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CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH LANZARONE, for himself and other members of the general public similarly situated,

Plaintiffs,

vs.

Guardsmark Holdings, Inc. dba Guardsmark, LLC, a Delaware corporation; and Does 1 through 20, Inclusive,

Defendant.

CASE NO. CV06-1136 R (PLAx)

ORDER DENYING PLANTIFF'S MOTION FOR CLASS CERTIFICATION WITH PREJUDICE

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On August 14, 2006, the Court heard Plaintiffs' motion for class certification. Miguel Caballero of the Law Offices of Herbert Hafif represented Plaintiff, and Malcolm A. Heinicke of Munger, Tolles & Olson LLP represented Defendant. For the following reasons, the motion is denied with prejudice.

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On or about January 12, 2006, Plaintiff Joseph Lanzarone ("Plaintiff") filed this action on behalf of himself and others purportedly similarly situated. He alleged that his former employer Defendant Guardsmark, LLC ("Guardsmark") failed to provide him with meal and rest periods as required by California law. Plaintiff filed this action in California state court, and Guardsmark timely removed it to this Court. It is undisputed that the Court has original and removal jurisdiction over this matter pursuant to 28 U.S.C. §§ 1332, 1441 & 1453.

On April 20, 2006, the Court granted Guardsmark's motion to strike. Among other things, the Court held that the monetary remedy sought for alleged meal and rest period violations under California Labor Code section 226.7 constitutes a penalty. The Court thus concluded that Plaintiff could not seek this remedy under the California Unfair Competition Law. This ruling also meant that the pertinent statute of limitations for Plaintiff's meal and rest period claims was, at most, one year under California Code of Civil Procedure section 340.

In the wake of this Order, on or about April 27, 2006, after Plaintiff had voluntarily resigned from Guardsmark, Plaintiff filed a First Amended Complaint ("FAC"). Through this FAC, Plaintiff added two related claims that a Guardsmark supervisor orally misled him to believe that his hourly uniform maintenance allowance was not part of the total hourly rate orally offered to him at his time of hiring. Plaintiff sought to bring these claims on a class basis as well.

Plaintiff has now moved the Court for class certification. The Court has considered all papers submitted in connection with to this motion, and the entire record. This includes the instant motion, the opposition, the reply, the sur-reply and

the response to the sur-reply, and it also includes all declarations and deposition testimony submitted by the parties. (Because certification is denied even if all declarations were considered, the Court denies without prejudice Guardsmark's evidentiary objections to the declarations of other officers submitted by Plaintiff.)

I. CLASS CERTIFICATION STANDARDS

"[D]istrict courts must conduct a rigorous analysis into whether the prerequisites of Rule 23 are met before certifying a class." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233 (9th Cir. 1996). Plaintiff bears the burden of establishing all the requirements of Rule 23. See, e.g., Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). Because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," district courts need not accept all allegations in the complaint and instead must look past the pleadings "to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative." Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982); Staton v. Boeing, 327 F.3d 938, 954 (9th Cir. 2003); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675, 677-78 (7th Cir. 2001).

To meet this burden and satisfy this rigorous analysis, the plaintiff must demonstrate that all of the requirements of Rule 23(a) are satisfied, including the requirements that the plaintiff's claims be typical of the claims alleged for the class and that the plaintiff adequately represents the interests of the class. In addition, in cases seeking primarily monetary relief, like this one, the plaintiff must also meet the requirements of Rule 23(b)(3), i.e., the Plaintiff must show both that common questions of law and fact predominate over individual questions and also that a class action is superior to alternate means of resolving the dispute. Here, because Plaintiff fails to satisfy two of the Rule 23(a) requirements and because he also fails to satisfy two of the Rule 23(b)(3) requirements, his motion for certification fails on four independently sufficient grounds.

II. GENERAL FACTUAL FINDINGS

Guardsmark provides security services to clients. In California, Guardsmark employs uniformed security officers who are assigned to work at client accounts. Officers receive instructions through generally applicable written manuals, and they also receive instructions specific to their accounts through (1) an account specific document called the Mission Partnership Statement ("MPS"); and (2) instructions from their supervisors and/or managers.

