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JACKSON COUNTY COURTS

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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

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6 RENEЕ MAZA, JODI REAL, and STEVE
PRICE, individuals,

7 Plaintiffs,

8 v.

9 WATERFORD OPERATIONS LLC, and
10 COOS BAY REHABILITATION LLC, a
domestic limited liability company,

11 Defendants.
12

Case No. 14CV03147

ORDER ON MOTION FOR
CLASS CERTIFICATION

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14 This matter having come before the Court on January 5, 2015 on Plaintiffs' Motion for
15 Class Certification and Plaintiffs appearing by and through their counsel, David Schuck and
16 Schuck Law, LLC, and Defendants, Waterford Operations, LLC and Coos Bay Rehabilitation,
17 LLC, appearing by and through their counsel, William Gaar and Buckley Law PC, and the
18 Court, having heard oral argument, having carefully studied the parties' written submissions
19 and, after taking the matter under advisement, makes the following findings of fact,
conclusions and determinations pursuant to ORCP 32C(1).

20 **I. Introduction**

21 Plaintiffs seek, pursuant to ORCP 32, to have their statutory wage and hour civil
22 damage case certified as a class action; the class to be identified as all current and former
23 employees of Defendants who worked for one or both Defendants in Oregon at any time
24 between March 22, 2007 and March 22, 2013 and who are also members of one or more of
the following subclasses:

- 25 1. Point Click Care ("PCC") Class – Hourly employees who used Point Click Care, an
26 electronic health record and patient charting system, and whose work time was also
recorded in Kronos, Defendants' electronic time keeping system;

- 2.) Pay Card Class – Hourly employees who were paid their final wages through Defendants’ Money Network System pay card;
- 3.) Meal Period Class – Hourly employees who were required to take a full 30 minute meal period; and
- 4.) Late Pay Class – Hourly employees whose employment ended between March 22, 2010 and March 22, 2013 and who are also members of the PCC Class, the Pay Card Class or the Meal Period Class.

The Defendants oppose class certification.

II. Findings of Fact

- 1.) Defendants, assisted care living facilities located in Medford and Coos Bay, are owned by Avamere Health Services.
- 2.) Plaintiff Renee Maza, a non-exempt hourly employee, worked as a Certification Medication Aide at Waterford between December 29, 2011 until her termination on January 4, 2013.
- 3.) Plaintiff Jodi Real, a non-exempt hourly employee, worked as a receptionist and as an admissions coordinator at Waterford between August 23, 2011 until her termination on January 4, 2013.
- 4.) Plaintiff Steve Price, both an exempt and non-exempt employee, worked as a Resident Care Manager (exempt) and as a charge nurse (non-exempt) at both facilities between January 18, 2010 and his termination on January 23, 2013.
- 5.) Avamere established uniform human resource policies and procedures for both facilities during the relevant time period. Those policies and procedures are, for the most part, contained in a uniform Employee Handbook.
- 6.) Avamere established a uniform non-exempt employee timekeeping procedure and practice through the implementation of an electronic timekeeping system called Kronos. Through this system, hourly employees were essentially required to “clock” in and out in order for their work time to be recorded. The data from Kronos was then transmitted to Avamere’s payroll system, UltiPro, that calculated hours and pay rates and disseminated wage payments to employees at uniform times of the month.
- 7.) Avamere also established a uniform electronic health record and charting system called Point Click Care (“PCC”). Employees were instructed that all patient medical

1 charting, a recognized job duty for which the employee would be paid, was to be
2 through PCC. In order to perform electronic charting, employees were required to go
3 through a log on and off procedure with PCC.

4 8.) Non-exempt employees were also uniformly entitled to an unpaid 30 minute duty-
5 free lunch period.

6 9.) Avamere's Employee Handbook admonished employees that they were ultimately
7 responsible for accurately recording their work time, to not perform any work when not
8 on-the-clock, to record their lunch period-time and to report incidents when they didn't
9 receive their full 30 minute lunch period. Employees were also allowed to correct time-
10 keeping mistakes after the fact by completing edit slips.

