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United States District Court
For the Northern District of California

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

MELINDA FRIEND, et al.,
Plaintiff,
v.
HERTZ CORPORATION,
Defendant.

No. C-07-5222 MMC

**ORDER DENYING PLAINTIFFS' MOTION
FOR LEAVE TO FILE MOTION FOR
ISSUE CERTIFICATION**

Before the Court is plaintiffs' Motion for Leave to File a Motion for Issue Certification, filed June 27, 2014. Defendant Hertz Corporation ("Hertz") has filed opposition, to which plaintiffs have replied. The matter came on regularly for hearing August 15, 2014. Joshua G. Konecky of Schneider Wallace Cotrell Konecky LLP appeared on behalf of plaintiffs. Robert A. Dolinko of Nixon Peabody LLP appeared on behalf of Hertz. Having read and considered the papers filed in support of and in opposition to the motion, and having considered the arguments of counsel made at the hearing, the Court rules as follows.

BACKGROUND

In the operative complaint, the SAC filed June 18, 2010 ("SAC"), plaintiffs allege they each formerly worked for Hertz as a "Location Manager" at one of Hertz's airport locations (see SAC ¶¶ 13-16), and that Hertz had erroneously classified each of them as

1 “exempt from California’s overtime laws” (see SAC ¶ 22). Plaintiffs also allege that, as a
2 result of such asserted misclassification, Hertz failed to pay them overtime for work
3 performed in excess of 8 hours per day and 40 hours per week (see SAC ¶¶ 42-43), did
4 not provide them with the meal and rest periods applicable to persons not classified as
5 exempt (see SAC ¶ 50), and, upon termination, did not provide them all overtime wages
6 due (see SAC ¶ 62). Plaintiffs seek to proceed with such claims on behalf of a class of
7 persons who work or have worked as Location Managers at Hertz’s airport locations. (See
8 SAC ¶ 27.) In its answer, Hertz alleges, inter alia, that “[p]laintiffs and the class members
9 they purport to represent were/are exempt from the overtime provisions of California law
10 (e.g., as executive and/or administrative employees).” (See Joint Case Management
11 Statement, filed May 28, 2010, Ex. C ¶ 9 (Answer to First Amended Complaint); Civil
12 Minutes, filed June 4, 2010 (deeming answer to First Amended Complaint to be answer to
13 SAC).)

14 On June 4, 2010, the Court conducted a Case Management Conference, at which
15 time the Court set a deadline of September 17, 2010, for plaintiffs to file a motion for class
16 certification. Plaintiffs subsequently filed their motion, in which they argued certification of a
17 class was proper under Rule 23(b)(2) and Rule 23(b)(3) of the Federal Rules of Civil
18 Procedure; in particular, plaintiffs argued certification under Rule 23(b)(3) was proper
19 because, with respect to plaintiffs’ “prima facie case” and defendant’s “affirmative
20 exemption defense,” common questions would predominate over individual issues. (See
21 Pls.’ Mem. of P. & A., filed September 17, 2010, at 5:21-24, 32:9-10, 32:25-33:3.) By order
22 filed February 24, 2011, the Court denied plaintiffs’ motion for class certification, and, in
23 particular, found plaintiffs had not shown certification under Rule 23(b)(3) was proper, given
24 “plaintiffs ha[d] failed to show that questions common to members of the class will
25 predominate over questions affecting only individual members of the class.” See Friend v.
26 Hertz Corp., 2011 WL 750741, at *8 (N.D. Cal. February 24, 2011).¹

27
28 ¹In addition, the Court found plaintiffs lacked standing to seek certification under
Rule 23(b)(2). See id. at *4.

