 15 minutes. When he was hired, Jaime was told that he needed to wear a uniform. Sometimes Jaime would work on Saturdays for about six hours. He would get lunch breaks. But, he did not get rest breaks.

Jaime did not initially talk to anyone about the uniform requirements. About six months after he began working for defendant, Jaime spoke to a supervisor, Luis Ahumada. Jaime said he did not want to continue paying for the uniform. Jaime wanted defendant to stop the deductions for uniforms from his paycheck. Mr. Ahumada responded that Jaime had to wear the uniform.

C. Defendant's Opposition To The Certification Motion

Defendant introduced the following evidence in response to plaintiffs' class certification motion. Deborah Vincent had been employed by defendant since November 1, 1993. She has been the general manager for seven years. Defendant is a family owned scrap-tire removal and tire-recycling business. The company collects used tires which are assessed, re-sold or transformed into such uses as rubberized asphalt for roads or playground surfaces. Jaime and Mr. Rodriguez were given termination notices dated January 23, 2007, for insubordination.

Attached to Ms. Vincent's declaration as exhibit E was a copy of a 22-page petition signed by over 100 of defendant's current employees indicating a desire to retain the single 20-minute break. According to Ms. Vincent, the bell system employed at the time plaintiffs worked for defendant is no longer used. Rather, in March 2009, defendant changed the bell system. Now a bell sounds to announce the beginning of a rest break. A second bell sounds two minutes after the end of the break time. (The complaint was filed October 20, 2008.) The second bell is to notify employees they should return to their work stations. Ms. Vincent declared that defendant's policy has always been that the supervisors in the warehouse have discretion to allow more or longer break times. She had never heard of an employee being disciplined for taking too much time for lunch or a rest period. Defendant also offered 25 declarations of former and current employees, supervisors and managers. The declarations disputed the complaint's allegations concerning the deprivation of meal and rest breaks and uniform requirements.

D. Reply And Surreply

As previously noted, defendant opposed plaintiffs' certification motion with 25 declarations of current and former employees. Plaintiffs responded by noticing depositions for all 25 of declarants, which prompted a protective order motion from defendant. The trial court ultimately allowed plaintiffs to conduct five depositions. Plaintiffs then filed a reply to defendant's opposition. Plaintiffs cited excerpts from the five depositions to support their claim that the class certification motion should be granted. According to plaintiffs, the depositions revealed that the deposed employees attended schools in Mexico and their education range was between the fifth and eighth grade level. Plaintiffs further asserted that none of defendant's 25 declarations established as a matter of law that it provided uninterrupted 30-minute meal periods. Rather, the declarations showed common questions regarding the use of the bell system which interrupted the periods by warning employees that they had to return to work.

Defendant's surreply asserted the depositions of the putative class members confirmed that the lawsuit was not amenable to adjudication as a class action. Defendant argued plaintiffs appeared to have abandoned class certification requests concerning the uniform and civil penalties.

E. The Trial Court's Denial Of Plaintiffs' Class Certification Motion

1. There are consistent and conflicting findings.

We begin by summarizing the trial court's findings in their entirety. An important issue is whether Mr. Rodriguez was an adequate representative of the claims involving the 20-minute rest break. The trial court's findings in regard to Mr. Rodriguez's adequacy as a class representative of the claims involving the 20-minute rest break are in conflict. For purposes of clarity, we will separately set forth the conflicting findings.

2. The trial court made some consistent findings.

On April 5, 2011, the trial court issued a comprehensive order denying the class certification motion in its entirety. However, class certification was denied with prejudice in part as to some theories. The class certification motion was denied without prejudice as to one theory. First, the trial court denied *with prejudice* the proposed Class 1 (bell system meal and rest breaks) claims on the grounds of: ascertainability; adequacy of class representative; commonality and superiority; and typicality (for Jaime as to all classes and Mr. Rodriguez as to subclass 1B). The classes corresponded to the first (failure to provide required meal breaks) and third (unlawful collection of wages previously held) causes of action. Second, the class certification motion was denied *with prejudice* as to proposed Class 2 (uniform services) on the grounds it lacked ascertainability, adequacy of class representative, commonality and superiority. Third, plaintiffs' motion was denied *without prejudice* with respect to Class 1 and its subparts

(meal and rest breaks). The trial court reasoned the proposed class and its subparts lacked ascertainability and adequacy of class representation as to the remaining causes of action. Those remaining causes of action consist of the following: the second (failure to provide required rest periods); fourth (failure to pay all wages due to discharged or quitting employees); fifth (failure to maintain required records); sixth (civil penalties); and seventh (unfair business practices).

