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Court of Appeal, Second
District, Division 5, California.

Shannon PALM, et al., Plaintiffs and Appellants,
v.
CHARLOTTE RUSSE, INC.,
Defendant and Respondent.

No. B225586.
|
(Los Angeles County Super. Ct. No. BC392548).
|
Sept. 13, 2011.

APPEAL from a judgment of the Superior Court of Los Angeles County. Rita Miller, Judge. Affirmed.

Attorneys and Law Firms

Gould & Associates, Michael A. Gould, Aarin A. Zeif for Plaintiffs and Appellants.

Cooley, Michelle C. Doolin, Summer J. Wynn for Defendant and Respondent.

Opinion

ARMSTRONG, J.

***1** This is an appeal from an order denying a motion for class certification. We affirm.

Background

Defendant and respondent Charlotte Russe, Inc., operates approximately 56 stores in California, selling fashionable clothes and accessories for young women. In the relevant time period, it had about 11,426 store employees in California, all of whom were paid hourly.

Plaintiffs and appellants Shannon Palm and Kayla Lovato are former California Charlotte Russe sales associates. Their complaint alleged that, in violation of specified sections of the Labor Code, Charlotte Russe store employees were coerced into wearing Charlotte Russe clothing to work, that Charlotte Russe's dress code amounted to a requirement that employees wear a uniform, and that Charlotte Russe failed to provide or to pay for meal and rest breaks, failed to pay overtime wages, and failed to pay for all hours worked, and that employees incurred costs to retrieve their wages.

Plaintiff sought to certify seven classes of former and current managers, assistant managers, and sales associates employed in California within the statute of limitations who were subject to those practices. They also sought to certify three "derivative classes," that is, classes of employees who were members of other classes and were not provided with statements which included the correct gross wages, and/or were denied wages on termination, and/or were subject to unfair business practices under the Business and Professions Code.

The trial court denied certification, finding, as to each proposed class, that plaintiffs had not demonstrated commonality or that common issues would predominate, manageability, or superiority.

Legal Principles

A class action "is a procedural device that enforces substantive law by aggregating many individual claims into a single claim...." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313.) In order to have a class certified on their theories, plaintiffs are required to prove the existence of a sufficiently numerous, ascertainable class, with a well-defined community of interest, and that certification would provide substantial benefits to litigants and the courts. (*Ibid.*) As part of the community of interest requirement, plaintiffs bear the burden of showing, inter alia, that common questions of law or fact predominate. (*Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The ultimate

question is whether the issues which can be jointly tried are so numerous or substantial that maintenance of a class action will be advantageous to the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1105–1106.)

"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." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) If the ruling is supported by substantial evidence, it will be affirmed unless the trial court used improper criteria or made erroneous legal assumptions. (*Id.* at pp. 435–436.)

Discussion

Timeliness of the Appeal

***2** The court denied certification as to two of plaintiffs' proposed classes on January 26, 2010, but continued the hearing on the remaining classes to a later date. Charlotte Russe argues that, as to those two causes of action, this appeal is untimely, in that the notice of appeal was filed more than 60 days from the time the clerk served notice of the January 26 order. (Cal. Rules of Court, rule 8 .104.)

However, if time is counted from the order denying certification as to the remaining classes, which was on June 17, 2010, the appeal was timely filed, and we think that that is the proper measure of timeliness.

In *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, the California Supreme Court decided that a ruling denying class certification is appealable because "the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff." (*Id.* at p. 699.) The order is a "death knell" and "renders appealable only those orders that effectively terminate class claims but permit individual claims to continue." (In re Baycol Cases I & II (2011) 51 Cal.4th 751, 754.) "On the other hand, no appeal lies if, after the trial court's order, a viable class claim remains pending in the trial court." (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 360; *Vasquez v. Superior Court of San Joaquin County* (1971) 4 Cal.3d 800, 807.)

After the court's hearing on January 26, 2010, both class and individual claims remained in the trial court. Appeal did not lie from that order, but from the June order, which was, effectively, a dismissal of the action for all members of the class other than plaintiffs.

Class 1: Coerced Purchasing of Clothing

Plaintiffs alleged that Charlotte Russe had a common practice or scheme of compelling or coercing employees to purchase Charlotte Russe clothing and to wear that clothing to work, in violation of Labor Code section 450, subdivision (a), which provides that "No employer ... may compel or coerce any employee ... to patronize his or her employer, or any other person, in the purchase of any thing of value." Plaintiffs alleged that they and class members were entitled to restitution for all purchases made in violation of the statute.

