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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

KENDELL CRAWLEY et al., Plaintiffs and Appellants, v. AIRTOUCH CELLULAR, Defendant and Respondent.	B264042 (Los Angeles County Super. Ct. No. JCCP4693)

APPEAL from an order of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Affirmed.

Marlin & Saltzman, Stanley D. Saltzman, Stephen P. O'Dell, David C. Leimbach; United Employees Law Group and Walter Haines for Plaintiffs and Appellants.

Jones Day, Peter E. Davids, Cindi L. Ritchey, Liat Yamini and Brian M. Jorgensen for Defendant and Respondent.

Plaintiffs Kendell Crawley and Duana Hicks, on behalf of themselves and a proposed class of others similarly situated, appeal from an order denying their motion to certify a class of approximately 339 current and former Verizon Wireless store managers whom defendant AirTouch Cellular (AirTouch) allegedly misclassified as "exempt" from state overtime compensation requirements. The trial court denied the motion, finding the proposed class lacked the requisite community of interest. Because the trial court used proper legal criteria in assessing the motion and substantial evidence supported its findings, and in light of the deference afforded trial courts in ruling on class certification motions, we affirm the court's order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background and plaintiffs' complaint*

Defendant AirTouch operates Verizon Wireless retail stores and kiosks throughout Southern California. Its stores sell cellular telephone service, telephones, electronics equipment, and accessories.

Southern California stores are organized into roughly a dozen districts, each with a single district manager ("DM"). Each store is overseen by a single store manager ("RSM"), who reports to the DM. The RSM is the highest-ranking employee -- and the only "exempt" employee -- in each store. Below the RSMs are assistant managers. Stores are further staffed with between three and 40 sales and customer service representatives. Stores vary in size and sales volume, ranging from small kiosks to large "flagship" stores.

The RSM has overall responsibility for store performance and operations. He or she directs the daily activities of store staff and is responsible to ensure the store meets sales targets set by

AirTouch. The RSMs' duties include training and coaching employees; documenting disciplinary issues and administering discipline; interviewing job candidates; making recommendations as to hiring, employee discipline, termination, and compensation; and ensuring staff meet sales goals and follow Verizon's procedures and guidelines. RSMs confer with Human Resources ("HR") and the DM regarding terminations, discipline, and hiring and do not have authority to finalize such decisions without approval. Verizon allegedly requires that RSMs and sales representatives follow a specific selling method or "sequence" and promote particular products or services. RSMs also monitor the sales floor; greet and direct customers; hold store meetings; prepare schedules; monitor inventory; handle customer issues or "escalations"; and ensure their stores' layouts follow and are routinely "refreshed" according to a Verizon-issued "planogram."

AirTouch designates all RSMs as exempt employees under Industrial Welfare Commission Wage Order No. 7-2001, under the executive and/or administrative exemptions. RSMs typically work between 50 and 70 hours per week, but are not paid overtime due to their classification as exempt employees. AirTouch does not record actual time worked by RSMs, nor does it have a written policy, custom, or practice regarding meal and rest breaks for RSMs.

Plaintiffs Crawley and Hicks are former or current RSMs. Their operative First Amended Complaint alleged that AirTouch uniformly misclassified RSMs as exempt employees. Consequently, AirTouch unlawfully failed to pay RSMs overtime, required them to work without meal and rest periods, and failed to provide accurate wage statements in violation of various provisions of the Labor and Business and Professions Codes.

Based on these allegations, the Complaint asserted nine causes of action seeking, on behalf of plaintiffs and the putative class, unpaid wages, penalties, interest, equitable relief, restitution, attorney fees, and costs.[1]

2. *Class certification proceedings*

a. *The motion for class certification*

Plaintiffs moved to certify a class of approximately 339 persons "who have been, or currently are, employed by [AirTouch] and who worked at least one shift in a California retail store location during the Class Period [August 12, 2007 through final judgment] and who held, or hold, the position" of RSM.[2] They averred that the proposed class was sufficiently numerous and ascertainable; they were adequate class representatives; and their claims were typical. They also sought certification of a proposed subclass of all class members whose employment with AirTouch had ended.

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[1] The causes of action were denominated as follows: (1) failure to pay overtime compensation (Lab. Code, §§ 510, 1194, 1198 & Wage Order No. 7); (2) failure to pay all regular wages (Lab. Code, § 204); (3) failure to pay minimum wages (Lab. Code, §§ 1194, 1194.2, 1197.1); (4) failure to pay all regular wages (Lab. Code, §§ 1197.1, 1199); (5) failure to allow or pay for meal periods (Lab. Code, §§ 226.7, 512); (6) failure to allow or pay for rest periods (Lab. Code, § 226.7); (7) waiting time penalties (Lab. Code, §§ 201-203); (8) failure to provide accurate itemized wage statements (Lab. Code, § 226(a)); and (9) unfair business practices (Bus. & Prof. Code, § 17200 et seq.).

[2] The proposed class excluded persons who held the position of "floating" retail manager, as well as DMs and persons in managerial or corporate positions equal or superior to DMs.

According to plaintiffs, common questions of law and fact would predominate over individual issues because all RSMs: were misclassified as exempt employees under the managerial exception; worked between 50 and 70 hours per week, without receiving overtime or payment for missed meal and rest periods; performed the same job duties in the same manner and under the same supervision and control; received the same training; operated under a common job description; and were required to follow AirTouch's standardized policies and procedures. Analysis of AirTouch's "uniform policies and practices in regard to RSMs" would establish that all were "subject to uniform treatment . . . which results in each failing to meet the standards applicable to the executive exemption."

Plaintiffs' theory was that as a result of AirTouch's standardized trainings and restrictive policies, "RSMs cannot exercise discretion and independent judgment, and spend the majority of their time engaged in non-exempt work." Recognizing that "at first blush," some RSM duties appeared managerial, plaintiffs averred that in an effort to streamline its retail stores "much like an assembly line," AirTouch had "stripped RSMs of any ability to actually make decisions in their stores or perform true managerial job functions," thereby reducing their responsibilities to "clerical and sales duties" on par with those performed by nonexempt store employees. Plaintiffs posited that the "time spent in actually performing what might be classified as exempt duties is minor compared with the overwhelming amount of non-exempt work done by RSMs."

Specifically, plaintiffs averred that absent approval by the DM and/or HR, RSMs could not discipline, terminate, or hire employees; give a performance review; increase store staffing; or

retroactively alter employee time records. RSMs were required to use standardized performance review and progressive discipline forms. DM and HR approval was required before an RSM could issue a raise or bonus, which in any event had to fall within a company-mandated bracket. RSMs had to follow a standardized interview guide when recruiting employees. They were required to use specific methods of observing and coaching employees, and had to document those activities using standardized templates. All RSMs and employees had to follow a uniform sales process and use standardized forms to document their sales activities. RSMs could not, without approval, deviate from a standard "planogram" when organizing a store's layout. They could not set prices, service contract terms, or hours of operation, nor could they alter the merchandise sold in the store. They could not initiate marketing campaigns or promotions without approval. Approval was likewise required before RSMs could issue discounts and credits to customers beyond the level set for their store. RSMs had no role in setting sales targets for their stores. Their training of employees was "so formulaic that there [was] absolutely no room for the exercise of independent judgment or discretion." Plaintiffs represented that the foregoing "significant restrictions on RSMs' ability to manage their stores" were "all common and uniform policies" that applied to "each and every member of the proposed class." Thus, plaintiffs urged, "[r]esolution of the classification status of one RSM will resolve the issue for all."