The trial court made two findings which were common to all plaintiffs' theories. The trial court found the class members were not ascertainable. The trial court ruled: none of the classes were ascertainable; plaintiffs had failed to establish the class members could be identified; payroll information from Mr. Roth's deposition testimony was insufficient to show the class members could be easily identified; Jamie was not typical of Class 1 (meal and rest breaks); Jaime was not typical Subclass 1B (meal and rest breaks) which is limited to those employed from October 20, 2007 to the present; Jaime did not produce any evidence as to the date he stopped working for defendant; and neither Mr. Rodriguez nor Jaime were typical of the proposed Class 2 (uniform charges).

The trial court further found common questions did not predominate concerning the bell system and uniform theories. The trial court found plaintiffs' articulated theory was not supported by the evidence. Plaintiffs' theory was a courtesy bell rings five minutes prior to the end of meal and rest breaks. The courtesy bell informed employees to start back to work station. All class members had to be back when the final bell rang. The courtesy bell denied the full break because employees would have to end their breaks in order to get back to the work station.

The trial court found: defendant's written policy on the bell system did not support the articulated theory; defendant's written policy it did not mention a courtesy bell; the policy did not require employees to do anything on the ringing of a courtesy bell; the policy did not state what the employees must do when the second bell rang; and the policy stated that employees must not start work until the second bell rings. According to the trial court, Mr. Roth's testimony did not assist plaintiffs. Mr. Roth explained the

three-bell system, including the courtesy bell which rang at minute 29. The employees were not required to be at their work stations before the third bell rang.

The trial court found plaintiffs established a manageable class concerning the courtesy bell. Plaintiffs testified that a bell rang five minutes before the end of the break. They both understood that they had to start working. The trial court found their testimony problematic. This was because the testimony about their understanding did not establish a company policy or that all the other employees had the same understanding. And, plaintiffs did not explain why they believed they had to stop their breaks at the end of the second bell. Jaime's shift manager was Gustavo Ortiz. Mr. Ortiz told employees they had to be at their stations waiting for the final bell. But, there was no evidence defendant had the policy or all the shift managers followed the same procedure with the employees.

The trial court then cited specific excerpts from the five deposed putative class members which showed three different scenarios regarding the class members' responses to the bell system. In the first scenario, plaintiffs thought they had to go back to work once the second bell rang. The second scenario was illustrated through Gumaro Rivera, Javier Hildago and Jose Mayorquin. Those three testified that they did not have to go back to work when the second bell rang. The third scenario was established through Victor Lopez's testimony that he and other maintenance workers sometimes ignored the bells. They took their meal breaks when they completed what they were working on at the time. The variations indicate individual inquiry is necessary to determine what each person understood the various bell to mean with the possibility of several different answers. There was no evidence to support the claim there was a class-wide policy requiring employees to wear and be charged for uniforms. The trial court found the class action was not a superior means to conduct the litigation with respect to the first (meal) and third (uniform) causes of action on a lack of commonality grounds.

By contrast, the trial court determined defendant's admitted practice of having a combined 20-minute rest break rather than two 10-minute breaks was "particularly susceptible" to common questions. However, the class certification motion was not the

place to settle the question of its legality. Because the combined rest break claim was amenable to common treatment, a class action was the superior means to manage the claim. The policy was common to the company and consolidation of the claims is "highly desirable" to litigate. Thus, the class action would be a superior means of managing the combined rest period theory for the remaining causes of action: the second (failure to provide required rest periods); fourth (failure to pay all wages due to discharged or quitting employees); fifth (failure to maintain required records); sixth (civil penalties); and seventh (unfair business practices).