Plaintiffs sought to certify a class of all former and current managers, assistant managers and sales associates employed in California who were coerced to purchase products at Charlotte Russe stores.

Plaintiffs' evidence

Plaintiffs submitted evidence that employees were given a 40 percent discount on purchases at Charlotte Russe, [1] and submitted the declarations of approximately 17 current or former employees who identically declared that "On more than one occasion, I purchased clothing and/or accessories at Charlotte Russe, Inc. to wear while working at Charlotte Russe, Inc. [¶] I feel as though I was coerced or compelled to purchase clothing and/or accessories at Charlotte Russe, Inc. to wear during my shift ... [¶] While working at Charlotte Russe, Inc. I was pressured to purchase certain clothing for work of certain design and/or color to project current fashion trends. [¶] ... [¶] On more than one occasion I was encouraged by my supervisor to purchase certain clothing brands sold at Charlotte Russe, Inc. to wear during my shift or at meetings." Each declarant included the amount per week spent on purchasing clothing and accessories for work at Charlotte Russe and a statement that she had not been

reimbursed for those costs. These declarations did not identify the store the employee worked at.

***3** A few additional declarants added statements about clothing to their form declarations on other issues. One said, "[W]e were forced to buy merchandise at the end of the night to make [last year's numbers]" and one that "there were items that the management forced employees to purchase...."

Plaintiffs also submitted six slightly more specific declarations, which do identify the employee's store, and are from employees at six different stores. Five of these declarants stated that a manager or district manager had told the declarant to wear Charlotte Russe clothing during shifts, or, in one instance, that "I felt that my manager pressured me to wear Charlotte Russe clothing during my shifts. For example, if I bought something from Wet Seal, my store manager would ask me, 'why aren't you buying Charlotte Russe clothing? ... My manager would often tell the associates that sales were up because certain employees were wearing Charlotte Russe clothes."

The sixth declarant was a manager. She declared that "As an hourly paid manager, I was told by my district manager that I needed to wear clothes that represent the Charlotte Russe image during my shifts ... [¶] Approximately once a month I was required to participate in a conference call with my district manager and other store managers. At these conference calls, other store managers and I were reminded that managers and associates need to be 'brand right' in order to sell the Charlotte Russe product and that managers and associates were to wear Charlotte Russe clothing during shifts. I was told that I had to push the associates to purchase Charlotte Russe clothing and to look a certain image (or be 'branded') in order to sell Charlotte Russe clothing.... [¶] As store manager, I told all cashiers that they were required to purchase Charlotte Russe accessories to wear during their shifts to comply with the dress code policy of having a 'complete outfit.' "

Plaintiffs also submitted evidence concerning Charlotte Russe's written dress code, which, in addition to standard requirements (for instance, that clothing be neat and clean) provides, inter alia, that "Associates bring Charlotte Russe to life by wearing clothes that are reflective of current trends and fashions," that employees cannot wear clothes which display a competitor's logo, and that "jewelry must be consistent with current fashion."

Concerning this policy, a manager, Christine Halverson, testified at her deposition that wearing clothing that is reflective of current trends and fashions means that "you want to be brand right for Charlotte Russe so you definitely want to uphold some sort of fashion element whether it be a personal style or something that's represented in our store so that way you can sell it to our customers," that "brand right" meant "Just depending on—it's kind of just like the image or whatever," that on one occasion, she had told employees to wear Charlotte Russe's jeans to a meeting, and that when salespeople wore Charlotte Russe clothing, sales increased.

Charlotte Russe's evidence

***4** Charlotte Russe submitted declarations from over 200 sales associates and managers. The associates declared, in sum, that they knew that Charlotte Russe did not require them to buy or wear Charlotte Russe clothing, that they routinely came to work in clothes they had bought elsewhere and worn at other jobs, including other retail jobs, and were not disciplined for doing so, that they used their employee discount because they liked Charlotte Russe clothing, and that they used that discount to buy not just clothing but gifts, and, at times, clothing such as short-shorts or yoga pants which they could not wear to work. They wore clothes purchased at Charlotte Russe to school, to social events, and to other jobs. Some of these declarants worked in the same stores as did plaintiffs' declarants.

