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

RENEE MAZA, JODI REAL, AND STEVE PRICE, individually and on behalf of all similarly situated,, **Plaintiffs,** **v.** **WATERFORD OPERATIONS, LLC AND COOS BAY REHABILITATION, LLC, domestic limited liability company,** **Defendants,**	**Case No. 14CV03147** **ORDER ON MOTIONS**

This matter having come before the Court on November 2, 2016 for argument on the following motions:

1.) Defendant's Motion to Decertify Class Action;

2.) Plaintiff's Motion for Partial Summary Judgment As To Liability For Meal Period Class;

3.) Defendant's Motion for Partial Summary Judgment [Penalty Wage Claim]; and

4.) Defendant's Motions to Strike Declarations of Karen A. Moore and Plaintiff's OEC 1006 Summaries; and

Plaintiffs' appearing by and through their counsel, David Schuck and Karen Moore, and Defendant's appearing by and through their counsel, William Gaar, and the Court, having carefully considered the parties' memoranda and their oral arguments and

taking the matter under advisement to further consider the complex legal issues presented and now being fully informed in the matter, rules as follows:

A.) Brief Procedural History of Case

The initial complaint in this case, alleging claims for wage and hour violations, was initially filed on March 3, 2013 in Multnomah County Circuit Court. A motion for change of venue was thereafter granted and the case was transferred to Clackamas County. A second change of venue motion resulted in the transfer of the case in April 2014 to Jackson County.

After conducting document discovery, Plaintiffs' filed their Motion For Class Certification in December 2014 identifying four (4) subclasses:

1.) Meal Period Class (hourly employees who were required to take a full thirty (30) minute meal period);

2.) Point Click Care Class ("PCC") (hourly employees who used an electronic health record and patient charting system (PCC) and whose work time was recorded in Kronos, an electronic time keeping system);

3.) Pay Card Class (hourly employees who were paid their final wages through a Money Network System pay card); and

4.) Late Pay Class (hourly employees who were also members of classes identified in 1, 2 and/or 3 above.

Defendants' vigorously opposed the motion.

On April 16, 2015, the Court certified Plaintiffs' action as a class action as to the Meal Period, PCC and Pay Card subclasses (The Court did not certify the Late Pay subclass because all of its members were already a part of one or more of the subclasses that had been certified).

On May 4, 2015, the Court granted partial summary judgment in favor of Defendants with respect to Plaintiffs' Pay Card subclass. As a consequence, Plaintiffs' class action moved forward with the class being composed of two (2) distinct subclasses – Meal Period and PCC.

Thereafter, the Court entered several scheduling and revised scheduling orders, the Court allowed Defendants' to engage in limited ORCP 40 discovery and the Court ultimately set the case for trial on January 31, 2017. These motions followed.

B.) The Oregon Supreme Court's Decision in *Pearson v. Phillip Morris, Inc.*

This Court's certification order came after the Court of Appeals decision in *Pearson* (257 Or. App. 106 (2013)), but before the November 2015 decision by the Oregon Supreme Court (358 Or. 88 (2015)). The Supreme Court reversed the Court of Appeals' reversal of the trial court's refusal to certify plaintiffs' class action In doing so, the Court acknowledged that, while all the eight (8) factors identified in ORCP 32 B are important, the predominance factor, identified in ORCP 32 B(3), is oftentimes the driver or the most problematic. That provision requires the court to determine, in connection with performing its assessment whether a class action is the superior method for adjudicating a controversy in a fair and efficient manner:

> "The extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

Id at 106. The Supreme Court emphasized that the predominance inquiry is considerably more exacting and demanding than the commonality requirement contained in ORCP 32 A(2):

> "Commonality asks only if there are questions of law or fact common to the class. It does not test how central the common questions are to the resolution of the action. Nor does it take into account the nature of the proof required to litigate those common issues.

The predominance inquiry, on the other hand, asks exactly those things – how central are the common questions, and will common proof resolve them? To test whether common issues of fact or law predominate over individual ones, the trial court must assess whether it is "likely" that the final determination of the action will require separate adjudications to resolve factual or legal questions regarding the individual class members and, if so, how many individual adjudications would be required. .. The predominance criterion requires the trial court to predict how the issues will play out at trial by considering whether the adjudication can be resolved with evidence common to the class (*i.e.*, proof for one class member will be the same for all), or whether it will entail separate inquiries for the individual class members....