But, as previously noted, the trial court concluded the certification should be denied without prejudice as to the combined break theory. This was because the class was not ascertainable and plaintiffs were inadequate to represent the class. Thus, the trial court refused to certify any of the proposed classes by denying the motion with and without prejudice as explained above.

3. The trial court made some conflicting findings.

The trial court made conflicting findings on the issue of Mr. Rodriguez's suitability to act as the representative for Class 1 in connection with the combined rest break issue. At one point the trial court ruled: "[Mr. Rodriguez] is typical of Class 1 and (subclasses 1A and 1B) . . . . [¶] [Mr. Rodriguez] was employed during the class period. . . . This makes him typical of the members of Class 1." Later, in discussing both Classes 1 and 2, and typicality issue, the trial court ruled: "Defendant also challenges the typicality of [p]laintiffs on the grounds that they are former employees who cannot represent the interests of current employees. This is not persuasive. Former employees regularly represent the interests of current employees whose interests have been allegedly damaged in the same way by the same defendant(s). The key issue is whether the current and former employees were subjected to the same allegedly unlawful policies and practices. Since, that is the allegation in this case, there is no conflict of interest between the current and former employees." Yet on the next page of its ruling, the trial court

ruled, "[Mr. Rodriguez] has not demonstrated that he is an adequate class representative for Classes 1 or 2." On the next page of its ruling, the trial court probably limited its ruling to Mr. Rodriguez's adequacy as to Class 2, "[Mr. Rodriguez] is not adequate to represent Class 2 since he is not typical of that class."

The trial court continued, "Defendant[] also challenge[s] [p]laintiffs' adequacy on the grounds that they lack credibility by pointing to conflicting and divergent testimony regarding [d]efendant's use of the 'bell system.'" After finding the alleged inconsistency unpersuasive, the trial court ruled: "[T]his does not demonstrate a lack of credibility as there is no directly contradictory testimony by either [p]laintiff. Also, the opinion of other class members that [p]laintiffs are not honest is irrelevant to whether [p]laintiffs are adequate class representatives."

III. DISCUSSION

A. Jurisdictional Issues

1. The death knell doctrine applies: one final judgment issue.

Defendant asserts the one final judgment rule precludes this appeal. The one final judgment rule precludes multiple and piecemeal litigation. The rule restricts the right to appeal until there is a final judgment in the entire action. (Code Civ. Proc., § 904.1; *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 756; *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 921.) Plaintiffs assert that the denial of the certification motion is appealable under the so-called "death knell" doctrine, which was adopted by our Supreme Court in *Daar v. Yellow Cab. Co.* (1967) 67 Cal.2d 695, 699. This provides an exception to the one final judgment rule when a class certification motion is denied. *(In re Baycol Cases I & II, supra,* 51 Cal.4th at p. 757; *Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 435.) In *Daar*, the trial court sustained a demurrer to a putative class action. (*Id*. at p. 698.) In *Daar*, the trial court ruled plaintiff could not maintain a class action or

satisfy a jurisdictional amount for the superior court. (*Ibid*.) Our Supreme Court in *Daar* concluded that the question of whether the order sustaining the demurrer was appealable was not the form of the order but its legal effect. (*Id*. at pp. 698-699.) The order under review in *Daar* had determined the legal insufficiency of the complaint as a class action but preserved plaintiff's individual claims. (*Id*. at p. 699.) As a result, it was tantamount to a dismissal of the action as to all class members except the individual claims of that plaintiff rendering the order immediately appealable. (*Ibid*.) Because an order denying a class certification motion is immediately appealable, it is final and binding. (*In re Baycol Cases I & II*, *supra*, 51 Cal.4th at p. 754; *Linder v. Thrifty Oil*, *supra*, 23 Cal.4th at p. 435; *Daar v. Yellow Cab Co.*, *supra*, 69 Cal.2d at p. 699.) The failure to appeal from a death knell order precludes a subsequent attack on appeal from a judgment on the merits. (*Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806, 811; see *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 359-360.)