In support of these theories, plaintiffs offered various AirTouch training materials, guides, and documents; progressive discipline and performance appraisal forms; intra-company e-mails and communications; checklists and forms related to,

among other things, coaching and store operations; job descriptions; an employee handbook; excerpts from the depositions of AirTouch personnel; discovery responses; and declarations from the class representatives and nine former RSMs.

Plaintiffs also asserted the court could look to statistical evidence to determine both liability (i.e., whether all RSMs fell within the relevant exemptions) and damages. In support, plaintiffs offered the declaration of statistics expert Richard Drogin. He opined, "It is my opinion that random sampling would be an appropriate statistical technique for obtaining representative evidence about the nature of the job, tasks performed, and time spent on various tasks. In addition, the random sample could be used to obtain statistically valid estimates of the average number of overtime hours worked per week by class members, the percentage of days when meal and rest breaks were taken, and the consequent aggregate class wide amount of back pay due for unpaid overtime hours worked." Dr. Drogin suggested that "a random sample of class members be selected for depositions, and possibly testimony as witnesses at trial. Evidence presented by the sample members would provide representative evidence from the class regarding the employer's realistic expectations, and the actual overall requirements of the job. Testimony from the random sample of class members could . . . aid in evaluating whether there is class-wide liability, in conjunction with other evidence that may be presented."

After our Supreme Court issued its decision in *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1 (*Duran*), plaintiffs filed a supplemental brief and a second declaration from Dr. Drogin, in which he averred that "a properly designed and

implemented random sampling plan" that avoided the mistakes present in the sample at issue in *Duran* "would be an appropriate statistical technique for obtaining representative evidence about the nature of the job, tasks performed, and time spent on various tasks" in the instant case.

b. *AirTouch's opposition*

AirTouch opposed the motion. It argued class certification was inappropriate because the plaintiffs had failed to demonstrate a well-defined community of interest and had not shown misclassification was "the rule rather than the exception." First, it averred that common issues did not predominate. The parties' evidence demonstrated wide variation in the types of, and time spent on, tasks RSMs actually completed. RSMs' actual work varied depending on "numerous factors, such as store size, store type, number of employees, store location, sales volume, demographics served, and employee styles." Many of the purportedly standardized requirements plaintiffs cited were, in fact, guidelines or tools that RSMs could adapt to their own needs. Second, the plaintiffs were neither adequate nor typical representatives. Third, class treatment was not superior to other forms of adjudication and a class action would be unmanageable. Plaintiffs' reliance on statistical sampling was inadequate, AirTouch argued, because Dr. Drogin had offered only a mere proposal for statistical sampling, which under *Duran*, *supra*, 59 Cal.4th 1, was inadequate. Allowing plaintiffs to prove liability based upon the "limited testimony of a small, non-representative group" would violate AirTouch's due process rights under the state and federal Constitutions.

In support, AirTouch offered declarations and/or deposition testimony from numerous current or former RSMs and other

AirTouch executives and personnel. AirTouch also offered the declaration of expert Cristina G. Banks, who, along with her staff, conducted an observational study of 33 RSMs (or 32 percent of the RSM population by year), to determine what tasks and activities RSMs actually performed; whether RSMs were sufficiently similar to determine the exempt/non-exempt status of the position on a group basis; and how much time RSMs spent on exempt and nonexempt tasks. Dr. Banks and her staff also conducted interviews with 10 additional RSMs to gather more information. Dr. Banks concluded the tasks performed by RSMs varied widely, as did the amount of time they spent on particular tasks. This was especially true in four task areas: managing store performance, serving customers and selling, managing customer service and selling, and coaching and training employees. Banks concluded RSMs "spent vastly different amounts of time on the same group of tasks." They also differed in the percentage of time spent performing exempt and non-exempt work, resulting in a differential of 48 percent. The interviews revealed substantial differences in the level of discretion managers exercised. Banks concluded, "Because of the degree of variability found among RSMs in this study, it is not possible to predict how a particular RSM performed his or her job based on knowledge of what other RSMs did."

c. *Plaintiffs' reply*

In reply, plaintiffs clarified that they offered two theories to establish AirTouch's liability: (1) RSMs do not spend more than 50 percent of their time performing exempt duties; and (2) AirTouch's "control policies" resulted in RSMs lacking any substantial independent judgment and discretion. Under either theory, they averred, they could "establish liability without the

need to consider any fluctuations in the amount of time RSMs spend on a particular task." Plaintiffs theorized that virtually none of the RSMs' tasks were exempt, either because the task itself was nonmanagerial, or because AirTouch's restrictive policies deprived RSMs of discretion; therefore, the amount of time RSMs spent on any particular task was irrelevant.

Plaintiffs distinguished between "quantitative" and "qualitative" approaches to the exemption, that is, the amount of time spent on particular tasks, versus the nature of the tasks. Plaintiffs urged that under *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 (*Sav-On*), at the certification stage a court must consider only the qualitative issue, determining whether each task on a purportedly finite list of RSM job duties was exempt or nonexempt, and leaving the determination of the amount of time RSMs spent on those tasks to the trier of fact. To the extent evidence was required to show how individual RSMs spent their time, statistical sampling could provide it. Plaintiffs also attacked AirTouch's evidence, contending the proffered declarations and deposition testimony failed to show RSMs had "*true* discretion and *actual* independent judgment," and Dr. Banks's study was flawed. In support, plaintiffs offered, among other things, a third declaration from Dr. Drogin and various deposition excerpts.

d. *The trial court's ruling and plaintiffs' appeal*

The trial court denied the motion for class certification, concluding plaintiffs had failed to establish common, as opposed to individual, issues, would predominate; the plaintiffs' claims were typical of the class; or that the class action device was superior.

After setting forth the appropriate legal standards and considering plaintiffs' theories of the case and the evidence presented, the court reasoned: "The Court recognizes that here there are common questions about whether a given task involved sufficient discretion or independent judgment to be exempt, but . . . how [RSMs] spend their time appears to be the more central issue for trial. The evidence before the Court is replete with examples of how RSMs spent their time differently." The court found "further evidence of individualized differences as to how RSMs spent their time" in Dr. Banks's observational study, which the court concluded provided "additional evidence of lack of commonality and [was] consistent with the record evidence that shows that RSMs vary in both tasks and amount of time spent on those tasks." "[E]ven the declarations submitted by Plaintiffs show that RSMs perform(ed) traditionally exempt tasks (albeit in accordance with [AirTouch's] policies and procedures)." The court explained: "in addition to whether the tasks performed are exempt or non-exempt, there is a dispute as to how much time putative class members spent on the tasks. Because the executive/administrative exemption is at issue here and is quantitative in nature (requiring an employee to spend over 50% of his/her time on exempt tasks to meet the exemption), 'some proof about how individual employees use their time will often be necessary to accurately determine an employer's overtime liability.' [Citation.]" The relevant regulation provided that "[t]he 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." Quoting *Duran,* the court reasoned that "in a misclassification case, such as this, 'whether a given employee is properly classified depends in large part on the employee's individual circumstances.' [Citation.]" The court found *Sav-On* and a second case, *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362 (*Martinez*), distinguishable and instead relied on *Mies v. Sephora U.S.A., Inc.* (2015) 234 Cal.App.4th 967 (*Mies*), which it found analogous. It concluded: "Weighing the foreseeable common and individualized issues, the Court finds that, on the basis of the evidence before the [C]ourt, individual issues will likely predominate over common issues." Because the meal, rest break, and derivative claims were dependent upon the misclassification issue, they were likewise not amenable to class certification.

