

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 LATONYA TYUS, an individual; DAVID)
4 HUNSICKER, an individual; LINDA)
5 DAVIS, an individual; TERRON SHARP,)
6 an individual; COLLINS KWAYISI, an)
7 individual; LEE JONES, an individual;)
8 RAISSA BURTON, an individual;)
9 JERMEY MCKINNEY, an individual; and)
10 FLORENCE EDJEOU, an individual, all on)
11 behalf of themselves and all similarly situated)
12 individuals,)

10 Plaintiffs,

11 vs.

12 WENDY'S OF LAS VEGAS, INC., an)
13 Ohio corporation; CEDAR ENTERPRISES,)
14 INC., an Ohio Corporation; and DOES 1)
15 through 100, inclusive,)

15 Defendants.)

Case No.: 2:14-cv-0729-GMN-VCF

ORDER

17 Pending before the Court is the Motion for Summary Judgment, (ECF No. 77), filed by
18 Defendants Cedar Enterprises, Inc., and Wendy's of Las Vegas, Inc. (collectively
19 "Defendants"). Plaintiffs Raissa Burton, Linda Davis, Florence Edjeou, David Hunsicker, Lee
20 Jones, Collins Kwayisi ("Kwayisi"), Jeremy McKinney, Terron Sharp, and Latonya Tyus
21 (collectively "Plaintiffs") filed a Response, (ECF No. 84), and Defendants filed a Reply, (ECF
22 No. 87). For the reasons discussed below, the Court GRANTS Defendants' Motion for
23 Summary Judgment.¹

25 ¹ Also pending before the Court is the Motion to Certify Class, (ECF No. 76), filed by Plaintiffs. Defendants
filed a Response, (ECF No. 85), and Plaintiffs filed a Reply, (ECF No. 86). Because the Court is granting
Defendants' Motion for Summary Judgment, the Court DENIES Plaintiffs' Motion to Certify Class as moot.

1 **I. BACKGROUND**

2 This case arises out of alleged violations of Nevada’s Minimum Wage Amendment,
3 Nev. Const. art. XV, § 16 (the “MWA”). Plaintiffs are employees at various locations
4 throughout Clark County, Nevada, of the fast food restaurant chain, Wendy’s. (Am. Compl. ¶ 1,
5 ECF No. 3). Plaintiffs allege that this action “is a result of [Defendants’] failure to pay
6 Plaintiffs and other similarly-situated employees who are members of the Class the lawful
7 minimum wage, [sic] because [Defendants] improperly claim, or have claimed, the right to
8 compensate employees below the upper-tier hourly minimum wage level under [the MWA].”
9 (Id. ¶ 2).

10 For example, Kwayisi alleges that he worked at a Wendy’s restaurant owned and
11 operated by Defendants and earned an hourly wage below the upper-tier hourly minimum wage
12 under the MWA. (Id. ¶ 45). Moreover, Defendants offered Kwayisi a health insurance plan
13 through Aetna Inc., but Kwayisi declined the insurance coverage. (Id. ¶ 46). As a result,
14 Plaintiffs allege that Defendants “do not provide, offer,” or “maintain qualifying health
15 insurance plan benefits for the benefit of Plaintiffs and members of the Class, and therefore
16 Defendants are not, and have not been, eligible to pay Plaintiffs and members of the Class
17 below the upper-tier hourly minimum wage level.” (Id. ¶ 11).

18 Plaintiffs filed the instant action on May 9, 2014. (See Compl., ECF No. 1). Shortly
19 thereafter, on May 20, 2014, Plaintiffs filed an Amended Complaint. (See Am. Compl.).
20 Subsequently, Defendants filed a Motion to Dismiss, seeking dismissal of Plaintiffs’ Amended
21 Complaint. (Mot. to Dismiss, ECF No. 11). The Court dismissed Plaintiffs’ second, third, and
22 fourth claims for relief with prejudice, and denied Defendants’ Motion as to Plaintiffs’ first
23 claim for relief. (Feb. 4, 2015 Order, ECF No. 40).

24 On August 21, 2015, in response to Kwayisi’s Motion for Partial Summary Judgment,
25 (ECF No. 48), the Court certified the following question to the Nevada Supreme Court:

1 “Whether an employee must actually enroll in health benefits offered by an employer before
2 the employer may pay that employee at the lower-tier wage under the [MWA].” (Order on Mot.
3 for Summ. J. 11:3–5, ECF No. 71). The Nevada Supreme Court answered the question in *MDC*
4 *Restaurants, LLC v. Eighth Judicial District Court*, 383 P.3d 262 (Nev. 2016), by holding that
5 “under the MWA, health benefits need only be offered or made available for the employer to
6 pay the lower-tier wage.” 383 P.3d at 266.

7 Subsequently, the parties filed a Joint Motion to Certify an additional question to the
8 Nevada Supreme Court. (ECF No. 78). The parties specifically sought to certify the following
9 question: “What constitutes ‘health benefits’ offered by an employer for purposes of paying
10 below the upper-tier minimum hourly wage rate under [the MWA]?” (Joint Mot. to Certify
11 3:26–27). The Court denied the parties’ Motion finding that the Nevada Supreme Court had
12 answered the proposed question in *Western Cab Company v. Eighth Judicial District Court*,
13 390 P.3d 662 (Nev. 2017). See 390 P.3d at 671 (“The MWA defines ‘health benefits’ as
14 ‘making health insurance available to the employee for the employee and the employee’s
15 dependents at a total cost to the employee for premiums of not more than 10 percent of the
16 employee’s gross taxable income from the employer.’”).