Defendant relies on our Supreme Court's recent clarification of the scope of the death knell doctrine in the case of *In re Baycol Cases I & II*, *supra*, 51 Cal.4th at page 754. Defendant contends the analysis in *Daar* is inapplicable to this appeal. The Supreme Court clarified the scope of its prior *Daar* analysis as follows, "[T]he preservation of individual claims is an essential prerequisite to application of the death knell doctrine: the doctrine renders appealable only those orders that effectively terminate class claims but permit individual claims to continue." (*Ibid.*) According to defendant, plaintiffs cannot appeal from the class certification order because all the class claims were not resolved. This is because the denial without prejudice of certification of the class concerning the combined break theory left plaintiffs a second opportunity to seek certify the class. Thus, the question is whether the death knell doctrine applies because the order, although denying certification as to all the claims, did so without prejudice as to this one theory.

An appellate court has explained, "The term 'without prejudice,' in its general adaptation, means that there is no decision of the controversy on its merits, and leaves the whole subject in litigation as much open to another application as if no suit had ever been

brought." (*Chambreau v. Coughlan* (1968) 263 Cal.App.2d 712, 718; *Guenter v. Lomas & Nettleton Co.* (1983) 140 Cal.App.3d 460, 465.) However, it has been held that review of an otherwise appealable order is not precluded by a trial court's order labeling its ruling without prejudice. (*Steen v. Board of Civil Service Comm'rs.* (1945) 26 Cal.2d 716, 727-728; *In re Lauren P.* (1996) 44 Cal.App.4th 763, 768.) When the denial without prejudice of a class certification motion is on the merits, it is appealable. (*Guenter v. Lomas & Nettleton Co., supra,* 140 Cal.App.3d at p. 465; see also *Prince v. CLS Transp., Inc.* (2004) 118 Cal.App.4th 1320, 1322, fn. 2 [in whatever its form an order that has effect of denying certification of a class action and disposes of class claims is appealable].)

Here, although the trial court denied without prejudice a portion of the certification motion, the denial was on the merits. The trial court ruled plaintiffs failed to establish any of the classes were ascertainable or; in conflicting rulings, they were adequate representatives. The denial encompassed all seven causes of action in the complaint. The trial court suggested that plaintiffs might seek certification in the future. But no class claims remained after the denial unless they chose to further pursue the one remaining theory. Thus, the order virtually demolished the class action claims even though it partially denied the motion without prejudice. (*Daar v. Yellow Cab Co., supra,* 67 Cal.2d at p. 699; *Alch v. Superior Court, supra,* 122 Cal.App.4th at p. 360.) The orders under review are appealable.

2. This court has jurisdiction to decide issues related to Jaime.

Defendant is also incorrect that we lack jurisdiction to consider the issues related to Jaime on the theory he did not file a notice of appeal. The notice of appeal is on Judicial Council of California, Form APP-002 (Rev. July 1, 2004). The notice of appeal identifies Jaime in the caption of the form but not in its body. The body of the notice states: "Plaintiff Hector Rogelio Rodriguez" appeals from "[a]n order denying plaintiffs'" class certification motion.

Appeal notices are to be construed liberally to protect the right of appeal. (Cal. Rules of Court, rule 8.100(a)(2); *In re Joshua S.* (2007) 41 Cal.4th 261, 272; *Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) The test is whether it is reasonably clear as to what the appellant was trying to appeal from and the respondent could possibly been misled or prejudiced. (*In re Joshua S.*, *supra*, 41 Cal.4th at p. 272; *Luz v. Lopes*, *supra*, 55 Cal.2d at p. 59.) Moreover, the absence of a party's name from a notice of appeal does not deprive an appellate court of jurisdiction to consider issues related to the party as a matter of law. (See *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1216-1217 [notice sufficient where judgment affected wife and husband signed notice of appeal but did not include wife's name in notice]; *Hopkins v. Sanderson* (1916) 29 Cal.App. 666, 668 [use of plural word "defendants" for parties in notice of appeal makes it apparent that all affected parties intended to appeal].) Rather, applicable liberal construction standards must be utilized to determine the questions of intent and prejudice. Here, it is clear that both named plaintiffs intended to appeal from the order denying certification. Jaime's name is mentioned in the caption and a reference is made to "plaintiffs" in the body of the form. In any event, defendant is not prejudiced by the failure to include Jaime's name in the body of the form. In part, this is due to the fact that at oral argument, plaintiffs' counsel abandoned any argument that Jaime may act as a class representative. The notice of appeal is sufficient to include Jaime, albeit, the practical effect is of no consequence because he no longer seeks to be a class representative.