11 10.) In the Fall, 2011, Avamere established a uniform policy that all non-exempt
12 employee final wages following voluntary or involuntary separations would be paid by a
13 pay card called a Money Network System pay card. Separated employees were not
14 allowed to elect to receive their final payment by check or any other method. In using
15 the pay cards at ATM's a fee would be charged, unless it was used at a Wal-Mart
16 store.

17 11.) All three Plaintiffs encountered circumstances where they were performing patient
18 charting on PCC, but were not logged onto Kronos and were, thus, not being paid for
19 the charting work they were performing. This occurred primarily when they were
20 charting off-the-clock from a remote computer and/or after their scheduled hours of
21 work.

22 12.) Through discovery of Defendant's Kronos and PCC computerized records (Ex.57),
23 Plaintiffs' counsel developed information through which they have reasonably
24 estimated that the PCC class size for similarly situated employees could be at least
25 220 members.

26 13.) All three Plaintiffs encountered incidents where their lunch break period was less
than 30 minutes and for which they were not paid for a full 30 minute lunch break as
required by law.

14.) Through discovery of Defendants' Kronos computerized records (Ex.58), Plaintiffs
developed information through which they have reasonably estimated that the Pay
Period class size for similarly situated employees could be at least 390 members.

1 15.) At their time of separation, Plaintiffs Maza and Real received their final wages by
2 pay card.

3 16.) Through discovery, Plaintiffs developed information (Ex.56) through which they
4 have reasonably estimated that the Pay Card class size for similarly situated
5 employees could be at least 150 members.

6 17.) The Late Pay class size, estimated by Plaintiffs to be 245 members, is composed
7 of members of the other three classes who were not paid all the wages they were due
8 at time of separation.

8 **III. Legal Analysis and Conclusions**

9 A.) Overview

10 Whether or not a trial court should certify a case as a class action is controlled
11 by ORCP 32 A and B. A case can only be certified as a class action if all the following
12 requirements under 32 A are met:

- 12 1.) The class is so numerous that joinder of all members is impracticable
13 (numerosity);
- 14 2.) There are questions of law or fact common to the class or classes
15 (commonality);
- 16 3.) The claims or defenses of the representative parties are typical of the claims
17 or defenses of the class (typicality);
- 18 4.) The representative parties will fairly and adequately protect the interests of
19 the class (adequacy and fairness); and
- 20 5.) The representative parties have complied with the pre-litigation notice
21 provisions of ORCP 32 H.

22 If all of the requirements of ORCP 32 A are satisfied the trial court must also
23 find, under ORCP 32 B, that a class action is superior to other available methods for
24 the fair and efficient adjudication of the case. In making this finding, the court must take
25 into consideration each of the following factors identified in that subsection:

- 26 1.) The risk of inconsistent or varying adjudications with respect to class
members which would establish incompatible standards for the Defendants; or
the risk of the dispositive effects of piecemeal litigation by class members on
other potential members not parties to those adjudications;

- 2.) The extent to which relief sought is in the nature of injunctive or declaratory relief;
- 3.) The extent to which questions of law or fact common to the members of the class predominate over questions only affecting individual class members¹;
- 4.) The interests of members of the class in individually controlling actions to which they have a pecuniary interest;
- 5.) The extent and nature of pending litigation concerning the same issues by other class members;
- 6.) The desirability of concentrating the litigation in the forum chosen;
- 7.) The difficulties likely to be encountered in the management of the class action that would be eliminated by another method of adjudicating the dispute; and
- 8.) The sufficiency of the amount in controversy when considering the complexities of the issues involved and the expenses of litigation.

B.) Subclass Analysis Under 32 A.

1.) Initial Determinations Common To Subclasses

- a.) Under these circumstances, the Court concludes that the adequacy and fairness requirement has been satisfied. There is no challenge based upon potential conflicts or antagonism between class representatives and class members and the Court further finds that Plaintiffs' counsel is well experienced in handling class actions, including those that involve employee wage and hour claims. The Court rejects Defendants arguments to the contrary.
- b.) The Court finds that Plaintiffs' counsel complied with the notice requirements of ORCP 32 H.