Further, the typicality requirement was not satisfied. The evidence showed "wide variation as to how each Plaintiff spent his/her workday and managed his/her store and employees. . . . Thus, Plaintiffs' interests [may] not be necessarily aligned with class members' interests, and instead, appear to be dictated by unique circumstances."

As to superiority and manageability, the court concluded plaintiffs had failed to adequately explain how they would present evidence in the liability phase showing how the putative class members actually spent their time, nor had they demonstrated how the proposed trial plan would afford AirTouch its due process rights to present individual evidence on its affirmative defenses.[3] Under *Duran,* a mere proposal for

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[3] AirTouch did not challenge the numerosity and ascertainability requirements, and the trial court found them met. It rejected AirTouch's contention that Crawley and Hicks

statistical sampling was not an adequate evidentiary substitute for demonstrating the requisite commonality, and the sampling methodology proposed by Dr. Drogin amounted to just such a proposal.

Plaintiffs timely appealed the trial court's order.

DISCUSSION

Plaintiffs contend the trial court's ruling rests on "improper criteria and erroneous legal assumptions," and insist that its order should be reversed and the matter remanded with instructions to certify the class. AirTouch, on the other hand, urges that the trial court acted well within its discretion in concluding individual issues would predominate, and properly denied the class certification motion. We agree with AirTouch.

1. *Relevant labor law principles*

" 'Under California law, employees are entitled to overtime pay for any work in excess of eight hours in one workday, or 40 hours in any one workweek, unless the employer affirmatively establishes that the employee qualifies for a statutory exemption.' " (*Martinez, supra,* 231 Cal.App.4th at p. 373; Lab. Code, § 510, subd. (a); *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 978; *Mies*, *supra*, 234 Cal.App.4th at p. 976.) Nonexempt employees are also generally entitled to meal and rest breaks. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1018 (*Brinker*); Lab. Code, § 226.7.) Labor Code section 515 authorizes the Industrial Welfare Commission (IWC) to establish exemptions from these requirements for executive, administrative, and professional employees, who are "primarily

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were inadequate class representatives. These rulings are not at issue here.

engaged in the duties that meet the test of the exemption, [and] customarily and regularly exercise[ ] discretion and independent judgment in performing those duties." (Lab. Code, § 515, subd. (a); *Dailey, supra,* at p. 979.) For purposes of the exemptions, "primarily" means "more than one-half of the employee's worktime." (Lab. Code, § 515, subd. (e).) Exemptions from statutory overtime provisions are narrowly construed. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794.)

IWC wage order No. 7-2001 governs exemptions for employees in the mercantile industry. (Cal. Code Regs., tit. 8, § 11070, subd. 2(H) [defining mercantile industry as including businesses "operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail"].) AirTouch contends RSMs are exempt under both the "executive" and "administrative" exemptions set forth therein. Wage order No. 7-2001 provides, in pertinent part, that a person "employed in an executive capacity" means any employee who earns a minimum amount, "(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and [¶] (b) Who customarily and regularly directs the work of two or more other employees therein; and [¶] (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees 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 the exemption. The activities constituting exempt work and non-exempt work shall be construed in the

same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104–111, and 541.115–116. 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." (Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1)(a)-(e).)[4]

As relevant here, a person "employed in an administrative capacity" means any employee who earns a minimum salary, and whose duties involve "office or non-manual work directly related to management policies or general business operations of his/her

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[4] The applicable federal regulation in effect as of the date of the wage order provided that exempt work performed by a bona fide executive employee included "[i]nterviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property." (Former 29 C.F.R. § 541.102(b) (2000); see *Martinez, supra,* 231 Cal.App.4th at p. 374, fn. 14.) The employee must be "directly concerned either with the hiring or the firing and other change of status of the employees under his supervision, whether by direct action or by recommendation to those to who[m] the hiring and firing functions are delegated." (Former 29 C.F.R. § 541.106 (2000).)

employer or their employer's customers." (Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(2)(a)(i).) The employee also must be one "(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 (as such terms are defined for purposes of this section); 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 that meet the test of the exemption. 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: 29 C.F.R. Sections 541.201–205, 541.207–208, 541.210, and 541.215. 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." (*Id.*, subd. 1(A)(2)(b)-(f).)[5]

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[5] Plaintiffs discuss the current version of 29 Code of Federal Regulations part 541.202 (2017), a federal regulation pertaining to the administrative exemption. AirTouch avers that under the plain terms of the wage order, the relevant regulation is that which was in effect on January 1, 2001. AirTouch is correct. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1015; *Campbell v. Pricewaterhousecoopers, LLP* (E.D.Cal. 2008) 253 F.R.D. 586, 598 fn. 9; see also *Martinez, supra,* 231 Cal.App.4th at p. 374 & fn. 14.)

Plaintiffs also aver that both the administrative and executive exemptions require employees to customarily and

The regulations governing both the executive and administrative exemptions provide that "[t]he 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 an employee is primarily engaged in performing exempt duties. (Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1)(e), (2)(f).) Thus, "[u]nder both definitions, whether an employee is exempt depends not only upon factors related to the job, itself (e.g., 'employer's realistic expectations' and 'realistic requirements of the job'), but also 'first and foremost' upon what an employee actually does on the job (e.g., 'work actually performed'). [Citations.] 'No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt . . . .' [Citation.] Thus, even though '[e]mployers often treat all workers within a job position as either exempt or nonexempt' in reality, 'exemptions frequently

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regularly exercise discretion and independent judgment as to "matters of significance." AirTouch argues that this requirement applies only to the administrative exemption. Plaintiffs disagree, citing *United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at page 1024 & fn. 11, *Campbell v. Pricewaterhousecoopers, LLP, supra,* 253 F.R.D. at pages 599-600, several unpublished federal district court decisions, and portions of the Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual (2002). We need not reach this question because most of the tasks at issue here – hiring, firing, disciplining, training, directing employees' work, coaching, etc. – are matters of significance.

depend on how individual employees perform their jobs.' [Citation.]" (*Mies*, *supra*, 234 Cal.App.4th at p. 978.)

2. *Class certification principles and standard of review*

Code of Civil Procedure section 382 authorizes class actions " 'when 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.' " (*Sav-On, supra,* 34 Cal.4th at p. 326; *Dailey v. Sears, Roebuck & Co., supra,* 214 Cal.App.4th at p. 988.) The party seeking certification has the burden of showing the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest among class members, and substantial benefits from certification that render proceeding as a class superior to the alternatives. (*Brinker, supra,* 53 Cal.4th at p. 1021; *Sav-On, supra,* at p. 326; *Duran, supra,* 59 Cal.4th at p. 28.) 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. (*Sav-On, supra,* at p. 326; *Brinker*, *supra,* at p. 1021.) "To establish these factors, the party seeking certification must show 'that questions of law or fact common to the class predominate over the questions affecting the individual members (hereafter sometimes referred to as predominance). [Citation.]' " (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 143.)

The "certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' " (*Sav-On, supra,* 34 Cal.4th at p. 326; *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 506; *Martinez, supra,* 231 Cal.App.4th at p. 372.) Public policy "supports the use

of class actions to enforce California's minimum wage and overtime laws for the benefit of workers." (*Dailey v. Sears, Roebuck & Co., supra,* 214 Cal.App.4th at p. 987; *Sav-On, supra,* at p. 340; *Mora v. Big Lots Stores, Inc., supra,* at p. 506.)

