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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

XIAO-MEI JIN, on behalf of herself))	
and all others similarly situated,))	
)	
Plaintiff,))	2:07-cv-1587-GEB-KJN
)	
v.))	<u>ORDER</u>
)	
BEN BRIDGE-JEWELER, INC., a))	
Washington Corporation,))	
)	
Defendant.))	
_____))	

Plaintiff moves for certification of the following class under Rule 23 of the Federal Rules of Civil Procedure¹: "All current and former employees of Defendant who worked shifts in excess of six (6) hours as a sales associate at [Defendant's] retail stores in California, and who were entitled to receive meal periods, since July 21, 2003." Plaintiff argues this class should be certified since Defendant failed to pay compensation to its employees who worked

¹ Unless otherwise indicated, all references to Rules are to the Federal Rules of Civil Procedure.

1 through their meal periods, as required by California Labor Code §§
2 226.7, 512 and the Industrial Welfare Commission's ("IWC") Wage Order
3 7-2001.

4 "The party seeking certification bears the burden of showing
5 that each of the four requirements of Rule 23(a) and at least one
6 requirement of Rule 23(b) have been met." Dukes v. Wal-Mart, Inc.,
7 509 F.3d 1168, 1176 (9th Cir. 2007) (citations omitted). Plaintiff
8 argues she has satisfied the class certification prerequisites in Rule
9 23(a) and Rule 23(b) (3). Defendant disputes Plaintiff's contention
10 that Rule 23(b) (3) is satisfied.

11 Rule 23(b) (3) requires a court to find "the questions of law
12 or fact common to the class members predominate over any question
13 affecting individual members, and that a class action is superior to
14 other available methods for fairly and efficiently adjudicating the
15 controversy." "To determine whether common issues predominate, this
16 Court must first examine the substantive issues raised by Plaintiff[]
17 and second inquire into the proof relevant to each issue." Jiminez v.
18 Dominos Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006) (quotation
19 and citation omitted); In re Coordinated Pretrial Proceedings in
20 Petroleum Prods. Antitrust Litig. State of Cal. v. Standard Oil Co. of
21 Cal., 691 F.2d 1335, 1342 (9th Cir. 1982) (citations omitted) (stating
22 when "determining whether to certify the class, the district court is
23 bound to take the substantive allegations of the complaint as true,
24 [and] is required to consider the nature and range of proof necessary
25 to establish those allegations").

26 Plaintiff argues California law obligates an employer to
27 "ensure" that meal periods are taken, and to compensate each employee
28 for a missed meal period. Defendant rejoins this law only requires an

1 employer to "provide" employees with an opportunity to take a meal
2 period, and that class certification is inappropriate here because
3 individualized discovery is necessary to determine why an employee
4 failed to take a meal period. This dispute requires interpretation of
5 California "meal period" law.

6 "When interpreting state law, federal courts are bound by
7 decisions of the state's highest court." Kimoto v. McDonald's Corps.,
8 No. CV 06-3032, 2008 WL 4690536, at *5 (C.D. Cal. Aug. 19, 2008)
9 (citing In re Kirkland, 915 F.2d 1236, 1238 (9th Cir. 1990)). The
10 California Supreme Court has not addressed whether an employer is
11 required to "provide" or "ensure" meal periods. "In the absence of
12 such a decision, a federal court must predict how the highest state
13 court would decide the issue using intermediate appellate court
14 decisions, decisions from other jurisdictions, statutes, treatises,
15 and restatements as guidance." Ariz. Elec. Power Coop., Inc. v.
16 Berkeley, 59 F.3d 988, 991 (9th Cir. 1995) (internal quotation and
17 citation omitted). However, decisions of the California appellate
18 courts are not controlling, but may be instructive on an unsettled
19 area of California law. Guebara v. Allstate Ins. Co., 237 F.3d 987,
20 993 (9th Cir. 2001).