¹ Prior to 1992, a class could not be certified unless common questions of law or fact predominated over individual questions. Since then, this absolute requirement has been eliminated, so now it is only one factor among eight in the court's determination whether the class action method is superior. See, Pearson v. Phillip Morris, Inc., 257 Or App 106, 121-122 (2013): rev. all'd, 354 Or. 699(2014) For the same reason, ORCP 32 is more flexible than FRCP 23 which maintains the predominance standard as the "sine qua non" of class certifications. Wal-Mart Stores, Inc. v. Dukes, 131S. Ct. 2541, 2551 (2011).

1 c.) Based upon findings 12, 14 and 16, the Court finds that numerosity
2 has been satisfied with respect to all proposed subclasses.

3 2.) PCC Class

4 a.) Commonality

5 The Court of Appeals in Pearson, supra recently explained how
6 the commonality factor should be applied:

7 “As the cases illustrate, when determining whether a question is
8 common or individual, the court is determining how the question
9 should be litigated; it is not resolving the question itself. In other
10 words, it is determining whether it is possible and appropriate for
11 the parties to litigate the question through evidence common to
12 the class, which depends on the likelihood that valid conclusions
13 can be drawn about the class as a whole. That, in turn, depends
14 on the likelihood that, at the times relevant to the disputed
15 question, the putative class members were similarly situated or
16 acted in a similar manner.” Id. at 156

17 See also, Delgado v. Del Monte Fresh Produce, N.A., Inc., 260 Or. App.
18 480, 490 (2014)

19 The Court finds that there are both questions of fact and law that
20 are common to this subclass. Common questions of fact include:

- 21 1.) Did the Defendants use Kronos as a means to record and track all
22 work hours performed by their non-exempt hourly employees?
- 23 2.) Did the Defendants require their hourly employees to use PCC to
24 perform all patient charting?
- 25 3.) Is patient charting “work” that requires wage remuneration?
- 26 4.) Is there time worked in PCC by hourly employees that was
performed off the Kronos time clock and for which wages were not paid?

The outcome of this claim can also be resolved through common
questions of law under Oregon statutory wage and hour laws. See ORS
Chapters 652 and 653.

1 Even though, for the sake of argument, there may be issues raised by
2 the Defendants that require a differential analysis (i.e. Defendant's "knowledge"
3 that particular employees were logged into PCC while off-the-clock or whether
4 particular employees filled out time-edit slips after the fact so that they were
5 paid for work performed off-the-clock) those inquiries are also common
6 questions that need to be resolved. Defendants' contentions will also be
7 discussed further below on the issue of predominance. Commonality has been
8 satisfied.

9 b.) Typicality

10 Typicality was defined by the Oregon Supreme Court in Newman
11 v. Tualitin Development Co., Inc., 287 Or. 47 (1979) as follows:

12 "[A] plaintiff's claim is typical if it arises from the same event or
13 practice or course of conduct that gives rise to the claims of
14 members and his or her claims are based on the same legal
15 theory" Id. at 50

16 Plaintiffs have easily established that the Plaintiffs' claims are
17 typical under the above definition.

18 c.) Conclusion

19 This Court finds that this subclass satisfies the provisions of
20 ORCP 32 A.

21 3.) Meal Period Class

22 a.) Commonality

23 The Court finds there are questions of fact and law that are
24 common to this subclass, which include:

- 25 1.) Did the Defendants use Kronos as a means to record and track all
26 work hours performed by their non-exempt hourly employees?
- 27 2.) Were all full time hourly employees entitled to a duty free 30 minute
28 lunch break?
- 29 3.) Were all employees required to clock off for lunch and clock back in
30 following their 30 minute lunch break?

1 4.) Does Kronos disclose that class member's 30 minute lunch periods
2 were interrupted by having to clock back onto Kronos less than 30
3 minutes into their break?