We review the trial court's ruling for abuse of discretion. (*Sav-On, supra,* 34 Cal.4th at p. 326; *Mies*, *supra*, 234 Cal.App.4th at p. 980.) Our "inquiry 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.]' " (*Brinker, supra,* 53 Cal.4th at p. 1022; *Sav-On, supra,* at pp. 326-327.) Where a ruling on class certification turns on disputed facts or inferences to be drawn from the facts, a reviewing court has no authority to substitute its decision for the trial court's. (*Sav-On, supra,* at p. 328; *Soderstedt v. CBIZ Southern California, LLC, supra,* 197 Cal.App.4th at p. 143; *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1345.) We presume in support of the ruling the existence of every fact the trial court could reasonably deduce from the record. (*Brinker, supra,* at p. 1022.) "In determining whether the record contains substantial evidence supporting the ruling, a reviewing court does not reweigh the evidence and must draw all reasonable inferences supporting the court's order." (*Dailey v. Sears, Roebuck & Co., supra,* 214 Cal.App.4th at p. 988.)

However, " 'appellate review of orders denying class certification differs from ordinary appellate review. Under ordinary appellate review, we do not address the trial court's reasoning and consider only whether the result was correct. [Citation.] But when denying class certification, the trial court must state its reasons, and we must review those reasons for correctness. [Citation.] We may only consider the reasons stated by the trial court and must ignore any unexpressed reason that might support the ruling. [Citations.] [¶] We will affirm an order denying class certification if any of the trial court's stated reasons was valid and sufficient to justify the order, and it is supported by substantial evidence. [Citations.]' " (*Mies*, *supra,* 234 Cal.App.4th at pp. 980-981; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530; *Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 726.)

3. *The trial court did not abuse its discretion in denying class certification*

Plaintiffs' primary contention on appeal is that the trial court erred by concluding individualized, rather than common, issues and proof predominate. We disagree.

a. *Commonality standards*

The " 'ultimate question' for predominance 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.' " (*Duran, supra,* 59 Cal.4th at p. 28; *Brinker, supra,* 53 Cal.4th at pp. 1021-1022.) " 'The answer hinges on "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter,

likely to prove amenable to class treatment." [Citation.]' " (*Duran, supra,* at p. 28; *Brinker, supra,* at p. 1021.) "Defenses that raise individual questions about the calculation of *damages* generally do not defeat certification. [Citation.] However, a defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability. . . . [Citation.] 'Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability.' " (*Duran, supra,* at p. 30.) Class treatment is not appropriate if each class member would be required to litigate numerous and substantial questions to determine the employer's liability. (*Mies, supra,* 234 Cal.App.4th at p. 979; *Mora v. Big Lots Stores, Inc., supra,* 194 Cal.App.4th at pp. 506-507; *Soderstedt v. CBIZ Southern California, LLC, supra,* 197 Cal.App.4th at p. 143.)

"Because actions asserting misclassification will typically require an inquiry into a particular job type and into the work actually done by individuals within that job category, these actions often involve both common and individualized issues. The inquiry into a job's requirements and an employer's expectations likely involves common issues." (*Mies, supra,* 234 Cal.App.4th at p. 979; *Duran, supra*, 59 Cal.4th at p. 27; *Sav-On, supra,* 34 Cal.4th at pp. 336-337 ["considerations such as 'the employer's realistic expectations' . . . and 'the actual overall requirements of the job' . . . are likely to prove susceptible of common proof"; however, "[a]ny dispute over 'how the employee actually spends his or her time' . . . has the potential to generate individual issues"].) The "inquiry into what work is actually done . . . can be heavily individualized." (*Mies, supra,* at p. 979;

Soderstedt v. CBIZ Southern California, LLC, supra, 197 Cal.App.4th at p. 148.) "Labor Code exemptions frequently depend on how individual employees perform their jobs. When an exemption defense turns on such individualized issues, questions about how, or whether, the case can proceed as a class action become particularly thorny." (*Duran, supra,* at p. 25.) When both common and individual issues exist, the question for the trial court is which predominate. (*Mies, supra,* at p. 979.)

On the other hand, individual issues "will not *necessarily* overwhelm common issues when a case involves exemptions premised on how employees spend the workday," (*Duran, supra,* 59 Cal.4th at p. 31), and class treatment is not inappropriate simply because there may be some individual issues at some point in determining a class member's eligibility for relief. (*Sav-On, supra,* 34 Cal.4th at pp. 333-334.) Individual issues do not defeat class certification where they may be effectively managed. (*Ayala v. Antelope Valley Newspapers, Inc., supra,* 59 Cal.4th at p. 539.) "Where standardized job duties or other policies result in employees uniformly spending most of their time on nonexempt work, class treatment may be appropriate even if the case involves an exemption that typically entails fact-specific individual inquiries." (*Duran, supra*, at p. 31.)

b. *Substantial evidence supported the trial court's ruling*

Examining the plaintiffs' theory of recovery and assessing the nature of the legal and factual disputes likely to be presented (*Dailey v. Sears, Roebuck & Co., supra,* 214 Cal.App.4th at p. 988), we conclude substantial evidence supported the trial court's finding that individual issues predominated. Plaintiffs' principal theory of liability was that RSMs do not qualify for the exemptions because many of their tasks are, by their nature,

nonmanagerial; and in any event, AirTouch's restrictive, uniform policies and procedures made it impossible for them to exercise discretion or independent judgment when completing *any* task. "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.) As explained in *Dailey,* in which the plaintiff advanced a similar theory: "Resolution of this dispute will require proof at trial not only of [the employer's] expectations regarding how its managerial employees perform their duties, as expressed in its job descriptions and operational policies and procedures, but also of how these policies and procedures actually impact the potential class—i.e., whether proposed class members in fact engage primarily in nonexempt activities. [Citations.] For class certification purposes, then, [plaintiff] was required to present substantial evidence that proving *both* the existence of [the employer's] uniform policies and practices *and* the alleged illegal effects of [the employer's] conduct could be accomplished efficiently and manageably within a class setting. [Citations.]" (*Dailey v. Sears, Roebuck & Co., supra,* at p. 989.) Thus, as contemplated by the relevant regulation, examination of the work actually done by RSMs was, first and foremost, necessary to determination of whether the exemptions applied. (See Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1)(e).)

Plaintiffs do not appear to dispute that there was sufficient evidence demonstrating wide variations in the amount of time RSMs spent on given tasks during the workday. AirTouch

presented, through numerous declarations, evidence that individual RSMs spent different amounts of time on different tasks depending on a variety of factors, including the size and location of the store, the experience level and performance of the RSM's subordinates, store demographics, and the RSM's personal preferences, among other things. Dr. Banks's observational study provided further evidence, concluding that "RSMs vary widely in tasks performed and in the amount of time spent on groups of tasks."

AirTouch also presented substantial evidence, including the declarations and/or deposition testimony of proposed class members and corporate personnel, showing that the policies and practices identified by plaintiffs did not have the uniform effect of depriving RSMs of discretion and requiring them to engage in only, or primarily, nonexempt work.