The managers declared, in sum, that they did not direct, demand, or require employees to wear Charlotte Russe clothing, or discipline employees for failing to do so, that they too shopped at Charlotte Russe because they wanted to, and that they went to work in clothing purchased elsewhere.

Charlotte Russe produced additional evidence from manager Halverson's deposition and from her declaration, to the effect that employees were allowed to wear other brands as long as there were no visible logos, that associates were not required to purchase Charlotte Russe clothing, that she had never told sales associates to purchase Charlotte Russe clothing, and that she had never told employees that they had to wear Charlotte Russe jeans. When questioned about the dress code policy that jewelry be consistent with current fashion, she testified

that "if it's not Charlotte Russe, you want to wear something similar that's in that fashion trend so that we can show them something similar in the store."

Further, Charlotte Russe produced evidence that employee records showed that some employees, including several of the people who submitted declarations for plaintiffs, had either never used their employee discount, or had done so only on one or two occasions, or had used the discount in part to buy non-clothing items or clothing which could not be worn to work.

Discussion

We can see no abuse of discretion in the trial court ruling. Plaintiffs' form declarations are ambiguous, with the seemingly contradictory statements that "I feel as though I was coerced or compelled to purchase Charlotte Russe clothing," and that "I was encouraged by my supervisor to purchase" Charlotte Russe clothing, and that "I was pressured to purchase certain clothing for work of certain design and/or color."

A statement that "I feel as though" I was "coerced or compelled" is remarkably lacking in foundation, and really establishes nothing. To complicate things, those same declarants said they were "encouraged," which is not the same as compulsion or coercion. The final statement, that there was "pressure" to purchase clothing "of certain design and/or color," does not even seem to refer to "pressure" to purchase Charlotte Russe clothing.

***5** Even aside from problems of vagueness and lack of foundation, these declarations do not even identify the declarants' store, or the managers who "encouraged" or "coerced," or "pressured." We thus do not know how many different stores the declarants represent, or how many managers at those stores engaged in these practices. These declarations do not establish that Charlotte Russe had a common practice or scheme, but only that the declarants had these experiences.

The final six declarations include more detail, and most recite that a manager specifically told the employee that Charlotte Russe clothing was required, solving some of the foundation problems of the form declarations. These declarations also identify the declarants' store, establishing that the declarants represented more than one store, and a few identify the manager. However, there were not very many of these declarations. Six declarations do not establish a common practice or scheme.

In contrast, Charlotte Russe produced many, many declarations from employees—some of whom worked in the same stores as did plaintiffs' declarants—that there was no pressure or coercion, but that they commonly worked in clothes purchased elsewhere, with no repercussion. Plaintiffs' reliance on Halverson's deposition does not assist them. She was but one manager, and nothing indicates that when she told employees to wear Charlotte Russe jeans to a meeting, she was following Charlotte Russe policy.

It is thus difficult to see that plaintiffs showed the existence of a numerous class with common issues of fact, and no abuse of discretion in the trial court's finding that they did not.

Class 2: Uniforms

Plaintiffs alleged that Charlotte Russe failed to indemnify employees for uniforms they were required to wear as a condition of employment, in violation of Labor Code section 2802, subdivision (a), which provides that "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, ..." They sought to certify a class of all former and current managers, assistant managers and sales associates employed in California who were subject to Charlotte Russe's dress code.

Evidence

In general, plaintiffs relied on Charlotte Russe's written dress code. In addition to the portions of the dress code described above, they cite the code's prohibition on low necklines and short skirts, the provision that "screen tees" (described as "the little T-shirts with different sayings on it") could only be worn as layering pieces, that is, over or under another shirt or sweater, and the provision, under "personal grooming," that "As a representative of the brand, your appearance should be stylish, professional, and neat."

Plaintiffs also relied on the form declarations described above, in particular the declarants' statement that "While

working at Charlotte Russe, Inc. I was pressured to purchase certain clothing for work of certain design and/or color to project current fashion trends," and on a few additional declarations: "I was told by my district manager that I was required to wear 'trendy' clothes to work ..." and, "If the associates' clothes that were worn to work were not 'up' on the fashion the associates would get pulled aside and told not to let it happen again. I was required to wear clothing that was 'in season,' " and "I feel that the company should have had uniforms considering we were strictly notified to use Charlotte Russe's clothing...."