In effect, predominance asks: What do the individual class members have in common, what don't they have in common, and how much will those similarities and dissimilarities matter in litigating the case? In practical terms, the inquiry is designed to determine if proof as to one class member will be proof as to all, or whether dissimilarities among the class members will require individualized inquiries. How the predominance inquiry is answered, then, is a key factor in the trial court's discretionary assessment of whether a class action will be a fair and efficient means of litigating the case, and thus superior over other available means to resolve the controversy...." *Id* at 110-111

In its concluding remarks regarding the importance of the predominance criteria, the Supreme Court stated:

"Collectively, our cases demonstrate that whether common issues predominate in a particular case for purposes of class certification depends on a pragmatic assessment of how a case, if fairly and fully tried, is likely to be litigated. The point of asking whether common issues predominate is to predict the degree to which litigation of the controversy will require delving into individualized proof or, conversely, the degree to which the issues lend themselves to resolution through common proof – that is, proof for one individual class member will be proof for all. The inquiry looks not only to how a plaintiff can prove its *prima facie* case; it considers, as well, the nature of the plaintiff's claim more generally, the defenses to the claim, the legal and factual issues framed by the parties' position, and the record made on the disputed issues of fact. *See Bernard*, 275 Or at 159 (class action procedures not designed to deprive defendants of valuable procedural and substantive rights by preventing them from asserting what appear to be bona fide defenses; predominance inquiry requires consideration of likelihood that individual inquiries are necessary to permit defendant to litigate legitimate issues in defense). If the record suggests legitimate and legally material factual differences among the class members that a defendant is entitled to expose through individualized inquires – what Professor Nagareda terms "fatal dissimilarities" among the class – the

predominance inquiry must take those individualized inquiries into account." *Id.* at 114

This Court believes it is important to highlight the foregoing portions of Justice Linders' opinion in *Pearson* because they serve as instruction to the trial court with respect to its responsibilities in assessing the predominance criterion. That is precisely the case here because it is this criterion that is the focus of Defendants' vigorous challenge in its Motion for Decertification.

C.) Analysis And Rulings On Motions

1.) Defendants' Motion to Strike

Defendants' Motion to Strike is denied.

2.) Defendants' Motion to Decertify Class Action

a.) Meal Period Subclass

The Court understands that Plaintiffs' class action consists of approximately 955 class members, roughly 75% of whom are in the meal period subclass. This subclass consists of hourly employees whose 30 minute unpaid duty-free lunch break was cut short and, for one reason or another, those employees clocked back in prematurely on Defendants' Kronos electronic time keeping system. Plaintiffs' allege that this is a violation of OAR 839-020-0050(2) which provides:

> "a.) Except as otherwise provided by this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.
>
> b.) Except as otherwise provided by this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30 minute meal period."

The parties have two (2) competing views on how the above rule should be interpreted by this Court. According to Plaintiffs' trial plan, which they previewed to the Court in these motions, they will present, through an expert, representative evidence in the form of summaries of Defendants' Kronos records for all subclass members containing the employee names, dates and all the log-in and log-out short-lunch period data to support a calculation of wages to which each member was entitled but was not paid (*i.e.* for a short 20 minute lunch break recorded on Kronos, employee entitled to full 30 minutes of pay minus 10 minutes already paid).

According to Plaintiffs' theory, unless an employer qualifies under one of the narrow exceptions contained in OAR 839-020-0050, the employer is liable for the full 30 minute meal period to the impacted employee, no matter what the circumstance was that led to the employee taking less than a full 30 minute lunch break. In effect, Plaintiffs' are advocating for a strict liability interpretation of OAR 839-020-0050.

Defendants' have a different interpretation of the rule. First, they point to specific promulgated written policies which were in effect that advised employees of their entitlement to a continuous 30 minute duty free lunch and the need to report any instances where they were denied that right. Next, they argue that the rule requires that an employer, subject to its application, only "provide", by making available or affording to employees, a continuous 30 minute duty free lunch. They argue, that

because an employee is only required to provide employees with the opportunity of a continuous 30 minute duty free break, it makes a material difference why and under what circumstances the employee decided to clock back in early. (*i.e.* press of work, express or implied pressure from management, forgetfulness, inadvertence, convenience). Their argument follows that an employee who does not avail him or herself of the right and remedies contained in Defendants' personnel policies and clocks back in from lunch prematurely without evidence of management direction or coercion have no legal basis for a claim. Essentially, the inquiry, as Defendant sees it, is whether the employee prematurely clocked back in voluntarily or involuntarily.