A few examples are illustrative. Plaintiffs theorized that RSMs lacked discretion in hiring, disciplinary, and termination decisions; instead, all real discretion on these matters rested with the DM and HR. Plaintiffs argued that the requirement RSMs follow progressive discipline requirements, and document disciplinary issues using standardized forms, proves a lack of discretion. Of course, an employee does not lack discretion where his or her recommendations on these issues are given serious consideration by a final decision maker. The " ' "fact that an employee's decisions may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment." ' " (*Soderstedt v. CBIZ Southern California, LLC, supra,* 197 Cal.App.4th at p. 148; *United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1026

["Supervisors and managers are not rendered mere automatons because they must navigate each workday mindful of regulations and internal policies governing their work environment and the employees they oversee"]; *Zelasko-Barrett v. Brayton-Purcell, LLP* (2011) 198 Cal.App.4th 582, 591 [employee may exercise discretion and independent judgment even if his or her decisions are subject to review].) Therefore, plaintiffs' theory that AirTouch's store standardization deprived RSMs of discretion turned on whether and how RSMs actually participated in these activities.

To this end, AirTouch presented evidence showing some RSM's routinely interviewed candidates and made hiring recommendations that were always or usually followed. Two RSMs stated they had hired seasonal temporary workers without approval. Several used AirTouch's interviewing materials only as a guide, and asked additional questions of their own choosing. Other evidence showed RSMs had discretion to issue verbal warnings and informal counseling without approval from HR or a DM, and their recommendations were seriously considered and usually followed. RSMs also had discretion regarding whether a subordinate's performance issues warranted starting the formal discipline process in the first place.

Similarly, AirTouch's evidence showed that when completing performance appraisals, RSMs did not simply fill out a preprinted form with little thought. Some RSMs stated that preparing the appraisals was a time-consuming process, in which they completed an overall summary of the employee based on their own observations, in addition to the standardized evaluation of the employee's sales numbers. RSMs had discretion

to select a salary increase within an approved range, and the raise received was based on the performance appraisal.

AirTouch's evidence also suggested coaching and training duties were not as routinized as plaintiffs suggest. RSMs stated they adjusted their coaching styles based on their assessment of subordinates' needs and personalities. It was a part of the job to assess individual and team performance and initiate developmental plans. Some RSMs viewed the coaching forms provided by AirTouch as a guide, and felt free to add any additional categories or information. One RSM preferred to use "role play" exercises, while others relied on skill drills. One led weekend workshops to train employees on new products or services; another stated it was his responsibility to evaluate his staff and determine whether additional training was necessary.

As to the training provided to RSMs, one RSM stated that he did not feel the training material required him to run his store in a specific way. Another stated that if the training suggestions did not work for him, he had no compunction about disregarding them in his store.

There was also evidence that AirTouch's control over stores left room for RSMs to exercise discretion. Some RSMs stated that they viewed the "planogram" as a guide, and modified it without preapproval. For example, one discussed omitting a wall of prepaid phones in affluent areas; another mentioned removing phones that were not selling. One explained that he generally had "discretion to do whatever makes business sense." Another stated she had discretion not to sell particular merchandise. Another explained how she used discretion to modify her store's focus depending on the area's demographics. In West Hollywood, where the clientele was tech-savvy, she had her staff focus on

selling Apple products. In a community where retirees were prevalent, she focused on training staff to teach the clientele how to use tablet devices to help them feel comfortable with the new technology. In another area, Samsung phones were very popular and the RSM focused her staff on selling that product line.

Many RSMs explained that they initiated a wide variety of contests to motivate employees, without preapproval from the DM. RSMs also averred they exercised discretion in scheduling, approving vacation requests and overtime, ensuring their strongest workers were scheduled during peak periods, working around individual employee scheduling constraints, such as school schedules, and ensuring the schedule was consistent and fair. One RSM explained that he felt it would be better for morale if inventory duties were rotated among staff, and put such a system into place. RSMs had discretion as to when to hold staff meetings, and what to cover. As to the sales process, AirTouch's evidence showed that some RSMs viewed the sales sequencing approach as a guideline that could be tailored to each store. RSMs were responsible to ensure subordinates took meal and rest breaks and complied with AirTouch's code of conduct and policies prohibiting harassment and discrimination. RSMs had the authority to assign tasks to employees.

And, RSMs uniformly agreed that they were responsible for their stores' overall performance. The amount of control to which an RSM was subject depended in part on the style of the DM; some were "micromanagers," whereas others employed a hands-off approach, leaving the manager to his or her own devices as long as the store was performing satisfactorily.

In short, the evidence before the court was in conflict. AirTouch's evidence tended to show that its corporate policies did

not eliminate managerial discretion in the fashion posited by plaintiffs; plaintiffs' evidence suggested otherwise. Given this conflict, the trial court could reasonably conclude that the question of whether store standardization placed RSMs outside the executive or administrative exemptions depended on an analysis of how each RSM operated, and was not susceptible to common proof. The trial court had discretion to weigh the evidence and credit AirTouch's evidence. " 'Critically, if the parties' evidence is conflicting on the issue of whether common or individual questions predominate . . . the trial court is permitted to credit one party's evidence over the other's in determining whether the requirements for class certification have been met . . . .' " (*Mies, supra,* 234 Cal.App.4th at p. 981; *Dailey v. Sears, Roebuck & Co.*, *supra*, 214 Cal.App.4th at p. 991.) Given the evidence and the deference owed to the trial court, we conclude sufficient evidence supported its finding that individual, rather than common, issues would predominate in adjudication of plaintiffs' theory. (See, e.g., *Mies, supra,* at p. 982; *Mora v. Big Lots Stores, Inc., supra,* 194 Cal.App.4th at p. 509; *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 734; *Dailey v. Sears, Roebuck & Co.*, *supra*, at p. 997.)

c. *The trial court did not rely on improper criteria or erroneous legal assumptions*

Plaintiffs urge that the trial court erred by failing to consider their primary theory: that RSMs cannot customarily and regularly exercise discretion and independent judgment on matters of significance, because due to centralized control and store standardization, they "perform virtually *no* exempt tasks." (See 29 C.F.R § 541.107(a) (2000) ["A person whose work is so completely routinized that he has no discretion does not qualify

for" the executive exemption].) But plaintiffs are incorrect. The trial court expressly considered this theory. Its order states: "In support of the contention that RSMs were misclassified, Plaintiffs essentially contend that: (1) Defendant controlled all aspects of RSMs' job duties and restricted their discretion and independent judgment, thereby reducing them to non-exempt employees . . . ." The trial court listed 19 task categories that plaintiffs alleged involved such uniform policies, and noted plaintiffs' contention that, "as a result of such policies and procedures, RSMs' job duties have been 'reduced . . . to clerical duties.' " The court also clearly summarized plaintiffs' theory during oral argument on the motion.

Mies v. Sephora U.S.A., Inc. rejected a similar contention, reasoning: "the trial court did recognize there would likely be common questions about whether a given task involved sufficient discretion or independent judgment to be exempt. Nevertheless, it viewed 'how Specialists spend their time' as being the more 'central' issue for trial. Resolution of this issue, the court concluded, would likely turn less on Sephora's general operational policies, and more on evidence, as in the Specialists' declarations, pertaining to the nature of each individual's actual work. The court also acknowledged the policies' detailed nature, but reasonably found such operational minutia offered little insight into classwide liability, especially in light of the declarations showing Specialists handled their time very differently, varying as to the nature and level of the tasks and the time spent on those tasks. In the end, the trial court weighed the foreseeable common and individual issues, and reasonably concluded the Specialists' proper classification would likely hinge on individualized proof. This sort of balancing analysis was

appropriate. [Citation.] [¶] Moreover, the mere fact Sephora has common policies applicable to all employees, including Specialists, cannot, alone, compel class certification. [Citations.]" (*Mies, supra,* 234 Cal.App.4th at pp. 983-984.) The same is true here.