***6** Plaintiffs produced manager Halverson's deposition testimony that she had told sales associates to accessorize and that to be in compliance with the dress code and to be "trend right" an associate could not wear "just one layer and jeans," but had to include a scarf or ring or necklace, or other accessory. On one occasion, she told associates (in writing) that "Charlotte girls" wear "lots of accessories," and "[g]oing forward everyone must have on a minimum of 3 accessories."

Charlotte Russe produced additional testimony by Halverson, to the effect that she only intended to offer a guideline on accessories, and that the guideline was hers, not a matter of store policy.

Discussion

Plaintiffs cite a 1994 Division of Labor Standards Enforcement opinion prepared for an employer who wished to prohibit clothing or shoes which contained metal, so that employees could go through a metal detector. The DLSE opined that the employer would be obligated to pay for the clothing, noting that "uniform" includes "wearing apparel and accessories of distinctive design or color," and that "the question is not whether the particular wearing apparel or accessory has some value outside employment, but whether the wearing apparel is required by the employer as a condition of employment."

Plaintiffs argue that Charlotte Russe employees, too, were required to wear clothes of a distinctive design and to accessorize. We cannot see any such evidence.

First, to the extent that plaintiffs rely on the form declarations, we again note the limits of those declarations. They do not identify the store or the manager allegedly responsible for "pressuring" associates to wear "certain clothing" or "certain design," and thus do not establish a common practice throughout Charlotte Russe. The other declarations do little to cure that fault. Individual statements by individual managers do not establish a common practice or policy.

Plaintiffs did not establish that Charlotte Russe required employees to wear any "distinctive design or color," or that, with the exception of one manager, there was even a suggestion that they had to accessorize. A prohibition on short skirts or low necklines or the display of a competitor's logo cannot be deemed a requirement that employees wear a "distinctive design" that amounts to a uniform. We say the same about a rule that an employee's "appearance should be stylish, professional, and neat."

What is more, the dress code provides "Employees who are not in compliance with this policy will be sent home and directed to return in compliance. Such employees will not be compensated for the time away from work and failure to meet these standards will result in disciplinary action, up to and including termination of employment." Yet, plaintiffs produced no evidence that any employee was disciplined for failing to wear clothes which reflected "current trends and fashion," or for wearing clothes which were not "trendy" or "in season." There is thus no evidence that Charlotte Russe required, as a uniform, that associates wear such clothes.

***7** Charlotte Russe cites DLSE opinion letters to the effect that in determining whether a dress code constitutes a uniform, the question is "whether the employee could be expected to be able to use the outfit while working at his or her 'occupation' with another employer." Charlotte Russe's declarations establish that Charlotte Russe employees could go to work in clothes they had worn in other retail jobs, indicating that the clothes acceptable to Charlotte Russe were acceptable elsewhere, and were not a uniform.

For all these reasons, there was no abuse of discretion in the trial court ruling.

Classes 3 & 4: Meal and Rest Break Violations

Plaintiffs alleged that Charlotte Russe failed to provide managers and assistant managers with meal and rest breaks. They alleged that Charlotte Russe policy required that one manager be present in each store at all times, and that often,

there was only one manager or assistant manager, so that it was impossible for managers and assistant managers to take their breaks.

Plaintiffs also alleged that Charlotte Russe had a policy and practice of failing to provide meal or rest breaks to sales associates. They alleged that Charlotte Russe policy was that there always be an associate to cover each zone of the store and that often there were not enough sales associates to allow each associate to take a full, uninterrupted meal or rest break.

Plaintiffs further alleged that as a matter of policy and practice, when a meal or rest period was not provided, employees did not receive one hour of pay. (Lab.Code, §§ 512, 226.7.)

Plaintiffs sought to certify a class of all California store employees who failed to receive a meal break for every five hours of work and/or failed to receive a rest break every four hours of work, and were not paid for one hour at the regular rate of pay.