Clearly, how the court interprets this rule squarely impacts the predominance criterion because, according to Defendants, determining liability for the 100's if not 1000's of short lunch break claims will require a myriad of mini-trials to determine the circumstances surrounding why the employee, in each instance, took a short lunch break. And the Defendants' reinforce their argument with the results of the limited ORCP 40 deposition discovery the Court allowed Defendants to undertake.

This is precisely the dilemma the courts were faced with in *Pearson* – the legal requirement that each class member must prove reliance under the UTPA. The Supreme Court ruled that proof of reliance was required in each class members' prima facie proof. This legal conclusion destroyed the predominance criteria and with it the

superior nature of the class action as a vehicle for resolving the controversy.

This Court is reminded of Justice Linder's admonition to trial courts in class action litigation:

> "Likewise, if the parties have competing views of the law that governs the class claims, a court must 'stand ready to say what the law is' to the extent that class determination will come out differently depending on which view is correct"... Id. At 108

Accordingly, after carefully analyzing the parties' respective positions on this issue, it is the Court's conclusion that liability depends on a fact specific inquiry regarding the circumstances surrounding why each short lunch break occurred. In this respect, I agree with the Defendants' view of how OAR 839-20-0050 should be interpreted. This precise issue has not been decided by an Oregon appellate court, but Oregon federal district courts have been confronted with the issue and have ruled adversely to the plaintiffs. For example, the Court stated in *Weir v. Joly*, 2011 WL 6778764 (D. Or. 2011):

> "Wier [the plaintiff] also seems to take the position that an employer must pay an employee for a break of less than 30 minutes, no matter the reason. For instance, if the employee took a 29-minute meal break and happened to clock in a minute before 30 minutes had passed, the employer must pay the employee for the entire 30 minutes. Although Oregon courts have not spoken to this issue, I do not agree with Weir's interpretation of the rule. The rule requires that employers "provide" a meal break of 30 continuous minutes during which the employee is relieved of all duties. OAR 839-20-0050. To require an employer to police when an employee clocks in and out would be an unreasonable burden on the employer. The outcome would be an employee who could take a proper meal break, but then demand that it paid simply by clocking in early."

Weir was followed earlier this year in *Marshall v. Pollin Hotels II, LLC*, 2016 WL 1065814, F. Supp. 3d (D. Or. 2016). Cases from other states cited in Defendant's briefing also provide support for their interpretation of Oregon's administrative rule.

Plaintiffs also argue that OAR 839-020-0050(2)(b) supports their strict liability interpretation. This Court disagrees. Rather, this Court believes a fair interpretation of the word "relieved" in that subsection is that it would relate to the anaylysis whether the employee returned prematurely from lunch voluntarily or involuntarily.

Accordingly, Defendant's Motion To Decertify this subclass is granted.

b.) PCC Subclass

This subclass consists of the approximate 25% balance of the entire class of employees. It includes those employees who logged onto Defendants' electronic health record and patient charting system (PCC) to perform work (*i.e.* patient charting), but were not also logged onto Kronos, so the work they were performing was not recorded and went unpaid. This Court understands that this circumstance would typically occur when an employee would log onto PCC after hours to complete charting that was not performed during regular work hours. Defendants' concede this is problematic and both parties agree that liability attaches for unpaid wages if Defendants knew or should have known that an employee was performing work and not getting paid for it. From this point, however, the parties' positions diverge.

According to Plaintiffs' trial plan, they propose to present, through an expert, summaries of data from Defendants' Kronos and PCC computer record-keeping systems demonstrating each instance, by date with long-in and log-out times, when a subclass member was working on PCC, but not logged onto Kronos at the same time, thus establishing that the employee was not being paid for performing the work. Plaintiffs intend to offer that data along with evidence that Defendants' management was responsible for performing regular reviews of Kronos and PCC records. Therefore, they argue, based on the sheer numbers of instances where off-the-clock work was being performed on PCC, the Defendants were at least on constructive notice that this practice was occurring. In other words, they should have known this practice was taking place.