B. Labor Code And Wage Orders

This case involves the confluence of two Labor Code provisions and two wage orders. Section 226.7 provides: "(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. [¶] (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the

employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

Section 512 regulates employee meal breaks as follows: "(a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived."

Section 11 of Industrial Welfare Commission Wage Order No. 1-2001 provides in part: "(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee. [¶] (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived. [¶] (C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time. [¶] (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1)

hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided." (Cal. Code Regs., tit. 8, § 11010.)

Section 12 of Industrial Welfare Commission Wage Order No. 1-2001, which regulates rest breaks, states: "(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. [¶] However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. [¶] (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided." (Cal. Code Regs., tit. 8, § 11010.)

C. Class Certification Standards

Code of Civil Procedure section 382 states in part, "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue . . . for the benefit of all." A class action is authorized under Code of Civil Procedure section 382 when a plaintiff demonstrates the existence of an ascertainable class and a well-defined community of interest. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1103-1104; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913; *Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 435.) Our Supreme Court has explained: "The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470; accord *Sav-on*

Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326; *Lockheed Martin Corp. v. Superior Court*, *supra*, 29 Cal.4th at p. 1104.)

In *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022, our Supreme Court explained that our "inquiry [of a class certification] is narrowly circumscribed": "'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' [Citations.] Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence. [Citation.] We must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record . . . ' [Citation.]"

D. The Class Certification Findings

1. There are three proposed classes.

As noted, plaintiffs sought the certification of two classes. Class 1 involves meal and rest break claims. There are two subclasses in Class 1. The first subclass consists of terminated employees who were fired from October 20, 2008, the date the complaint was filed, to the present. The second subclass consists of class members who were employed by defendant from October 20, 2007, to the present. Class 2 involves employees charged for uniforms. The Class 2 claims involves claims as far back as October 20, 2004, four years up to the time the complaint was filed.

2. Denial of certification of the bell system and uniform claims must be affirmed.

With respect to the Class 1 and its two subclasses (meal and rest break bell system) and Class 2 (uniform services), the trial court denied certification on the grounds of: ascertainability; adequacy of class representative; commonality; superiority; and no typicality. Plaintiffs challenge the findings in all respects. But, any valid reason stated is sufficient to uphold the trial court's order denying certification. (*Sav-on Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at pp. 326-327; *Lockheed Marin Corp. v. Superior Court*, *supra*, 29 Cal.4th at p. 1106.) We conclude defendant is correct that the predominance finding requires that the order denying certification of all bell system and uniform reimbursement claims must be affirmed. As will be noted, we reach a different conclusion to the combined rest break issue.

The focus in a class certification dispute is not on the merits but on the procedural issue of what types of questions are likely to arise in the litigation--common or individual. (*Sav-on Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at pp. 326-327; *Lockheed Martin Corp. v. Superior Court*, *supra*, 29 Cal.4th at pp. 1106-1107; *Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at pp. 439-440.) Thus, the existence of some common issues of law and fact does not dispose of the class certification issue. (*Lockheed Martin Corp. v. Superior Court*, *supra*, 29 Cal.4th at pp. 1108-1109; *Washington Mutual Bank v. Superior Court*, *supra*, 24 Cal.4th at p. 913.) Rather, in order to justify class certification, plaintiffs were required to establish the "questions of law or fact common to the class *predominate* over the questions affecting the individual members . . . . " (*Washington Mutual Bank v. Superior Court, supra*, 24 Cal.4th at p. 913, emphasis added; accord *Lockheed Martin Corp. v. Superior Court*, *supra*, 29 Cal.4th at p. 1108.) A class action may be maintained even if each class member must individually show eligibility for recovery or the amount of damages. (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 397; accord *Vasques v. Superior Court* (1971) 4 Cal.3d 800, 809.) But, the result is different if each class member is required to "litigate substantial and numerous factually unique questions" to the right to recover.