Plaintiffs' evidence

Plaintiffs produced evidence that hourly employees were required to punch in and out for meal and rest breaks. The person most knowledgeable about Charlotte Russe's timekeeping system testified at her deposition that the software would note a missed meal or break but would not automatically add an additional hour of pay. Plaintiffs also produced deposition testimony from Charlotte Russe employee Kelly Moriarty that Charlotte Russe does not have a policy of giving an additional hour of pay if an employee misses a meal or rest break, and deposition testimony from manager Christine Halverson, who said that she knew of no such policy, had been told of no such policy, and was only told by district managers that employees should not miss meal periods. Another Charlotte Russe employee, Rita Devlin, testified that she had never seen a pay stub which reflected an additional hour of pay for a missed meal period, and that, to her knowledge, the company's payroll system was not programmed to provide such pay.

Plaintiffs submitted approximately 17 declarations of current or former employees who identically declared that they were hourly employees and that "On more than one occasion, I did not receive a full thirty minute meal period when I worked over six hours. [¶] On more than one occasion, I did not receive a ten minute rest period when I worked over four hours. [¶] ... [¶] I never received an additional hour of pay on my paycheck when I worked over six hours per day and failed to receive a thirty minute meal period. [¶] I never received an additional hour of pay on my paycheck when I worked over four hours per day and failed to receive a ten minute rest period. [¶] I wanted to take a thirty minute meal period when I worked over six hours per day."

***8** Additionally, one hourly employee declared that "the biggest issue I had while working with Charlotte Russe was not being able to take bathroom breaks ...," one declared that "there were a number of times that I did not receive any breaks and or lunches due to poor scheduling and management," and one declared that I was sometimes not allowed to go to the bathroom. "I was often not given rest periods." None of these declarations identify the store the employee worked in, or identified the employee as a sales associate or manager, though we gather from other indications in the record that these individuals were associates and not managers.

There are also two declarations in which the store is identified and the declarant is identified as a sales associate. One of these employees declared that "At times I did not receive a full uninterrupted thirty minute meal period ... I was told by my manager to clock out for lunch and then even though my thirty minute lunch was not complete, I was told to come back from lunch in order to help customers." The other declaration is similar, and includes a statement that "I believe this occurred because there were not enough employees to cover associates' lunches," and that this occurred approximately four times in the six months that she worked at Charlotte Russe.

There are two declarations from managers. One declared that "At times I did not receive a full uninterrupted thirty minute meal period for all five hours of work. It was company policy that a manager could not leave the store. I therefore sometimes go my entire shift without a meal period." Another, Maria Sarabia, declared that "there were many times that I would be by myself in the store (no other management in the store) and I failed to receive an uninterrupted thirty minute meal period for every five hours of work. This occurred approximately two times a month." Sarabia also declared that she worked as a Charlotte Russe manager for a little more than two years.

Charlotte Russe's evidence

Charlotte Russe produced evidence that its policy is that all store employees take 45 minute meal breaks and 15 minute rest breaks at the appropriate intervals, and that this policy is made known to employees through the employee handbook and other materials, including a Meal and Rest Period Policy Acknowledgement which sets out the policy and is signed by the employee, and each store's Daily Break Shift Sheet. This sheet lists every employee scheduled to work on a given day and each employee's scheduled meal and rest periods. Each employee is required to initial the sheet when a meal or rest period is taken and the sheet is faxed to district managers at the end of every day.

District managers and all members of store management are required to monitor break compliance on a daily basis, in part through the use of the daily sheet, to communicate break policy to employees, and to discipline employees who do not comply with the policy.

***9** The policy requiring employees to clock in and out for breaks was primarily designed to assist in monitoring and enforcing meal and rest break compliance.

Charlotte Russe submitted declarations from approximately 70 managers and hundreds of employees to the effect that they knew of the policies, took their breaks, and initialed the sheet.

Further, Charlotte Russe produced evidence that each store has a manager, one or more senior associate managers, and one or more associate managers, and that managers' duties include scheduling shifts so that all employees can take meal and rest breaks. This includes scheduling managers' shifts to overlap or otherwise provide coverage so that all on-site managers can take meal and rest breaks. In California, Charlotte Russe provides all stores with additional labor hours, to facilitate compliance with meal and rest break laws.

Finally, Charlotte Russe produced evidence that plaintiffs' declarant Sarabia was disciplined for, inter alia, failing to enforce the meal and rest break policy in her store, and failing to regularly and accurately clock in and out for all shifts and breaks.

Discussion

Plaintiffs argue that they sufficiently advanced a theory of recovery that is likely to prove amenable to class treatment, that is, that managers missed meal breaks because they were required to stay in the store at all times, and that associates missed meal periods because there was not enough coverage in the store. We can see that they asserted such a theory, but not that it was supported with evidence.