Plaintiff worked for Guardsmark as a security officer on and off over the past decade. In his second most recent stint with Guardsmark, Plaintiff worked until May 8, 2004, and he then voluntarily left to work for another security company. Plaintiff returned to Guardsmark on or about October 3, 2005, and was assigned to the Citizens Business Bank ("CBB") account. This was his only permanent assignment until he voluntarily left Guardsmark once again on March 23, 2006 to go to another security company. Given the pertinent statute of limitations and other issues, this was the only permanent account assignment that Plaintiff had that is relevant here.

The evidence presented demonstrates that Guardsmark has a policy in California to require officers to take a meal period. Depending on the account, Guardsmark provides either an off-duty or on-duty meal period. Officers are assigned to on-duty meal period accounts only if they have expressly agreed to such paid periods. Similarly, the evidence demonstrates that Guardsmark has a policy to authorize and permit California officers to take ten or fifteen minute rest breaks every four hours worked. Finally, the evidence demonstrates that Guardsmark provides its officers with uniforms (blazers, slacks and shirts) free of charge, and pays them $.25 per hour for a uniform maintenance allowance. The evidence presented also demonstrates that Guardsmark has a policy to explain to its officers that their base hourly pay rate and this uniform allowance, which is unique to

Guardsmark's operations in California, together constitute the total hourly rate. Similarly, the evidence presented demonstrates each employee's biweekly pay stub details and differentiates the base hourly rate, the uniform allowance rate, and the total paid for each. The evidence presented demonstrates that Guardsmark did not and does not have a policy or systematic practice of failing to require meal periods, denying sufficient rest periods, or misleading officers about uniform allowances.

III. PLAINTIFF HAS FAILED TO SATISFY FRCP 23(b)

For organizational purposes, the Court will address FRCP 23(b) first.

A. Plaintiff Fails To Satisfy FRCP 23(b)(2)

Plaintiff tries to satisfy the FRCP 23(b) requirement under FRCP 23(b)(2). FRCP 23(b)(2) is designed to permit certification (when appropriate) in cases seeking mainly injunctive relief, not wage and hour actions seeking monetary remedies, and Plaintiff's effort fails for two independently sufficient reasons.

First, certification cannot be granted under Rule 23(b)(2) because Plaintiff, a former employee, lacks standing to pursue injunctive relief. See Nelsen v. King County, 895 F.2d 1248, 1254-55 (9th Cir. 1990). A plaintiff has standing only if he can show a credible threat that he will suffer the alleged harm again, and Plaintiff, who is no longer employed by Guardsmark, has failed to do so. See Sandidge v. Washington, 813 F.2d 1025, 1025-26 (9th Cir. 1987); see also Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1007 (11th Cir. 1997).

Plaintiff's reliance on County of Riverside v. McLaughlin, 500 U.S. 44 (1991), is misplaced. Plaintiff was no longer employed by Guardsmark, and thus lacked standing for injunctive relief, as of the date he filed his FAC, *i.e.*, the operative complaint, and Riverside focuses on the plaintiff's standing at the time the operative complaint is filed. More important, the Riverside exception applies only if "claims are so inherently transitory that the trial court will not even have enough time to rule on a motion for class certification before the proposed representative's individual interest expires." See id. at 52. The Court finds that this

case is not transitory in nature, and so Plaintiff's lack of standing precludes certification under FRCP 23(b)(2). See Sze v. INS, 153 F.3d 1005, 1010 (9th Cir. 1998); Wade v. Kirkland, 118 F.3d 667, 670 (9th Cir. 1997).

Second, Rule 23(b)(2) certification is proper only if monetary damages are incidental, or secondary, to injunctive relief. See Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003). Plaintiff's claims here clearly seek monetary relief, as well as a "common fund" for the monies sought. FAC at ¶ 20. The Court finds that the monetary relief sought by Plaintiff is primary, and at the very least is not secondary or incidental to the injunctive relief sought. See Zinser v. Accufix Research Inst., 253 F.3d 1180, 1196 (9th Cir. 2001). This is an action for Labor Code penalties, reimbursements and legal fees, and Rule 23(b)(2) does not apply.

Plaintiff's reliance on Wang v. Chinese Daily News, Inc., 231 F.R.D. 602 (C.D. Cal. 2005) in unavailing. In Wang, unlike this matter, the case was brought by current as well as former employees, and in any event, this Court finds that FRCP 23(b)(2) is not a proper means for certification in wage and hour actions, like this one, in which monetary remedies are hardly secondary.