(*Acree v. General Motors Acceptance Corp., supra,* 92 Cal.App.4th at p. 397; *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 756; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 742.) An appellate court has concluded: "[I]f a class action 'will splinter into individual trials,' common questions do not predominate and litigation of the action in the class format is inappropriate." (*Hamwi v. Citinational-Buckeye Investment Co.* (1977) 72 Cal.App.3d 462, 471; accord *McCullah v. Southern California Gas Co.* (2000) 82 Cal.App.4th 495, 501-502.)

Substantial evidence supports the trial court's predominance finding except as to the combined rest break issue. There is substantial evidence of material and numerous individual factual questions that will need to be tried as to whether each employee may recover. Only plaintiffs, not other class members, failed to consistently take full breaks. Plaintiffs' failure to take full breaks was premised on their individual beliefs the bell system shortened their rest and break periods by five minutes. There is also no evidence that there was a written policy requiring employees to wear uniforms. There was sufficient evidence to show that the uniform service was optional notwithstanding Jaime's testimony to the contrary. Different employees testified or signed declarations stating they were told the uniforms were optional. Even Mr. Rodriguez testified: when he first started working for defendant he wore his own "casual" attire; other employees wore their own clothes; and "nobody" told him the uniform was a requirement. Under the circumstances, each employee would have to testify as to his or her understanding concerning the bell system and the uniform requirement. Even if some of the employees thought the same thing as plaintiffs, this would require individual factual matters and determinations. Thus, substantial evidence supports the trial court's predominance finding that the absence of common proof on these issues makes a class action inappropriate as to Class 1 bell system and uniform services claims. (See *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459; *Wilens v. TD Waterhouse Group, Inc., supra,* 120 Cal.App.4th at p. 756; *Acree v. General Motors Acceptance Corporation, supra,* 92 Cal.App.4th at p. 397.) We need not consider plaintiffs' arguments concerning the other factors such as ascertainability, typicality, and adequacy of representation.

Plaintiffs also assert that the order denying class certification should be reversed because the trial court should have disregarded the defendant's declarations offered in support of the opposition. Plaintiffs also challenge deposition corrections made by the deponents. Assuming plaintiffs are correct, plaintiffs have failed to demonstrate a more favorable outcome because the evidence submitted in support of and in opposition to the motion supports the predominance finding. (Cal. Const. art. VI, § 13; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282; *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.)

3. The denial of certification as to the combined break period must be reversed.

a. ascertainability of class members

The trial court found the combined rest break claims for Class 1 were not ascertainable. As noted, there are two subclasses. The first subclass consists of terminated employees who were fired from October 20, 2004, four years before the complaint was filed, to the present. The second subclass consists of class members who were employed by defendant from October 20, 2007, to the present. Plaintiffs allege that combining the two 10-minute rest periods violates section 12 of Wage Order No. 1-2001. (See *infra*, at p. 17.) These claims concern the second, fourth, fifth, sixth and seventh causes of action. For the reasons stated below, we conclude there is no substantial evidence the combined rest break classes are not ascertainable.

The purpose of the ascertainability requirement is to give notice to putative class members upon whom a judgment in the action will be res judicata. (*Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 135; *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 914.) Whether a class is ascertainable depends on: class definition; class size; and a means of identifying its members. (*Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207; *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849.) An appellate court has held: "Class

members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records. [Citation.]" (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932; accord *Aguiar v. Cintas Corp. No. 2*, *supra*, 144 Cal.App.4th at p. 135.)

Defendant admitted that all its employees are subject to the combined 20-minute rest period policy, which was in place for at least 25 years. Plaintiffs are correct that the class members, who were subject to the 20-minute rest period, are readily identifiable through defendant's payroll records. Our Supreme Court has explained that the existence of standardized policy which violates wage and hour laws are "routinely, and properly, found suitable" for class certification. (*Brinker Restaurant Corp. v. Superior Court, supra,* 53 Cal.4th at p. 1033.) Thus, as a matter of law, the Class 1 members are ascertainable on the combined 20-minute rest period issue.