On the other hand, Defendants argue that such common class-wide evidence is wholly insufficient to establish liability for each and every instance where an employee was not getting paid for performing charting work on PCC because they were also not logged onto Kronos at the same time.

Their argument is similar to the one they advanced against the meal period subclass. First, Defendants argue that they had clear written policies in place advising employees that performing off-the-clock work was prohibited and that they were to immediately report such instances to management and fill out a time-edit slip to ensure payment for all work performed. Next, they argue that, even though management

does, perhaps, regularly review the charting work performed on PCC, those records are not independently reviewed to inspect log-in and log-out times or reviewed in conjunction with Defendants' Kronos records to determine when employee charting was taking place or whether it was occurring on or off-the-clock. Therefore, they argue actual or constructive notice must entail an individualized inquiry to ascertain in each of the 100's or 1000's of instances where this occurred, the facts and circumstances surrounding the occurrence to determine whether management knew about it or should of known about it.

Although this is a closer question than the issue presented in the meal period subclass, this Court again sides with the Defendants' position. The analysis whether there is sufficient evidence to support constructive notice should be the same, or at least similar, to the analysis associated with whether there is sufficient proof to support an inference. The Supreme Court in *Pearson* cautioned trial courts to be wary of common evidence offered for the purpose of raising an inference of class-wide knowledge (or lack thereof) or reliance. Id. At 110-111. *Bernard v. First National Bank*, 275 Or. 145 (1976); *Newman v. Tualatin Development Co. Inc.*, 287 Or. 47 (1979).

Presenting summaries of two independently stored electronic records and arguing that Defendants had constructive notice of the problem because they could have "put 2 + 2 together" or had the means to figure it out is a dubious assumption to make. It is questionable whether the mere access to records or, in this case the ability to

compare two independent sets of records, one which was never used for wage and hour purposes, is sufficient to place the employer on constructive notice. *Hertz v. Woodbury County*, 566 F. 3d 775 (8th Cir. 2009); *Newton v. City of Henderson*, 47 F. 3d 746 (5th Cir. 1985); *White v. Baptist Memorial Health Care Corp.*, 699 F. 3d 869 (6th Cir. 2012). As explained by the Court in *White*:

> "The court [in *Hertz*] ruled, "The FLSA's standard for constructive knowledge in the overtime context is whether the County 'should have known,' not whether it could have known." Id. At 782 (citation omitted). It went on to say, "it would not be reasonable to require that the County weed through non-payroll CAD records to determine whether or not its employees were working beyond their scheduled hours. This is particularly true given the fact that the County had an established procedure for overtime claims that Plaintiffs regularly used." Id. (citing *Newton*, 47 F 3d at 749)

Therefore, the common, class-wide evidence that the Plaintiffs' propose to present is likely insufficient to establish either actual or constructive knowledge of the practice by Defendants.

At best, constructive notice is a question of fact for the jury. However, the submission of only representational common evidence, without giving Defendants the opportunity to explore the facts and circumstances surrounding each instance (i.e. whether the PCC off-the-clock work was entirely voluntary or whether it was performed pursuant to employer instruction or coercion, whether the work was observed by management or whether it was concealed by the employee), deprives the Defendants of valuable substantive and procedure rights to present defenses to many or all of the instances in question. With respect to the

appropriate use of representational evidence, the circumstances presented in this case are far different from the facts in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 1036 (2016) where all employees were uniformly required to "don and doff" their uniforms off the clock.

Accordingly, Defendants' Motion To Decertify this subclass is granted.

3.) Plaintiffs' Motion For Partial Summary Judgment As To Liability For Meal Period Class

For the reasons expressed in C 2) above, this motion is denied.

4.) Defendants' Motion For Partial Summary Judgment [Penalty Wage Claim]

The Court defers ruling on this motion as it is unnecessary to the Court's determination that this class action be decertified.

Counsel shall confer to determine which party will prepare the Limited Judgement so that an appeal, if desirable, can be taken.

SO ORDERED:

Dated: December 12, 2016

HON. TIMOTHY C. GERKING
PRESIDING JUDGE
JACKSON COUNTY CIRCUIT COURT

Cc: David Schuck (email)
Karen Moore (email)
William Gaar (email)
Jillian Pollock (email)