B. Plaintiff Fails To Satisfy FRCP 23(b)(3)

Because FRCP 23(b)(2) does not apply here (and Plaintiff does not and cannot contend that FRCP 23(b)(1) applies), Plaintiff must satisfy FRCP 23(b)(3) to obtain certification. To do so, Plaintiff must demonstrate (1) that common questions of law and fact predominate; and (2) that a class action is superior to alternate means of resolving the dispute. Plaintiff fails to make either showing.

1. *Plaintiff Does Not Show that Common Questions Would Predominate*

Plaintiff asserts three main claims: he contends that (1) Guardsmark did not provide him with uninterrupted meal periods of sufficient length; (2) Guardsmark failed to authorize and permit him to take sufficient rest periods; and (3) a Guardsmark supervisor orally promised him an hourly wage without

clarifying that his total hourly wage rate included his separately itemized uniform allowance. Plaintiff also claims these predicate violations led to pay stub inaccuracies and record keeping violations.

In an apparent attempt to suggest that some issues of liability can be addressed for all class members at the same time, Plaintiff asserts in his motion papers that Guardsmark has a "practice and policy" of denying officers meal and rest periods and a practice of misleading officers about their uniform allowances. However, Plaintiff does not present any Guardsmark documents or testimony or other direct evidence showing that the company systematically violates meal and rest period laws or misleads its officers about their uniform allowances.

The declarations submitted support this conclusion. Guardsmark surveyed 130 officers at all of its 14 non-union branches in the state. 127 officers surveyed signed declarations confirming that they had no obligation to do so, and each one declared that they were instructed to, and in fact did take, sufficient meal periods and were also authorized and permitted to take sufficient rest periods. The record shows that except for three officers (two did not want to sign any declaration and one who declined to participate in the survey), every officer surveyed executed a declaration to this effect. Plaintiff offers only a dozen declarations and does not explain how he obtained them. These declarations are all from officers at one branch, and mostly at one account, and when viewed in the context of the entire record, they do not support a finding that the case presents the sort of questions concerning general policies or systematic practices that might support certification.

Even without concluding whether the evidence affirmatively shows that Guardsmark has a policy to comply with pertinent laws, at the very least, the direct evidence and declarations submitted compel the conclusion that Guardsmark has no policy that violates the law, i.e., the record does not support the notion that Guardsmark has a systematic policy or practice of providing insufficient meal and rest periods or misleading its officers about their uniform allowances. As a result,

the bulk of the issues that are truly in dispute in this matter are inherently individualized. Specifically, if certification were granted, the Court would have to resolve the following questions for each officer: (a) was he denied rest breaks at his specific account; (b) if not, were the rest breaks he was authorized to take of sufficient length; (c) if he was at an off-duty meal period account, was he relieved of his post during his meal period; (d) was he afforded thirty minutes for each meal at his specific account; (e) if proper meal or rest periods were not afforded, how many times did this happen to him within his limitations period and what is the proper penalty; (f) was he somehow orally misled by his individual supervisor to believe that his total hourly wage rate did not include a uniform allowance; and (g) if so, how long before he received a written pay stub explaining the rates and what was his individual monetary harm in the interim. Because the Court would have to address each of these issues on a one by one basis for all of the officers in the proposed class, Plaintiff cannot meet his burden under Rule 23(b)(3). See, e.g., Mike v. Safeco Ins. Co., 223 F.R.D. 50, 54 (D. Conn. 2004); Basco v. Wal-Mart Stores, Inc., 216 F. Supp. 2d 592 (E.D. La. 2002); Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 500 (D. N.J. 2000).

Indeed, the inherently individualized nature of these claims is compounded because, as Plaintiff concedes: (a) the precise manner and circumstances in which Guardsmark administers its meal and rest period policies can vary from account to account (and even from shift to shift); and (b) the claims that officers were orally misled about their uniform allowances will focus on each officer's own specific conversation with his specific manager or supervisor.

2. *A Class Action Is Not The Superior To Alternate Methods of Resolving This Dispute*

A class action is not the superior means for resolving the instant and varied claims presented. Absent class members could bring streamlined individual claims before the California Division of Labor Standards Enforcement ("DLSE"),

which routinely handles small, individual wage claims. See Cal. Lab. Code § 98. (Indeed, Guardsmark has asserted the defense that Plaintiff has no private right of action to pursue meal and rest period remedies, and thus only the DLSE can pursue such remedies, but the Court need not address that issue here.)