4 5.) Are those affected employees legally entitled to a fully paid 30
5 minute lunch break period for every lunch period that was interrupted?

6 Defendants launch a strenuous objection to Plaintiffs'
7 commonality assertion primarily on the basis that the Oregon
8 Administrative Rules permit an exemption based on undue hardship as
9 a result of health and safety considerations of their patients. This
10 argument is, again, more of an attack that individual issues predominate
11 over common issues and that will be discussed in greater detail under
12 the Court's ORCP 32 B analysis. The Court, nevertheless, concludes
13 that commonality has been satisfied.

14 b.) Typicality

15 I find that the typicality requirement has been satisfied as all
16 three Plaintiffs experienced unpaid shortened meal periods.

17 c.) Conclusion

18 The Court finds that this subclass satisfies the provisions of
19 ORCP 32 A.

20 4.) Pay Card Class

21 a.) Commonality

22 Similar to the previous two subclasses discussed, the Pay Card
23 Class has common questions of fact and law, including:

24 1.) Did all non-exempt hourly employees receive their final payment of
25 wages by Defendants' Money Network System pay card?

26 2.) Did each employee agree to receive their final payment of wages by pay
card?

3.) Do ATM fees constitute an unlawful employer deduction for those
separated employees who used their pay cards at ATM's other than at Wal-
Mart stores?

Again, Defendants' argue that the issues are predominately

1 dissimilar because, at least with respect to the second question posed
2 above, an individualized determination must be made with respect to
3 whether class members agreed or gave consent to receiving their final
4 wage payment by pay card. This issue will be addressed further below
5 when predominance is analyzed. The Court concludes that commonality
6 has been satisfied.

7 b.) Typicality

8 The typicality requirement has been satisfied because Maza and
9 Real received their final wages by pay card.

10 c.) Conclusion

11 The Court finds that this subclass satisfies the provisions of ORCP
12 32 A.

13 5.) Late Pay Class

14 The Court finds that no analysis under ORCP 32 A or B is necessary
15 in concluding that this separate subclass certification is unnecessary. All
16 members of this subclass are necessarily members of one of three other
17 subclasses; so, if those subclasses are certified then each member would
18 also be entitled to statutory damages for failing to receive all wages to which
19 that member is entitled at the time of employment separation.

20 C.) Subclass Analysis Under ORCP 32 B

21 1.) Factors B (1), (2) and (4)-(8)

22 Other than the predominance factor which is discussed separately below, I
23 find that the other enumerated considerations under ORCP 32 B militate in favor of
24 a finding that class action status for this case is superior to other methods such as
25 piecemeal litigation in any of several counties where such litigation could be filed. In
26 this regard, I generally accept Plaintiffs' analysis found on pages 32-39 of their
Motion.

2.) The Predominance Factor

Defendants offer up a number of factual and legal determinations that are
arguably common to each class, but which are individual specific and cannot be
resolved through a class-wide inquiry. For that reason, they argue that these class-

1 member-specific inquiries predominate over other common issues, thus destroying
2 the cohesive nature of the class. Each will be discussed in turn.

3 a.) PCC Subclass

4 1.) Proof of the Defendants' Knowledge

5 Defendants aptly point out that for them to be found liable for failure
6 to pay wages while employees were logged onto PCC, but not also at the
7 same time logged onto Kronos, Plaintiffs must prove that Defendants either
8 knew or should have known that practice was occurring. In addition to their
9 policies and procedures, including their Employee Handbook, expressly
10 forbidding the performance of any work off-the-clock, Defendants argue that
11 the resolution of this issue will require an individual inquiry to determine
12 whether management knew that one or more of the Plaintiffs or class
13 members were performing work (i.e. while on PCC) off-the-clock.