1 On May 12, 2011, the Court of Appeals for the Ninth Circuit granted plaintiffs
2 permission to appeal said denial. In their opening brief, plaintiffs argued that the Court's
3 February 24, 2011 order should be reversed, or, in the alternative, that "common issues
4 should be certified pursuant to Rule 23(c)(4)." (See Brief of Plaintiffs-Appellants at 45,
5 Friend v. Hertz Corp., No. 11-16195 (9th Cir. April 30, 2012).) By a decision filed March
6 18, 2014, the Ninth Circuit affirmed the Court's order of February 24, 2011. See Friend v.
7 Hertz Corp., 564 Fed. Appx. 309 (9th Cir. 2014). In a footnote, the Ninth Circuit, in
8 response to plaintiffs' request for "certification of an issue class under Federal Rule of Civil
9 Procedure 23(c)(4)," stated that because plaintiffs had not sought such certification in
10 district court, their "Rule 23(c)(4) claim [was] dismissed without prejudice to it being raised
11 in the district court." See id. at 310 n.1.

12 On April 25, 2014, the Court conducted a Further Case Management Conference, at
13 which time plaintiffs indicated their intent to pursue certification under Rule 23(c)(4). In
14 accordance therewith, the Court did not set a trial date on plaintiffs' individual claims, but,
15 rather, directed plaintiffs to file, no later than June 27, 2014, a motion for leave to file a
16 motion for issue certification.

17 DISCUSSION

18 Rule 23(c)(4)(A) provides that, "[w]here appropriate, an action may be brought or
19 maintained as a class action with respect to particular issues." See Fed. R. Civ. P.
20 23(c)(4)(A). In the instant motion, plaintiffs propose to file a motion seeking, on behalf of
21 the putative class, certification with respect to the issues of whether Hertz's policies
22 "deprive[] Location Managers of the requisite discretion and independent judgment that
23 would be needed to qualify for the exemption[s]" (see Pls.' Mot., filed June 27, 2014, at
24 7:16-19; see also id. at 8:21-9:1), and whether "particular tasks generally performed by
25 Location Managers fall on the exempt or non-exempt side of the ledger" (see id. at 8:3-5).
26 Hertz argues that such proposed motion for certification would be untimely under the
27 Court's June 4, 2010 scheduling order, that good cause does not exist to modify the
28 scheduling order, and that the proposed motion would be futile.

1 In conformity with Rule 16(b), the Court, at the case management conference
2 conducted June 4, 2010, set deadlines to amend the pleadings, to complete discovery, and
3 for plaintiffs to file a motion for class certification, the only motion that either party was then
4 contemplating filing. (See Minute Order, filed June 4, 2010); see also Fed. R. Civ. P.
5 16(b)(1) (providing district court shall issue scheduling order after conducting scheduling
6 conference); Fed. R. Civ. P. 16(b)(3) (providing scheduling order must limit the time to . . .
7 file motions”). Consequently, the deadlines set on June 4, 2010, including the deadline to
8 file a motion for class certification, “may be modified only for good cause and with the
9 judge’s consent.” See Fed. R. Civ. P. 16(b)(4).

10 The Court next considers whether good cause exists to modify the June 4, 2010
11 scheduling order.

12 Plaintiffs argue leave should be afforded because “class certification decisions are
13 routinely subject to multiple reviews.” (See Pls.’ Mot. at 3:11-12.) In support thereof,
14 plaintiffs cite Rule 23(c)(1)(C), which provides that an “order that grants or denies class
15 certification may be altered or amended before final judgment.” See Fed. R. Civ. P.
16 23(c)(1)(C).

17 The purpose of Rule 23(c)(1)(C) is to afford district courts the latitude to amend an
18 existing class certification order, or an order denying class certification, in light of
19 subsequent developments. See General Telephone Co. v. Falcon, 457 U.S. 147, 160 and
20 n.16 (1982) (holding, under predecessor to Rule 23(c)(1)(C), “after a certification order is
21 entered, the judge remains free to modify it in the light of subsequent developments in the
22 litigation”). In the absence of subsequent developments warranting a revision, however,
23 the Court ordinarily has little reason to revisit the issue of the propriety of its original
24 determination. See, e.g., Hartman v. United Bank Card, Inc., 291 F.R.D. 591, 597 (W.D.
25 Wash. 2013) (observing “[r]econsideration of an original class ruling typically occurs as a
26 result of a change in circumstances”; denying plaintiffs’ motion for leave to file second
27 motion for class certification where plaintiffs “identified no changed circumstances”
28 following denial of first motion).