Plaintiffs contend that the trial court improperly considered commonality in regard to the "quantitative" aspect of the exemptions (i.e., the amount of time RSMs spent on particular tasks), but failed to consider commonality in regard to the "qualitative" aspect (i.e., the nature of the work performed as demonstrated by the "realistic requirements of the job" and the "full range of evidence," including job descriptions, policies, and testimony of supervisors and managers). They aver that analysis of the time spent on various tasks, while relevant to the "outside salesperson" exemption (see *Ramirez v. Yosemite Water Co., supra,* 20 Cal.4th 785), is inapplicable to the managerial and administrative exemptions at issue here. Because the managerial and administrative exemptions do not apply if *either* the 50 percent or the "management-type activity" requirement is not met, they argue, if either requirement can be litigated on a classwide basis, certification is warranted. According to plaintiffs, *Sav-On* and *Martinez* require that "when evaluating the administrative and executive exemptions, the court does not conduct a quantitative actual activity analysis on an individual basis. Instead, the trial court applies a pragmatic qualitative approach that considers a variety of evidence." Thus, they argue the trial court erred by premising its ruling entirely on the fact individualized proof was required in regard to the amount of time individual RSMs spent on specific tasks.

We disagree. First, while the trial court concluded that how RSMs spend their time "appears to be the more central issue for trial," and focused primarily on this point, its ruling does not indicate it failed to consider the nature of the work. The trial court relied heavily on the reasoning in *Mies,* including quotation of *Mies*'s statement that the employees at issue there handled their "time very differently, varying *as to the nature and level of the tasks and the time spent on those tasks*." (*Mies, supra,* 234 Cal.App.4th at p. 983, italics added.) There is no showing that the trial court failed to consider plaintiffs' evidence, including the job descriptions, training materials, and declarations offered.

More to the point, neither *Sav-On* nor *Martinez* compel the conclusion that the amount of time an employee spends on particular tasks must be excluded from the commonality inquiry. To address plaintiffs' contention, a brief recap of *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785 is necessary. There, the plaintiff was employed as a water route sales and delivery person. In that capacity he performed a combination of sales and non-sales duties. The employer classified him as exempt based on the "outside salesperson" exemption. (*Id.* at pp. 789-790.) The trial and appellate courts concluded he qualified for the outside salesperson exemption based on their reading of federal regulations that substantially differed from the applicable California regulation defining the term. (*Id.* at pp. 790, 796.) The federal regulations focused on whether the employee's primary purpose was sales, not on how much time was spent selling; the California definition turned on whether he worked more than half the time in sales activities outside the business. (*Id.* at p.797.) The Supreme Court reversed, concluding that the

federal regulation was inapplicable. (*Id.* at p. 790.) It explained the California Wage Order "incorporates a quantitative method for determining whether an employee is an outside salesperson that differs in some respect from the qualitative method employed under federal law," and the lower courts erred by applying the federal method without acknowledging the differences between the two schemes. (*Id.* at p. 798.) *Ramirez* then considered whether the number of hours worked on sales-related activities should be determined by the number of hours the employer claimed the employee *should* be selling, or by the number of hours the employee *actually* spent selling. Both approaches were problematic: under the first, the employer could improperly make an employee exempt by crafting an idealized job description, whereas under the second, the employee who fell below the 50 percent mark due to his own substandard performance should not be able to evade a valid exemption. (*Id.* at p. 802.) *Ramirez* concluded that a trial court should inquire into the realistic requirements of the job, considering "first and foremost, how the employee actually spends his or her time," along with whether the employee's practice diverges from the employer's realistic expectations. (*Ibid.*)

In *Sav-On,* the court considered whether an order *granting* class certification was proper. Plaintiffs there alleged that salaried managers were misclassified as exempt based on their titles and job descriptions, without regard to their actual work. (*Sav-On, supra,* 34 Cal.4th at pp. 324-325.) Plaintiffs argued that the stores' operations were standardized and the managers' duties were similar, regardless of store location. The employer argued that whether any individual class member was exempt depended on which tasks the manager actually performed, and

the amount of time he or she actually spent on which tasks; and the specific tasks and time spent varied depending upon multiple factors, such as store location and size, volume, etc. (*Id.* at p. 325.)

The appellate court reversed the trial court's grant of class certification, but our Supreme Court concluded the trial court's exercise of discretion was proper. The record contained "substantial, if disputed, evidence that deliberate misclassification was defendant's policy and practice. The record also contain[ed] substantial evidence that, owing in part to operational standardization . . . classification based on job descriptions alone resulted in widespread de facto misclassification. Either theory is amenable to class treatment." (*Sav-On, supra,* 34 Cal.4th at p. 329, fn. omitted.) "[A] reasonable court crediting plaintiffs' evidence could conclude it raises substantial issues as to both whether a misclassification policy existed and whether . . . a uniform classification policy was put into practice under the standardized conditions alleged. A reasonable court, even allowing for individualized damage determinations, could conclude that, to the extent plaintiffs are able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception, a class action would be the most efficient means of resolving class members' overtime claims." (*Id.* at p. 330.)

The court continued: "The record contains substantial evidence suggesting that the predominant issue in dispute is how the various tasks in which [managers] actually engaged should be classified—as exempt or nonexempt. We previously have recognized in an overtime exemption case that task classification is a mixed question of law and fact appropriate for a court to

address separately from calculating the amount of time specific employees actually spend on specific tasks. (*Ramirez v. Yosemite Water, Inc.*[, *supra*,] 20 Cal.4th 785, 803, fn. 5 . . . .) [¶] On the one hand, each of the 51 declarations by the [managers] describing their actual work (including specific tasks) that defendant submitted in opposing certification states that the declarant spends a majority of his or her time on *managerial* tasks. Plaintiffs characterize most of that same work as *non*managerial. Regardless of who is correct, the fact is the tasks discussed in both defendant's and plaintiffs' submissions comprise a reasonably definite and finite list." (*Id.* at pp. 330-331.) Whether " 'certain identical work tasks are "managerial" or "non-managerial' " could " ' "easily be resolved on a class-wide basis by assigning each task to one side of the "ledger." ' " (*Id.* at p. 331.) Variations in the "mix of actual work activities undertaken during the class period by individual" managers did not bar class certification as a matter of law. (*Id.* at p. 335.)

In response to the employer's argument that the central factual issues were " 'the actual tasks performed by class members and the amount of time spent on each of those tasks,' " *Sav-On* explained that predominance is a comparative concept, and individual issues do not render class certification inappropriate so long as they may be effectively managed. (*Sav-On, supra,* 34 Cal.4th at p. 334.) The trial court was therefore within its discretion to credit plaintiffs' evidence over defendant's, and the appellate court had "no authority to substitute [its] own judgment for the trial court's respecting this or any other conflict in the evidence." (*Id.* at p. 331.) The court explained: "*We need not conclude that plaintiffs' evidence is compelling, or even that the trial court would have abused its*

discretion if it had credited defendant's evidence instead." (*Ibid.,* italics added.)