14 However, just as the Court of Appeals concluded in *Pearson* that the
15 issue of reliance could be litigated and resolved on a class wide basis (*Id.* at
16 156), so too can the issue of knowledge. This is ultimately a jury question
17 and it is for them to determine whether the information Defendants had
18 available (i.e. the PCC and Kronos computer data) was sufficient to put
19 them on notice to justify a finding that Defendants knew or should have
20 known this practice was occurring.

21 2.) Damage Issues

22 There is also concern that damages could be exaggerated or
23 inflated simply by comparing the data in Kronos and PCC and then
24 performing the arithmetic, because that would preclude Defendants' ability
25 to adjust down or eliminate wages due any Plaintiff or class member by
26 offering individual employee time-edit slips that corrected the oversight. I
find that individual issues concerning discrete damage claims do not destroy
the cohesiveness of the class and such issues can be handled in the
context of a class action. *Pearson* at 166-167

b.) Meal Period Class

1.) Undue Hardship

1 Defendants present evidence and argue that they have no liability
2 under OAR 839-020-0050(2)(b) for failing to pay for an entire 30-minute
3 meal period that was interrupted, if the interruption was due to a patient
4 health and safety issue. (OAR 839-020-0050(4)(d) Defendants, accordingly,
5 maintain that whether this exemption applies requires an analysis on an
6 individualized basis (i.e. Was any 30-minute lunch period interrupted by a
7 patient health or safety issue?). Although there is no hard evidence that this,
8 in fact, occurred, the Court is hard pressed not to accept the fact that this
9 probably did occur and did occur with some degree of frequency.

10 However, Plaintiffs counter that the exemption is not available to
11 Defendants because there is no proof in the record of compliance with the
12 requirements of OAR 839-020-0050(5) and, in any event, undue hardship is
13 an affirmative defense that was not raised by Defendants in their Answer.

14 Although this might have been an impediment to the certification of
15 this subclass, the Court does not believe it can deny certification on the
16 record before it.

17 c.) Pay Card Class

18 1.) Consent

19 Defendants maintain that there is evidentiary support that separated
20 employees consented or “agreed” under ORS 652.110(4) and (5) to receive
21 final wages by pay card which would constitute an affirmative defense to the
22 claim. Thus, they argue, whether or not each class member did or did not
23 consent requires an individualized analysis that would defeat the
24 cohesiveness of the subclass.

25 In examining this contention, I have found no real evidentiary
26 support for it. In other words, there is no documentary evidence, (i.e. written
27 agreements, signed consents, notations in employee personnel files) to
28 verify whether this is a legitimate issue. The Court of Appeals in Pearson
29 instructs that for individualized issues of fact or law to predominate over
30 those common to the class, there has to be some affirmative showing of
31 “numerous” instances of individualized treatment or that a “substantial”

1 number of class members are impacted. Pearson at p. 156. The defense
2 can't simply throw up a "theoretical defense requiring individual inquiries for
3 which there is little basis in fact". Id. at p.150

4 2.) Issues Raised on Motion For Summary Judgment

5 The Court acknowledges that there is pending before it Defendants'
6 Motion for Summary Judgment that makes a serious legal challenge to this
7 claim. In that motion, Defendants assert that, as a matter of law, an ATM
8 fee is not a "deduction" for purposes of ORS 652.610(3) and that ORS
9 652.110 does not create a private right of action for its violation (i.e. issuing
10 a wage payment card without the employee's agreement.) I find these legal
11 issues are common to the class and justify class treatment.

12 3.) Conclusion

13 The Court finds that class action treatment of this case is superior to other
14 methods of litigation.

15 **IV. Order**

16 Based on the foregoing, the Court enters the following Orders:

- 17 1.) This case is certified as a class action containing the following three subclasses only -
18 Point Click Care Class, Meal Period Class and Pay Card Class;
19 2.) Class representatives shall be Maza, Real and Price; and
20 3.) Class counsel shall be Schuck Law LLC.

21 SO ORDERED:

22 Dated: April 16, 2015

23 
24 HON. TIMOTHY C. GERKING
25 CIRCUIT COURT JUDGE

26 Cc: David Schuck (email)
William Gaar (email)