First, as Charlotte Russe argues, the evidence that there was a class of managers who missed meal breaks due to Charlotte Russe management staffing practices is scant. It amounts to two declarations, one of them from a manager who was disciplined for violations of Charlotte Russe policies concerning meal and rest breaks. In contrast, many managers declared that they regularly took their meal breaks, and Charlotte Russe produced evidence that each store had more than one manager and that managers were directed to schedule shifts so that managers' shifts would overlap and each manager could take the required breaks. The trial court did not abuse its discretion when it denied class certification on this issue. There simply is not enough evidence of the existence of a class so numerous that maintenance of a class action would be advantageous. (*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1105–1106.)

Our analysis concerning the non-managers is similar. There was evidence of missed meal and rest breaks, without payment. However, there was almost no evidence that this was caused by inadequate staffing. Three employees, from at most three stores, believed that that was the case, but there was no apparent foundation for their beliefs. In contrast, Charlotte Russe produced a great deal of evidence that it took affirmative steps to ensure compliance with meal and rest break laws. It was thus well within the trial court's discretion to conclude that common issue did not predominate, and that class certification should be denied.

Classes 5 & 6: Overtime Wages and Off–the–Clock Work

***10** Plaintiffs alleged that Charlotte Russe required employees to complete tasks off the clock, which at times required them to work more than 8 hours a day, and that Charlotte Russe required employees to arrive at work in time to open the stores, but did not allow them to clock in until a manager arrived, which might not be for another 20 or 30 minutes. Plaintiffs alleged that employees were not paid for

their time off the clock, and were not paid overtime when overtime was required. (Lab.Code, § 510.)

Plaintiffs sought to certify a class of all former and current managers, assistant managers, and sales associates employed in California who were not paid overtime wages for work in excess of 8 hours a day or 40 hours a week, and a class of all former and current managers, assistant managers and sales associates employed in California who performed work for Charlotte Russe and were not paid at their hourly rate of pay.

Plaintiffs' evidence

Plaintiffs produced evidence that only managers have keys to the stores, and that at one time or another, each associate is required to work the opening shift. Plaintiffs also produced five declarations: "I at times was asked to come at 5 AM to work and was not paid for the hours prior to the store opening at 9 AM." "Approximately six times during my employment at Charlotte Russe, I arrived at the store at my scheduled time and I was required to wait for my manager to arrive at the store before I could clock in." (This employee worked for Charlotte Russe for about 6 months.) "While employed at Charlotte Russe, Inc. I often worked off the clock and did not receive pay ... other associates and I would be told by the manager to 'clock out' and then continue performing duties...." "We were forced to clock out at closing time and continue the cleaning process until finished. Managers claimed that regional and district managers would be upset if we went 'over' the hours approved on the schedule."

And, from a manager, "I was often required to clock out and continue working without pay. I was told by my district manager that I could not go over my scheduled hours. However, I was also told by my district manager that I had to complete certain tasks such as floor sets. I therefore was required to complete these tasks without pay." This declarant added "Charlotte Russe did not pay over-time after 8 hr working period. While executing floor-sets management and associates stayed on the clock over 8 hours and were 'never' paid over-time...." [2]

Three of these five declarants identified the store they worked at, but two did not.

Charlotte Russe's evidence

Charlotte Russe submitted evidence that off the clock work is prohibited by company policy, that company policy is to pay for all hours worked, including overtime, and that these policies are communicated to all employees through an employee handbook, a store procedures manual, and other documents. Charlotte Russe also submitted hundreds of declarations from sales associates who declared that they knew about Charlotte Russe's policies in this regard, were paid overtime when they worked overtime, and never worked off the clock, but were paid for all the time that they worked. Many declared that if they could not clock in at the beginning of a shift, a manager would manually adjust the time to make sure the employee was paid for all hours worked. Many declared that they worked 4 or 5 hour shifts, and had never worked overtime.

***11** In addition, many, many managers declared that they knew of Charlotte Russe's policies in this regard and that as part of their job, they ensured that hourly associates were paid for all hours worked, and that if an employee began work before he or she could clock in, a manual adjustment would be made to the records to ensure that the employee was paid for all time worked.