4. Mr. Rodriguez is an adequate class representative.

a. overview

The trial court ultimately ruled that the neither Mr. Rodriguez nor Jaime were adequate class representatives in connection with the combined rest period claims. We respectfully disagree as to Mr. Rodriguez who worked during the Subclass 1A time period and there is no evidence of any conflict of interest. At oral argument, plaintiffs' counsel withdrew any argument concerning Mr. Rodriguez serving as the class representative of Subclass 1B. Also, at oral argument, plaintiffs' counsel withdrew any class representative claim as to Jaime.

b. Mr. Rodriguez

The following is uncontradicted. The trial court expressly twice ruled that Mr. Rodriguez is typical of the Class 1. The trial court explained: "[Mr. Rodriguez] was

employed during the class period. . . . his makes him typical of the members of Class 1." Further, the uncontraverted evidence shows: Mr. Rodriguez was employed by defendant during the class period until his discharge; he was not paid his full wages upon his termination (if the 20-minute work break claim is valid); he typically worked from 3:00 p.m. to 11:30 p.m. or 4:00 p.m. to 12:30 p.m. The trial court expressly overruled defendant's objections that Mr. Rodriguez was unqualified to serve as a class representative, "[T]here is no conflict of interest between the current and former employees."

We apply the following principles in the adequacy inquiry: "The adequacy of representation component of the community of interest requirement for class certification comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit. '"The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent."' [Citation.] " . . . To assure 'adequate' representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class. [Citation.]" [Citation.]' . . . To resolve the adequacy question the court 'will evaluate "the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; the alternatives to class representation available; the procedures available to limit and prevent unfairness; and any other facts bearing on the fairness with which the absent class member is represented." [Citation.]'" (*Capitol People First v. State Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 696-697, quoting *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212-213.) However, a representative claim will only be defeated by a conflict that goes to the very subject matter of the litigation. (*Richmond v. Dart Industries, Inc., supra*, 29 Cal.3d at p. 470; *Capital People First v. State Dept. of Developmental Services, supra*, 155 Cal.App.4th at p. 697.)

Plaintiffs sought certification of the classes on the theory the combined 20-minute break period violated state law. The Class 1 periods were as follows: Class 1 from October 20, 2004; Subclass 1A, from October 20, 2004; and Subclass 1B, from October

20, 2007. The trial court found that Mr. Rodriguez was typical of Class 1 and Subclass 1A. Mr. Rodriguez was employed during the Subclass 1A time period. But, the trial court ruled Mr. Rodriguez was not typical of the Subclass 1B employees who were employed from October 20, 2007, to the present. Nevertheless, the trial court concluded that Mr. Rodriguez had "not demonstrated that he is an adequate class representative" for all classes. On appeal, Mr. Rodriguez explicitly argues he is a qualified class representative for Subclass 1A. Defendant's contention at oral argument that Mr. Rodriguez has not asserted he is a proper Subclass 1A representative has no merit.

We respectfully disagree with the trial court insofar as it concluded Mr. Rodriguez could not represent the Subclass 1A members. Mr. Rodriguez worked for defendant until January 23, 2007--throughout most of the Subclass 1A time period. And the trial court found no conflict of interest existed between Mr. Rodriguez and Subclass 1A. Mr. Rodriguez is correct--he is a proper Subclass 1A class representative. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089; *Richmond v. Dart Industries, Inc.*, *supra*, 29 Cal.3d at p. 470.) As we noted, any argument concerning subclass 1B and Mr. Rodriguez has been abandoned.

IV. DISPOSITION

The order denying class certification as to the first and third causes of action is a affirmed. The order denying class certification as to the second and fourth through seventh causes of action on the theory the single 20-minute break violated state law is reversed. The order finding plaintiff, Jaime Rodriguez, is not qualified to represent any class or subclass is affirmed. The order finding plaintiff, Hector Rodriguez, is not qualified to represent Subclass 1A as to the second and fourth through seventh causes of action is reversed. The finding Hector Rodriguez is not qualified to act as the

class representative of Subclass 1B is affirmed. All parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.