A district court does not abuse its discretion in denying certification when existing administrative proceedings are superior to a class action. See Pattillo v. Schlesinger, 625 F.2d 262, 265 (9th Cir. 1980). Here, the record demonstrates that the average successful claim pursued before the DLSE is for about $500, and this demonstrates that even relatively small claims will not necessarily, as a matter of practice, be forsaken absent class certification.

Again, Plaintiff's reliance on Wang is misplaced because in that case, the defendant (unlike Defendant here) apparently presented no legal or factual support for its position that individual DLSE proceedings were a better alternative to class proceedings, and in fact, the defendant had obstructed class members in their efforts to pursue DLSE proceedings. See Wang, 231 F.R.D. at 614. The Court finds that there is no evidence in the record to suggest that Guardsmark has engaged in any such obstruction. Moreover, the California Court of Appeal has recently suggested that the availability of this sort of individual administrative proceedings is a valid reason to deny certification in a wage and hour class action brought under California law. See Dunbar v. Albertson's Inc., -- Cal. App. 4th --, 2006 WL 2025013 *2 (Cal. App. Dist. 1 July 20, 2006).

Plaintiff also fails other key aspects of the superiority test, i.e., class member interest in controlling separate actions (if any) and case management issues. See FRCP 23(b)(3)(A) & (D). Here, as discussed below, it appears that absent class members actually oppose Plaintiff's suit and thus have an interest in controlling their own claims. In addition, because Plaintiff's claims each present questions requiring individual and therefore voluminous evidence concerning liability and remedies, a class action here will not be manageable.

C. Plaintiff Fails To Satisfy FRCP 23(a)(3) and FRCP 23(a)(4)

Because Plaintiff cannot satisfy FRCP 23(b), class certification must be denied with prejudice regardless of FRCP 23(a). But Plaintiff cannot satisfy FRCP 23(a) either, thus providing further bases for denial of certification.

1. *Plaintiff Does Not Satisfy The Typicality Test*

To meet the typicality requirement, the plaintiff must show that he himself possesses timely claims that are typical of those he asserts for absent class members. As such, a plaintiff's inability to establish at least a basis for his own claims akin to those he asserts for others precludes certification. See E. Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403-04 & n.9 (1977); Robinson v. Sheriff of Cook County, 167 F.3d 1155, 1157 (7th Cir. 1999).

California law requires employers to provide employees with either off-duty or on-duty meal periods during the course of their work shifts. See Tit. 8 Cal. Code Regs. § 11040(11)(A) (codifying Wage Orders); Cal. Labor Code § 226.7 (imposing penalties). The record demonstrates that the nature of the Plaintiff's security duties at the CBB account prevented him from being relieved of all duty during his meal periods. Plaintiff concedes that he executed an express on-duty meal period agreement whereby he agreed to take paid, on-duty meal periods. He further admitted that upon his assignment to the CBB account, Guardsmark addressed past concerns about his inability to take proper meal periods at another employer, that he took a meal period every shift and that he was always allowed as much time as needed to eat his meal at his post.

The thrust of Plaintiff's meal claim is that he was not afforded "uninterrupted" meal periods of sufficient length. But, his claim that he was denied an uninterrupted meal period is precluded by the fact that he lawfully agreed to an on-duty and therefore interruptible meal period. And, his claim that he was denied a meal period of sufficient length is precluded by his own admission that he was

always given as much time as needed for these meal periods. As such, Plaintiff's own claim is not typical of those he alleges for the class.

The same is true of Plaintiff's claim concerning rest periods. Under California law, rest periods need only be authorized and permitted, they need not be enforced or actually taken. See Cicairos v. Summit Logistics, Inc., 133 Cal.App.4th 949, 963 (2005). Plaintiff has testified that he was authorized and permitted to take sufficient rest periods at the CBB account, and he has further admitted that he received no other instructions on the topic. Again, therefore, Plaintiff's own claim is not typical of those he alleges for the class.

To the extent Plaintiff's declaration can be read to contradict his clear deposition testimony on these topics, the Court disregards the declaration and further finds that the declaration is contradictory and a sham and cannot be credited. See Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1462 (9th Cir. 1985); Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619, 651 (N.D. Ga. 2003).