Discussion

First, as Charlotte Russe argues, because many employees worked four hour shifts, off the clock work would not necessarily be overtime work. With one exception, plaintiffs' declarations speak only to off the clock work and do not include information about the length of the employee's shift, or any affirmative statement about overtime. Those declarations thus cannot be construed as declarations concerning overtime. Only one declaration states that the employee and an unspecified number of associates were, on an unspecified number of occasions, entitled to overtime pay which they did not get. That is simply not enough to establish that a class must be certified.

There is slightly more evidence concerning off the clock work, but only slightly more. Because the declarations only identify three stores in which off the clock work took place at a manager's request, they do not tell us that the practice was a common one which affected a large number of employees. With one exception, the declarations say nothing about the frequency of the practice. We thus cannot find that the trial court abused its discretion by finding that the evidence did not

establish the existence of a numerous, ascertainable class, so that a class action would be beneficial.

Class 9: The "TotalPay Card"

Charlotte Russe offered employees the option of being paid with a debit card, called the "TotalPay Card," administered through an entity called Money Network. In their complaint, plaintiffs alleged that the card was not negotiable and payable in cash on demand, in violation of Labor Code section 212, which provides that "No person ... shall issue in payment of wages due, or to become due, or as an advance on wages to be earned: [¶] (1) Any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state...." Plaintiffs sought to certify a class of all former and current managers, assistant managers and sales associates employed in California "who on payday received their money debit card and had to incur costs to retrieve their money placed on the debit card by Charlotte Russe."

Plaintiffs' evidence

Plaintiffs submitted evidence that users of the TotalPay Card were charged for certain transactions with the card. For instance, they were charged $1.50 for an ATM withdrawal, after the first withdrawal, and were charged if they requested a paper statement concerning the card. [3]

Charlotte Russe's evidence

***12** Charlotte Russe employees, including hourly employees, can choose to be paid through a paper check, direct deposit, or the card, with no penalty for any choice. The default option for employees who do not make a choice is a paper check. Sixty percent of Charlotte Russe employees are paid with a paper check.

Employees who choose the TotalPay Card can access their wages without charge by using the card as a debit card. Or, the card can be used as an ATM card. There is no charge for the first ATM withdrawal in a pay period. Or, an employee can use the Money Network website or a toll free phone number to make an electronic transfer of funds to a U.S. bank account. The website and phone number can also be used, free of charge, for account information. Employees paid with a TotalPay Card are also provided with paper Money Network checks. There is no charge to cash one of these checks at a Wal–Mart, or to use the check to make a purchase.

Discussion

We can find no abuse of discretion in the order denying certification. Plaintiffs have not shown that a substantial number of hourly store employees even used the TotalPay Card, let alone the existence of a class of employees who had issues which could be jointly tried so numerous or substantial that maintenance of a class action would be advantageous to the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1105–1106.)

The Derivative Classes

Because we have found no abuse of discretion in the trial court ruling denying class certification on the substantive classes, we also find no abuse of discretion in the ruling denying certification on the derivative classes.

Disposition

The order denying class certification is affirmed. Respondent to recover costs on appeal.

We concur: TURNER, P.J., and KRIEGLER, J.

All Citations

Not Reported in Cal.Rptr.3d, 2011 WL 4036069

Footnotes

1 In their brief, plaintiffs assert that the evidence was that this discount is “much higher than other retail clothing stores,” but the only evidence cited is the deposition testimony of one manager who testified, without foundation, that the discount is “a benefit for our girls that—especially because like our competitors usually offer lesser of a discount.”

2 The meaning of this declaration, which is in the declarant's handwriting, is somewhat unclear. Are the quotation marks around ‘never’ for emphasis, which is a common, if erroneous use? Do they mean something else? Charlotte Russe produced evidence that this manager was paid overtime during almost every pay period in the two years she worked at Charlotte Russe. The declaration lacks specificity, so that we cannot say whether the declarant essentially acknowledges that she was paid overtime for work other than “floor-sets,” but not for that work.

3 In their brief, plaintiffs also cite the evidence, submitted with their motion, that although an employee could check the card's balance on-line, there was no location in a Charlotte Russe store for that purpose; and that Charlotte Russe encouraged employees to opt for the payment through the TotalPay Card, with promotions and prizes. We cannot see that the evidence is relevant to show that employees were made to incur costs to retrieve their pay, in contravention of the statute.