Accordingly, *Sav-On* rejected the employer's argument that *Ramirez* barred class certification. *Ramirez* was "no authority for constraining trial courts' 'great discretion in granting or denying certification' [citation] or . . . for applying a particular set of 'factors' whenever plaintiffs in an overtime case seek class certification." (*Sav-On, supra,* at p. 336.) *Ramirez* "did not . . . purport to limit the types of evidence or methods of proof that parties to overtime disputes may bring to bear. . . . [*Ramirez*] simply counseled trial courts to avoid sole reliance either on 'an employer's job description' or on 'the actual average hours the employee spent on sales activity' [citation]." (*Ibid.*) While recognizing that any dispute about how the employee actually spends his or her time has the potential to generate individual issues, *Sav-On* counseled that "considerations such as 'the employer's realistic expectations' [citation] and 'the actual overall requirements of the job' [citation] are likely to prove susceptible of common proof." (*Id.* at pp. 336-337.) Thus, class certification was not barred simply because some individual managers may have "labored below the 50 percent mark on nonexempt tasks notwithstanding defendant's alleged class-wide policies and practices either designed or destined to assure the contrary." (*Sav-On, supra,* 34 Cal.4th at p. 337.) *Ramirez* did not create a "requirement that courts assess an employer's affirmative exemption defense against every class member's claim before certifying an overtime class action," a reading that would improperly place the burden of proving an exemption on the employee, rather than the employer. (*Id.* at pp. 337-338.)

In our view, *Sav-On* is not authority for the proposition that a court making a commonality determination must always ignore variances in the amount of time spent by different class members on different tasks. The court noted that the "certification of a class is a discretionary decision that demands the weighing of many relevant considerations." (*Sav-On, supra,* 34 Cal.4th at p. 336.) *Dailey v. Sears, Roebuck & Co.,* is instructive. There, the plaintiff, relying on *Sav-On,* argued that conflicts in the parties' submissions regarding how much time proposed class members spent "on what tasks, and whether those tasks are managerial and exempt, or nonmanagerial and nonexempt, do not preclude class certification, because a reasonably definite and finite list of tasks performed by Managers and Assistant Managers could be developed." (*Dailey v. Sears, Roebuck & Co.*, *supra*, 214 Cal.App.4th at p. 995.) *Dailey* explained: "In *Sav-On*, the Supreme Court observed that the predominant issue in that case appeared to be 'how the various tasks in which [class members] actually engaged should be classified—as exempt or nonexempt.' [Citation.] That issue could be resolved in a class setting because 'both defendant's and plaintiffs' submissions comprise[d] a reasonably definite and finite list' of the tasks performed by class members. [Citation.]" (*Ibid.*) But the parties' dispute in *Dailey* was "not focused on whether the various duties of Managers and Assistant Managers are properly characterized as exempt or nonexempt, but on whether Sears has *implemented policies and practices* that *cause* these employees to spend most of their time engaging in nonexempt work. Second, the parties [in *Dailey*] pointedly did not agree that a 'reasonably definite and finite list' of tasks performed by *all* Managers and Assistant Managers

could be created." (*Id.* at pp. 995-996, fn. omitted.) Instead, the evidence showed that creation of such a list was problematic because tasks varied based on the store location, the season, sales volume, staffing levels, and other factors. (*Id.* at p. 996.) Further, as *Mies* noted, in *Sav-On* "the trial court *did not credit* evidence time spent on tasks varied significantly from employee to employee, such that, in spite of any variations, the dispute was primarily over how to characterize the tasks the employees performed." (*Mies, supra,* 234 Cal.App.4th at p. 983, fn. 12; see *Duran, supra,* 59 Cal.4th at p. 31 [in *Sav-On,* the evidence showed "all plaintiffs performed jobs that were highly standardized. As a result, class members performed essentially the same tasks, most of which were nonexempt as a matter of law"].)

Here, most of the duties ascribed to RSMs are *not* nonexempt as a matter of law. Interviewing, hiring, disciplining, training, directing work, and the like are generally exempt tasks. (See Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1); former 29 C.F.R. 541.102 (2000).) As in *Dailey,* and unlike in *Sav-On,* the parties' dispute is not about which tasks in a finite list are properly characterized as exempt or not; it is about whether the effect of AirTouch's policies was to transform exempt duties into routinized, nonexempt tasks. The trial court could reasonably conclude plaintiffs' theory – that AirTouch's standardized control over RSMs converted managerial duties into non-exempt ones – could only be adjudicated by examining how RSMs actually performed their jobs and how the policies played out in practice, an issue that could defeat commonality. If a trier of fact concluded that some of the RSMs' duties were exempt and some were not, consideration of whether the exempt tasks occupied

more than half the RSMs' time would become necessary to determine whether the exemption applied. (See Lab. Code, § 515, subds. (a), (e).) Consideration of whether this requirement is susceptible to classwide proof is not irrelevant.

And, whether the trial court here *could have* certified a class is not the question before us. Instead the issue is whether its ruling denying certification was supported by the evidence, as we have discussed. (*Dailey v. Sears, Roebuck & Co., supra,* 214 Cal.App.4th at p. 997.) One key teaching of *Sav-On* is that an appellate court must not disturb the trial court's exercise of discretion where its ruling is supported by substantial evidence. *Sav-On* did not hold that class certification was required in that case, but only that granting the certification motion was within the trial court's discretion. (See *Sav-On, supra,* 34 Cal.4th at p. 331.)

Nor do *Martinez* or *Ayala* compel the result plaintiffs seek. In *Ayala,* newspaper delivery carriers alleged they had been improperly treated as independent contractors rather than employees. (*Ayala v. Antelope Valley Newspapers, Inc., supra,* 59 Cal.4th at p. 528.) The trial court denied class certification, finding that resolving the carriers' status would require individualized inquiries. (*Id.* at p. 529.) Under the applicable common law test for distinguishing employees from independent contractors, the question was "not how much control a hirer *exercises,* but how much control the hirer retains the *right* to exercise." (*Id.* at p. 533.) Thus, at the certification stage the issue was not whether the employer actually controlled the manner and means of newspaper delivery, but whether its right to control the carriers was sufficiently uniform. (*Ibid.*) The carriers' relationship with the newspaper was governed by a form

contract, which the trial court failed to adequately consider. (*Id.* at p. 534.) The trial court erroneously focused on the "wrong legal question" and "rejected certification based not on differences in Antelope Valley's right to exercise control, but on variations in how that right was exercised." (*Id.* at pp. 535, 528.) But *Ayala* does not assist plaintiffs. Here, the key question is not AirTouch's right to control RSMs; instead it is whether the effect of the company's policies was to deprive RSMs of discretion and independent judgment to such an extent that typically exempt tasks became nonexempt. In light of the evidence, the trial court could reasonably conclude that plaintiffs' theory, unlike that at issue in *Ayala,* does require consideration of how the policies at issue affected individual managers.