21 Plaintiff argues California Labor Code §§ 226.7, 512 and
22 Wage Order 7-2001 should be interpreted consistent with what she
23 opines is the holding in Cicairos v. Summit Logistics, Inc., 133 Cal.
24 App. 4th 949 (2005), a case that Plaintiff contends held an employer
25 shall ensure that its employees take meal periods. However, as the
26 court stated in Watson-Smith v. Spherion Pacific Workforce, No. C
27 07-05774, 2008 WL 5221084, at *3 (N.D. Cal. Dec. 12, 2008):

28 Cicairos v. Summit Logistics, Inc., 133 Cal. App.
4th 949, 35 Cal. Rptr. 3d 243 (2005) does not

1 assist Plaintiff. In Cicairos, the employer
2 managed and scheduled the drivers in such a way
3 that prevented the drivers from taking their meal
4 periods. Id. at 962, 35 Cal. Rptr. 3d 243. Based
5 on an opinion letter from the Department of
6 Industrial Relations, the court held that
7 employers have an affirmative obligation to ensure
8 that workers are relieved of all duty during their
9 meal periods. Id. The court also noted that
10 employers have an obligation pursuant to the wage
11 order to record their employees' meal periods.
12 Because the employer complied with neither
13 obligation, based on the facts before it, the
14 court found that the employer "failed to establish
15 it provided the plaintiffs with their required
16 meal periods." Id. at 963, 35 Cal. Rptr. 3d 243.

10 Defendant submits the California Division of Labor Standards
11 Enforcement Office's ("DLSE") staff memorandum dated October 23, 2008,
12 on "Court Rulings on Meal Periods," in support of its position that an
13 employer is only required to provide a meal period. The DLSE states
14 in the memorandum: "the language of the [referenced statutes and wage
15 order], and the cases interpreting them demonstrate[] compelling
16 support for the position that employers must provide meal periods to
17 employees but do not have an additional obligation to ensure that such
18 meal periods are actually taken." (DLSE Memorandum dated Oct. 23,
19 2008, p.2.) The DLSE also discusses the Cicairos decision in this
20 memorandum, stating "there is recent, substantial, and persuasive
21 authority from many federal trial courts which have interpreted
22 Cicairos that the appellate court in that case did not hold as a
23 matter of binding law that employers have a statutory or regulatory
24 obligation to ensure that employees actually take their meal periods."
25 (Id.)

26 "The DLSE is the state agency empowered to enforce
27 California's labor laws, including IWC wage orders." Morillion v.
28 Royal Packing Co., 22 Cal. 4th 575, 581 (2000) (citation omitted).

1 "As such it frequently issues opinions and letters from which we can
2 properly obtain guidance." Koehl v. Verio, Inc., 142 Cal. App. 4th
3 1313, 1334 (2006). The DLSE's October 23 staff memorandum is given
4 "some consideration by the Court." Yamaha Corp. of Am. v. State Bd.
5 of Equalization, 19 Cal. 4th 1, 15 (1998). However, "the courts must
6 remain the final authorities on critical questions of statutory
7 construction." Bechtel Const., Inc. v. United Broth. of Carpenters &
8 Joiners of Am., 812 F.2d 1220, 1223 (9th Cir. 1987) (quoting Fagner v.
9 Heckler, 779 F.2d 541, 543 (9th Cir. 1985)).

10 The language in the statutes supports the DLSE's conclusions
11 in its memorandum. Section 226.7(b) requires an employer to pay
12 additional compensation to an employee "[i]f [it] fails to *provide*
13 [the] employee a meal period or rest period in accordance with an
14 applicable order of the Industrial Welfare Commission"
15 (emphasis added). Section 512(a) states "[a]n employer may not employ
16 an employee for a work period of more than five hours per day without
17 *providing* the employee with a meal period of not less than 30 minutes
18" (emphasis added). Since neither statute "define[s] the term
19 ['provide'] differently than its common usage, we turn to the
20 dictionary." United States v. Pearson, 274 F.3d 1225, 1231 n.6 (9th
21 Cir. 2001). The dictionary definition of the term "provide" is "'to
22 supply or make available' [and] does not suggest any obligation to
23 ensure that employees take advantage of what is made available to
24 them." Brown v. Federal Express Corp., 249 F.R.D. 580, 585 (C.D. Cal.
25 2008) (quoting Merriam Webster's Collegiate Dictionary 937 (10th ed.
26 2002)).