1 Here, the sole circumstance on which plaintiffs rely is the Supreme Court's
2 announcement of its decision in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011),
3 which opinion was issued four months after the denial of plaintiffs' motion for class
4 certification. Dukes, however, addressed the showing necessary to establish commonality
5 under Rule 23(a). Plaintiffs acknowledge Dukes does not address certification of issues
6 under Rule 23(c); rather, plaintiffs contend that, in the light of the requirements for Rule
7 23(a) certification imposed by Dukes, courts are increasingly being asked to certify issues
8 instead of entire cases.

9 If, in fact, a plaintiff seeking to proceed on behalf of a class might be more likely, in
10 light of Dukes or other recent authority, to seek certification of certain issues rather than
11 certification of the entirety of the case, such decision would be a tactical one. Likewise, any
12 decision by plaintiffs in 2010 not to seek, in the alternative, certification under Rule
13 23(c)(4)(A) was a tactical decision. Certification using the procedure identified in Rule
14 23(c)(4)(A) is not a new, post-Dukes phenomenon. In short, plaintiffs identified no change
15 of law, or other change in circumstance, applicable to the instant action. Consequently,
16 good cause does not exist to modify the prior scheduling order.

17 In the alternative, assuming plaintiffs are entitled to file a second motion, the Court
18 next considers Hertz's argument that plaintiffs' proposed second motion for class
19 certification would be futile.

20 The first issue plaintiffs seek to have certified is "whether Hertz's general common
21 policies, protocols and centralized control deprives Location Managers of the requisite
22 discretion and independent judgment that would be needed to qualify for the exemption[s]."
23 (See Pls.' Mot. at 7:15-19.) In their motion for class certification, plaintiffs raised this very
24 issue; specifically, plaintiffs argued certification is proper because Hertz's policies preclude
25 Location Managers from exercising the type of discretion and independent judgment
26 necessary to qualify for the exemptions. (See, e.g., Pls.' Notice, filed September 17, 2010,
27 at 1:21-25 (arguing certification proper because Hertz "affords the same level of discretion
28 and independent judgment to all class members" and because "the way in which class

1 members can perform their job duties is constrained by numerous corporate policies and
2 procedures that are uniform”).² The Court previously found, however, that plaintiffs’
3 reliance on Hertz’s policies did not warrant certification. In affirming the Court’s denial of
4 certification, the Ninth Circuit observed that “uniform corporate policies carry great weight
5 only where the policies reflect the realities of the workplace,” and concluded plaintiffs had
6 failed to offer evidence that could “bridge the gap between policy and practice.” See
7 Friend, 564 Fed. Appx. at 310 (internal quotation and citation omitted). Consequently, to
8 the extent plaintiffs propose a motion based on defendant’s asserted policies, such motion
9 would be futile. Additionally, such motion would be, in essence, a motion for
10 reconsideration, and no cognizable ground to warrant reconsideration has been shown.
11 See Civil L.R. 7-9(b) (setting forth grounds for reconsideration of interlocutory order); see
12 also Hartman, 291 F.R.D. at 597 (holding plaintiff seeking leave to file second motion for
13 class certification must show “some justification for filing a second motion, and not simply a
14 desire to have a second or third run at the same issues”).

