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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINDA SCHEID, individually and on behalf of all those similarly situated, Plaintiff-Appellee, v. PNC BANK, N.A., Defendant-Appellant.	No. 21-15988 D.C. No. 3:18-cv-04810-JCS MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted November 14, 2022
San Francisco, California

Before: GOULD and PAEZ, Circuit Judges, and MOLLOY,[**] District Judge.

Defendant-Appellant PNC Bank ("PNC") appeals the district court's grant of summary judgment to Plaintiff-Appellee Linda Scheid ("Scheid"), who represents a class of mortgage loan officers ("MLOs") employed by PNC. Scheid

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

alleges that PNC's Mortgage Originations Incentive Plan ("Incentive Plan"), under which all MLOs are paid, violates California Labor Code section 226.7 by failing to properly compensate MLOs for rest periods. Section 226.7 requires that rest periods "be counted as hours worked, for which there shall be no deduction from wages." Cal. Lab. Code § 226.7(d).

Under the Incentive Plan, MLOs receive either "Regular Pay," which PNC also calls a salary, or receive "Incentive Pay," which is tied to the MLOs' loan sales. MLOs only receive Incentive Pay if they meet a certain monthly threshold in sales. Rest period pay is understood to be included in Regular Pay. In calculating the threshold for Incentive Pay, however, PNC deducts Regular Pay—and thus the included rest period pay—from the MLO's earned incentive credits (essentially, commissions for loan sales). Moreover, if an MLO does not meet the threshold because her incentive credits do not exceed her Regular Pay, the resulting deficit is usually carried forward to the next month and added into the threshold calculation, such that the MLO must make up the deficit before earning Incentive Pay.

The district court granted summary judgment to Scheid, concluding that the Incentive Plan violated section 226.7. By deducting Regular Pay from incentive credits to determine Incentive Pay, and by carrying forward deficits when MLOs only received Regular Pay, the district court reasoned that PNC was not

compensating MLOs for their rest periods.

In so holding, the district court relied on *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98 (2017), a California appellate court case that considered rest period pay under a compensation plan structured similarly to PNC's. PNC argued that *Vaquero* was significantly narrowed by a later California Supreme Court case, *Oman v. Delta Air Lines, Inc.*, 466 P.3d 325 (Cal. 2020). The district court held that *Oman*, which concerned wage-borrowing and minimum wage requirements, did not limit *Vaquero* and was not relevant to the issues in this case. Subsequently, the district court certified under 28 U.S.C. § 1292(b) to this court the issue of whether PNC's Incentive Plan violates section 226.7 under California law. A motions panel granted review. *See Scheid v. PNC Bank*, No. 21-80039 (9th Cir. June 9, 2021) (Dkt. No. 3).

As discussed below, we have jurisdiction under 28 U.S.C. § 1292(b). We review de novo a district court's summary judgment ruling and its interpretation of state law. *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 685 (9th Cir. 2017); *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 426-27 (9th Cir. 2011). We affirm.

1. Jurisdiction. For jurisdiction to exist under 28 U.S.C. § 1292(b), we must conclude "(1) that there [is] a controlling question of law, (2) that there [is] substantial grounds for difference of opinion, and (3) that an immediate appeal

may materially advance the ultimate termination of the litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981). Scheid argues that the first factor is not met because no controlling question of law exists. The question in this case, however, is whether the district court correctly determined that *Oman* did not limit *Vaquero* in order to grant summary judgment based on undisputed facts. This is a pure question of law. The other two factors are easily met. We thus conclude that we have jurisdiction over this interlocutory appeal. 28 U.S.C. § 1292(b); *see also Scheid*, No. 21-80039 (Dkt. No. 3) (order granting PNC permission to appeal).

2. Grant of Summary Judgment. The district court correctly interpreted California law to conclude that PNC's Incentive Plan violates section 226.7. PNC's plan is nearly identical to the plan at issue in *Vaquero*. In *Vaquero*, sales associates would receive the higher of "Minimum Pay" of $12.01 per hour or their commissions. 9 Cal. App. 5th at 103. If they received only Minimum Pay, that amount would operate as a draw against their commissions the following month. *Id.* As here, sales associates recorded their time and did not clock out for rest periods, so any rest break pay was included in hourly pay. *Id.* Although PNC argues its Incentive Plan is distinguishable because it paid a salary based on a forty-hour workweek that exceeded minimum wage and did not operate as a draw, these arguments fail. PNC's "salary" (or Regular Pay) is no different than

Minimum Pay in *Vaquero*. And by counting Regular Pay as a deficit against future Incentive Pay, PNC's Incentive Plan also "deduct[ed] from future paychecks . . . wages advanced to compensate employees for hours worked, including rest periods." *Vaquero*, 9 Cal. App. 5th at 115.

Because it is effectively indistinguishable from the plan in *Vaquero*, PNC's Incentive Plan violates section 226.7(d) unless the *Oman* court limited the decision in *Vaquero*.[1] We agree with the district court that the California Supreme Court did not do so. The *Oman* court never once negatively discussed *Vaquero*. The *Oman* court also did not address rest periods or statutorily mandated rest period pay. Rather, the issue in *Oman* concerned minimum wage requirements and the "wage borrowing" rule, which means that "an employer who promises to compensate particular hours worked at a particular rate cannot borrow some of that compensation and apply it to other compensable hours for which no compensation is provided." *Oman*, 466 P.3d at 335-36. Rather than contradict *Vaquero*, the *Oman* court noted it "agree[d]" with the no wage-borrowing rule developed in *Vaquero* and related cases. *Id.* at 336. Simply put, *Oman* is not on point. *Oman*

[1] "When interpreting state law, federal courts are bound by decisions of the state's highest court." *In re Bartoni-Corsi Produce, Inc.*, 130 F.3d 857, 861 (9th Cir. 1997) (quoting *Lewis v. Tel. Emps. Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 19996)). If there is no relevant decision by the state's highest court, federal courts are "obligated to follow the decisions of the state's intermediate appellate courts" unless there is "convincing evidence that the state supreme court would decide differently." *Id.*

concerns minimum wage requirements, and Scheid makes no minimum wage claim here.

As in *Vaquero*, "[t]he problem with [PNC's] compensation system . . . is that the formula it used for determining commissions did not include any component that directly compensated [MLOs] for rest periods." *Vaquero*, 9 Cal. App. 5th at 114. If a compensation system involves a formula, employers must ensure rest period pay is never "deduct[ed] from wages." *See* Cal. Lab. Code § 226.7(d).

Because *Oman* did not limit *Vaquero*, and PNC's Incentive Plan failed to properly compensate MLOs for their rest breaks, we affirm the district court's grant of summary judgment.

AFFIRMED.