Finally, Plaintiff's uniform claims are not typical because Plaintiff's own testimony demonstrates that he knew that the rate presented to him orally by his supervisor was a total rate that included the uniform allowance, and so he was not misled to believe that the allowance would be paid in addition to the rate offered to him. Indeed, the record also shows that Plaintiff's pay stub differentiated his base rate and uniform allowance, and that his employment manual advised him on the topic.

Moreover, Plaintiff's uniform allowance claim is atypical as a matter of law because it inherently turns on his alleged oral conversation(s) with his supervisor, and the Court finds that there is not sufficient evidence to conclude that these alleged conversation(s) were conducted pursuant to a written script or other standardized company policy. If a claim is based substantially on oral rather than written communications, then Rule 23(a)(3) is not satisfied and treatment as a class action is inappropriate as a matter of law. See Spencer v. Central States, S.E. and

S.W. Area Pension Funds, 778 F. Supp. 985, 990-91 (N.D. Ill. 1991); Glick v. E.F. Hutton & Co., Inc., 106 F.R.D. 446, 449 (E.D. Pa. 1985); see also Szabo, 249 F.3d at 674. This is the case here, and so Plaintiff fails the typicality test.

2. *Plaintiff Does Not Satisfy the Adequate Representation Requirement*

Rule 23(a)(4) requires a plaintiff seeking certification to establish not only that he has retained able counsel, but also that he and the absent class members have no antagonistic or conflicting interests. See Molski v. Gleich, 318 F.3d 937, 955 (9th Cir. 2003); Mayfield v. Dalton, 109 F.3d 1423, 1424 (9th Cir. 1997).

Here, Plaintiff is seeking to assert meal period claims on behalf of those class members who were denied a 30 minute uninterrupted meal period. By challenging the uninterrupted nature of the meal period, Plaintiff has inherently challenged the on-duty nature of his own meal periods. For the first time on reply, Plaintiff claimed that he was not seeking to challenge the on-duty nature of his meal periods. But, even if he could change the apparent focus of his claim in the middle of briefing, he never truly disavowed his challenge to the meal periods on the grounds that they were not uninterrupted. Specifically, Plaintiff still argued he was denied full meal periods by claiming that on occasion "he was interrupted by client needs or other incidents during his meal periods." Reply at 8.

As such, the conflict identified by Guardsmark between Plaintiff and the absent class members persists. Specifically, the record, and Guardsmark's survey and representative declarations in particular, demonstrate, and the Court finds, that a sizeable segment of the absent class members has on-duty meal periods and does not want the validity of their agreements challenged. These officers would understandably rather work during and be paid for their meal periods than be forced to take off-duty and unpaid meal periods. As such, Plaintiff's apparent efforts to challenge the interruptible nature of these meal periods creates an incurable conflict. That goes to the heart of the claim presented and therefore

precludes certification. See Mayfield, 109 F.3d at 1427; Valley Drug Co. v. Geneva Pharms. Inc., 350 F.3d 1181, 1190 (11th Cir. 2003); Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000); Alston v. Va. High Sch. League, 184 F.R.D. 574, 579-80 (W.D. Va. 1999); cf. Broussard v. Meineke Disc. Muffler Shops, 155 F.3d 331, 339 (4th Cir. 1998); Vengurlekar v. Silverline Techs., Ltd., 220 F.R.D. 222, 227 (S.D.N.Y. 2003).

Of course, even if Plaintiff had truly disavowed any effort to attack the validity of the on-duty meal period agreements, then class certification would still be inappropriate for the other reasons identified herein.

For these reasons, the Court DENIES Plaintiff's motion for class certification with prejudice. Plaintiff's claims shall proceed before this Court.

IT IS SO ORDERED.

DATED: Sept. 7, 2006

The Honorable Manuel Real
United States District Judge

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 355 South Grand Avenue, Thirty-Fifth Floor, Los Angeles, California, 90071-1560.

On August 23, 2006, I served the foregoing document described as ORDER DENYING PLANTIFF'S MOTION FOR CLASS CERTIFICATION WITH PREJUDICE on the interested party in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Herbert Hafif, Esq.
Greg K. Hafif, Esq.
Miguel G. Caballero, Esq.
Law Offices of Herbert Hafif
269 West Bonita Avenue
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I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 23, 2006, at Los Angeles, California.

Annette Higa