15 The second issue plaintiffs seek to have certified is “whether particular duties
16 generally performed by the Location Managers fall on the exempt or non-exempt side of
17 the ledger.” (See Pls.’ Mot. at 8:3-5.) It is readily apparent from the substantive law
18 governing the exemptions on which Hertz relies, however, that no such analysis can be
19 meaningfully performed without consideration of the circumstances under which each
20 Location Manager performs or performed his/her duties. In particular, and even assuming
21 a trier of fact could determine, in the abstract, whether the performance of a particular duty
22 constitutes exempt or non-exempt work, California law provides that non-exempt work is
23 deemed exempt work where it is “directly and closely related to exempt work” or where it is
24 “properly viewed as a means for carrying out exempt functions.” See Cal. Code Regs. tit. 8
25 § 11040(1)(A)(1)(e); Cal. Code Regs. tit. 8 § 11040(1)(A)(2)(f). For example, “[k]eeping

27 ²At the hearing conducted August 15, 2014, plaintiffs confirmed that the policies on
28 which they seek to base a second motion for class certification are the same policies that
were addressed in their prior motion for class certification.

1 basic records of working time,” when performed by a “supervisor” of a department, is
2 considered exempt work under the executive exemption because it is “directly related to the
3 function of managing the particular department,” whereas the exact same task, when
4 performed by a “timekeeper,” is considered non-exempt work. See 29 C.F.R.
5 § 541.108(b); Cal. Code Regs. tit. 8 § 11040(1)(A)(1)(e) (providing “activities constituting
6 exempt work and non-exempt work shall be construed in the same manner as such items
7 are construed in . . . 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-16”).
8 Similarly, for purposes of the administrative exemption, because an “administrative
9 assistant”³ performs exempt work when he “determin[es] whether to answer
10 correspondence directly, call it to his superior’s attention, or route it to someone else for
11 reply,” the task of “opening the mail” for such purpose is considered exempt work because
12 it is “directly and closely related to” making such decisions. See 29 C.F.R. § 541.208(d);
13 Cal. Code Regs. tit. 8 § 11040(1)(A)(2)(f) (providing “activities constituting exempt work and
14 non-exempt work shall be construed in the same manner as such items are construed in . .
15 . 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215”).

16 Here, as discussed at length in the Court’s order of February 24, 2011, the evidence
17 offered in connection with plaintiffs’ motion for class certification established that Location
18 Managers perform “a wide range of possible duties during any given workweek,” see
19 Friend, 2011 WL 750741, at *5, and that the amount of time spent performing those
20 possible duties and the circumstances under which they were performed varied
21 considerably, see id. at *5-8; see also id. at *5 (noting “plaintiffs have failed to show the
22 duties performed by Location Managers are of a similar character and/or performed for a
23 similar duration”). Consequently, to the extent plaintiffs propose a motion based on
24 categorization of duties, such motion would be futile, as a determination of even such
25 assertedly common issue would require consideration of the particular circumstances of
26 each Location Manager’s work and thus would not be “apt to drive the resolution of the

27
28 ³For purposes of the administrative exemption, “administrative assistants” include
“assistant manager[s]” in “retail or service establishments.” See 29 C.F.R. § 541.201(a)(1).

1 litigation,” see Jimenez v. Allstate Ins. Co., --- F.3d ---, 2014 WL 4338841, at *3 (9th Cir.
2 2014) (quoting Dukes, 131 S. Ct. at 2551), let alone predominate, see Valentino v. Carter-
3 Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996) (vacating order certifying issues for
4 classwide determination where plaintiffs failed to show “common issues predominate[d]
5 over individual issues certified”).

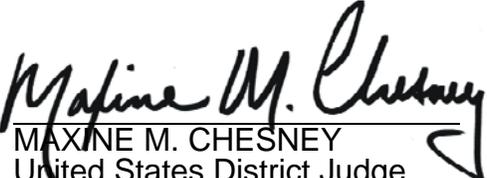
6 Accordingly, plaintiffs’ motion for leave to file a second motion for class certification
7 will be denied.

8 **CONCLUSION**

9 For the reasons stated above, plaintiffs’ motion is hereby DENIED.

10 **IT IS SO ORDERED.**

11
12 Dated: September 8, 2014

13 
14 MAXINE M. CHESNEY
15 United States District Judge