27 Language in the wage order "comes closest to imposing a duty
28 to enforce meal breaks." Brown, 249 F.R.D. at 585. Wage Order 7-2001

1 states "[n]o employer shall employ any person for a work period of
2 more than five (5) hours without a meal period of not less than 30
3 minutes" 8 CCR § 11070(11). However, the California Supreme
4 Court dicta in Murphy v. Kenneth Cole Productions, Inc., 40 Cal. 4th
5 1094 (2007), does not support construing this language to impose a
6 duty on employers to ensure that meal breaks are taken. When
7 discussing this wage order, the Supreme Court said "employees are
8 entitled to an unpaid 30-minute, duty-free meal period after working
9 for five hours An employee *forced to forgo* his or her meal
10 period . . . loses a benefit to which the law entitles him or her."
11 Id. at 1104 (emphasis added). These statements indicate that an
12 employee decides whether he or she takes a meal period.

13 For the stated reasons, an employer is required to provide
14 meal periods but need not ensure that an employee actually takes a
15 meal period.

16 Plaintiff argues her class should still be certified because
17 there is no need to conduct an inquiry into the reasons why meal
18 periods were missed in this case, since Defendant has a policy of
19 denying timely meal periods. Plaintiff declares when she worked as a
20 sales associate at Defendant's Sacramento retail store, she was often
21 denied timely meal periods due to Defendant's policy that "there must
22 be at least two sales associates . . . on the sales floor at all
23 times." (Pl. Decl. ¶ 5.) She declares Defendant "frequently
24 scheduled only two employees to work during the same shift, and
25 accordingly, [she] was not able to take [her] meal break if by doing
26 so there was only one other employee in the store." (Id.) She
27 further declares "[g]enerally, [her] manager decided and told [her]
28 when [she] was to take [her] meal break." (Id.)

1 Plaintiff also relies on her expert David J. Weiner's
2 analysis of Defendant's timekeeping records, which capture when a
3 sales associate clocks in and out for his or her work shift. Weiner
4 analyzed samples of Defendant's timekeeping records from four of
5 Defendant's 32 California retail stores, for two different six-month
6 periods, and concluded that a significant number of shifts did not
7 include the requisite meal break. (Weiner Decl. ¶¶ 10, 11.)

8 Defendant rejoins with its expert Robert W. Crandall who
9 analyzed the same four stores Weiner analyzed, and declares the data
10 shows some sales associates never missed a meal period while others
11 missed all of their meal periods. He also found that in the store
12 where Plaintiff was employed, which was one of the four stores
13 analyzed, significantly more employees reported missed meal periods.

14 Defendant also relies on the deposition testimony of its
15 Regional Vice President Steve Wilson, who is in charge of six of
16 Defendant's California stores, including the store where Plaintiff
17 worked. Wilson testified that he regularly reviews sales associates'
18 shift schedules and meets with sales associates and store managers to
19 ensure that meal periods are properly provided. (Wilson Depo. at
20 16:8-17:4, 21:21-22:1, 28:24-29:8.) He also testified that no sales
21 associate has ever complained to him about being denied a meal period.
22 (Wilson Depo. at 55:24-56:3.)

23 In light of the nature of proof necessary for Plaintiff to
24 establish why a sales associate missed a meal period, Plaintiff has
25 not shown that common factual issues predominate over the required
26 individualized discovery concerning why certain sales associates

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1 missed meal periods. Therefore, Plaintiff's motion for class
2 certification is denied.

3 Dated: February 4, 2009

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7 GARLAND E. BURRELL, JR.
8 United States District Judge
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