In *Martinez,* the appellate court concluded the trial court abused its discretion by denying the plaintiffs' motion for certification of a class of salaried managerial employees who had allegedly been misclassified. Plaintiffs alleged that the employer's operations, hiring, training, and other practices were uniform through the restaurant chain. Because the restaurants were typically understaffed, managers routinely filled in where needed, working as cooks, servers, bussers, hosts, stockers, bartenders, and kitchen staff. (*Martinez*, *supra*, 231 Cal.App.4th at pp. 368-369.) Each of plaintiffs' declarants estimated he or she had spent the majority of time performing such hourly tasks, but later admitted they were unable to estimate the amount of time spent on exempt versus nonexempt tasks. (*Id.* at pp. 369, 371.) The trial court concluded all putative class members performed similar duties and responsibilities pursuant to a finite task list. (*Id.* at p. 371, fn. 12.) But it found plaintiffs' claims were not typical and they were inadequate class representatives because

they were unable to estimate the number of hours spent on individual exempt and nonexempt tasks, and their job duties varied from day to day. Common questions did not predominate because there were "significant individual disputed issues of fact relating to the amount of time spent by individual class members on particular tasks," and such variability would require adjudication of the affirmative defense of exemption for each class member. (*Id.* at pp. 371-372.)

Our colleagues in Division Seven reversed. Citing *Ayala v. Antelope Valley Newspapers, Inc., supra,* 59 Cal.4th 522, *Martinez* cautioned that courts should "avoid focusing on the inevitable variations inherent in tracing the actions of individuals and to instead focus on the policies – formal or informal – in force in the workplace." (*Martinez*, *supra*, 231 Cal.App.4th at p. 380.) The plaintiffs' theory of liability – that by classifying all managerial employees as exempt, the employer violated overtime laws -- was " 'by its nature a common question eminently suited for class treatment.' " (*Id.* at p. 380.) Significant common issues pervaded: the employer operated a chain of restaurants governed by the same policies and procedures; exempt employees were expected to work at least 50 hours per week; and the parties had identified a finite task list, suggesting jobs were " 'highly standardized.' " (*Id.* at p. 380.) The "gist of plaintiffs' claim" was that "regardless of the patina of managerial discretion expressed in their job description, they functioned consistently as utility workers, cross-trained in all tasks, who could be assigned to fill in where needed without affecting the labor budget or requiring overtime compensation. *The crux of the matter, therefore, lies in whether a typically nonexempt task becomes exempt when performed by a managerial*

employee charged with supervision of other employees." (*Id.* at p. 381, italics added, fn. omitted.) *Martinez* reasoned that under *Sav-On,* "courts in overtime exemption cases must proceed through analysis of the employer's realistic expectations and classification of tasks rather than asking the employee to identify in retrospect whether, at a particular time, he or she was engaged in an exempt or nonexempt task." (*Id.* at p. 382.) "The court here must ask whether [the employer's] realistic expectations and the actual requirements of the job resulted in the exercise of supervisorial discretion by managerial employees or instead relegated employees to [a] utility role." (*Id.* at p. 383.) By focusing on the employees' inability to identify what tasks they performed and for what purpose, *Martinez* reasoned, the trial court failed to consider *Sav*-On's explicit direction that courts need not assess an employer's affirmative exemption defense against every class member's claim before certification. (*Ibid.*, citing *Sav-On, supra,* 32 Cal.4th at pp. 337-338.)

Martinez is distinguishable from the case at bar. For one thing, there is substantial evidence RSMs do not share the same level of uniformity in work as did the subordinate managers in *Martinez.* (See *Mies, supra,* 234 Cal.App.4th at p. 986, fn. 18.) For another, here the question is not whether typically nonexempt tasks such as bussing tables or tending bar become managerial when performed by a managerial employee. This case presents the opposite question: whether a typically *exempt* task (such as training, interviewing, directing work, disciplining) becomes *nonexempt* when a chain store allegedly exercises too much control over managerial employees. As we have explained, the trial court could reasonably conclude that the answer to that question would depend on individualized inquiries into how the

uniform policies actually affected particular RSMs, including the amounts of time managers spent on various tasks. (See generally *Mies, supra,* at p. 986, fn. 18.)

Tellingly, *Martinez* distinguished between *general managers*, who were unlikely to share the duties of assistant managers, and "lower . . . rung" managers, who were more likely to engage in tasks common to hourly employees. (*Martinez*, *supra*, 231 Cal.App.4th at p. 376.) *Martinez* ruled that on remand, the trial court could exercise its discretion to create a general manager subclass, or exclude them entirely from the class definition. (*Ibid.*) Thus, *Martinez* did *not* hold that the trial court's reasoning was faulty as to general managers, who are analogous to the RSMs at issue here.

Moreover, *Martinez* was careful to state that it did not disagree with the "substantial case authority, including [its] own, upholding trial court decisions not to certify class actions for claims similar to those raised" in *Martinez.* (*Martinez*, *supra*, 231 Cal.App.4th at p. 384.) Indeed, "courts have routinely concluded that an individualized inquiry is necessary even where the alleged misclassification involves application of a uniform policy, because the policy may properly classify some employees as exempt but not others." (*Soderstedt v. CBIZ Southern California, LLC, supra,* 197 Cal.App.4th at p. 153; see *Dailey v. Sears, Roebuck & Co., supra,* 214 Cal.App.4th at pp. 992-997; *Mora v. Big Lots Stores, Inc., supra,* 194 Cal.App.4th at pp. 507-512; *Arenas v. El Torito Restaurants, Inc., supra,* 183 Cal.App.4th at pp. 733-735; *Mies, supra,* 234 Cal.App.4th at pp. 981-985; *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1431-1433.)

Nor did the trial court here erroneously base its ruling on the merits, as plaintiffs insist. (See *Dailey v. Sears, Roebuck & Co., supra,* 214 Cal.App.4th at p. 988 ["The court may consider the elements of the claims and defenses, but should not rule on the merits unless necessary to resolve the certification issues"].) To the contrary, it considered whether common issues were likely to predominate and expressly acknowledged that the "focus of the court is not on whether plaintiffs can affirmatively prove their claims at trial, but rather, whether the class action 'will splinter into individual trials,' given the disputed facts and defendants' due process right to present individual evidence on the triable issues." (See *Mies, supra,* 234 Cal.App.4th at p. 985; *Arenas v. El Torito Restaurants, Inc., supra,* 183 Cal.App.4th at p. 734 [trial court did not improperly require plaintiffs to prove they could prevail on the merits, but simply considered whether their theory of recovery was, as an analytical matter, amenable to class treatment]; *Dailey, supra,* at pp. 990-991; *Mora v. Big Lots Stores, Inc., supra,* 194 Cal.App.4th at p. 510.)

Finally, we do not detect error in the trial court's conclusion that Dr. Drogin's statistical sampling proposal could not substitute for evidence of commonality during the liability phase of trial. *Duran* considered whether surveys and statistical sampling are appropriate tools to establish liability in a class context. The court reasoned: "if 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 [citation], 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.' " (*Duran, supra*, 59 Cal.4th at p. 31.) "If statistical evidence will comprise part of the proof on class action claims, the court should consider *at the certification stage* whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action." (*Id.* at pp. 31–32.)

Here, Dr. Drogin proposed that random sampling could be used to obtain "representative evidence about the nature of the job, tasks performed, and time spent on various tasks." He did not base his opinion on actual evidence in the case, conduct surveys or talk with class members. The trial court therefore did not abuse its discretion in concluding this was a mere proposal for future statistical sampling that could not substitute for evidence of commonality.

In light of our conclusions herein, we need not further consider the trial court's rulings on the related questions of typicality and manageability. As plaintiffs' claims regarding meal and rest periods, record keeping, payment of wages due upon termination, and unfair competition are all derivative of the misclassification claim, the trial court did not err by concluding they were unsuitable for certification.

DISPOSITION

The trial court's order is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.*

We concur:

LAVIN, Acting P. J.

JOHNSON (MICHAEL), J.**

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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