17 In the instant Motion, Defendants seek summary judgment on Plaintiffs’ remaining first
18 cause of action because, pursuant to the Nevada Supreme Court’s decisions, “Plaintiffs were
19 offered qualifying health insurance plans and were paid at least \$7.25 per hour.” (See Mot. for
20 Summ. J. (“MSJ”) 2:18–19, ECF No 77).

21 **II. LEGAL STANDARD**

22 The Federal Rules of Civil Procedure provide for summary adjudication when the
23 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
24 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
25 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that

1 may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
2 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
3 jury to return a verdict for the nonmoving party. See *id.* “Summary judgment is inappropriate if
4 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
5 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
6 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
7 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
8 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

9 In determining summary judgment, a court applies a burden-shifting analysis. “When
10 the party moving for summary judgment would bear the burden of proof at trial, it must come
11 forward with evidence which would entitle it to a directed verdict if the evidence went
12 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
13 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
14 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
15 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
16 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
17 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
18 party failed to make a showing sufficient to establish an element essential to that party’s case
19 on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–
20 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
21 the court need not consider the nonmoving party’s evidence. See *Adickes v. S.H. Kress & Co.*,
22 398 U.S. 144, 159–60 (1970).

23 If the moving party satisfies its initial burden, the burden then shifts to the opposing
24 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v.*
25 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,

1 the opposing party need not establish a material issue of fact conclusively in its favor. It is
2 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
3 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
4 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
5 summary judgment by relying solely on conclusory allegations that are unsupported by factual
6 data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
7 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
8 competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.

9 At summary judgment, a court’s function is not to weigh the evidence and determine the
10 truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249.
11 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
12 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is
13 not significantly probative, summary judgment may be granted. See *id.* at 249–50.

14 **III. DISCUSSION**

15 Defendants seek summary judgment on Plaintiffs sole surviving claim for unpaid
16 minimum wages under the MWA because “the health insurance [offered to Plaintiffs] is and
17 was proper health insurance under the MWA and supporting regulations.” (MSJ 2:8–9).
18 Specifically, Defendants state that under the MWA and supporting regulation, four
19 requirements must be met for the health insurance to be adequate: (1) the health insurance must
20 cover those categories of health care expenses that are generally deductible by an employee on
21 his individual federal income tax return pursuant to 26 U.S.C. § 213 if such expenses had been
22 borne directly by the employee; (2) the health insurance must be made available to the
23 employee and any dependents of the employee; (3) the health insurance must not have a
24 waiting period that exceeds more than six months; and (4) the health insurance must cost the
25 employee no more than ten percent of the employee’s gross taxable income attributable to the

1 employer. (Id. 2:10–16); see Nev. Const. art. XV § 16; Nev. Admin. Code (“NAC”) 608.102.
2 Defendants claim that the “health insurance plans offered to Plaintiffs satisfy all four.” (MSJ
3 2:17).

4 Plaintiffs respond that NAC 608.102 “is an unworkable standard” because “this Court
5 would end up interpreting not the Nevada Constitution itself, but rather the [NAC] 608.10[2]
6 language instead.” (Resp. 12:15–17). In lieu, Plaintiffs recommend the Court follow “the
7 provisions of [NRS] Chapters 608, 698A and 698B.” (Id. 13:2). Plaintiffs continue, however,
8 that regardless of the rationale the Court chooses to use, the plans “are not qualified health
9 insurance under the [MWA] in any case.” (Id. 2:18–19). The Court will first address Plaintiffs’
10 arguments against using NAC 608.102 as the standard for the MWA.

11 The MWA guarantees to each Nevada employee a base wage. See Nev. Const. art. 15, §
12 16(A). Effective in 2006, the lower-tier wage was originally \$5.15 per hour if the employer
13 provided health benefits, and the upper-tier wage was \$6.15 if the employer did not provide
14 health benefits. Id. When the instant action was filed, the lower-tier wage was \$7.25, and the
15 upper-tier wage was \$8.25. (2012–2015 Nevada Lab. Commissioner Bulls. Announcing
16 Minimum Wage, Ex. 3 to MSJ, ECF No. 77-4).

17 After the MWA was implemented, differing interpretations arose as to what “provides”
18 required, with some asserting that to pay the lower rate, the employer must actually enroll
19 employees in a benefits plan, and others arguing that the employer must merely offer benefits
20 to employees. (See, e.g., Kwayisi’s MSJ, ECF No. 48). In 2007, the Office of the Labor
21 Commissioner adopted administrative code regulations addressing this question and provided
22 that “[t]o qualify to pay an employee the [lower-tier] minimum wage . . . [t]he employer must
23 offer a health insurance plan.” NAC 608.102(1). Further, NAC 608.102(2) clarified that “[t]he
24 health insurance plan must be made available to the employee and any dependents of the
25 employee.”

1 Although Plaintiffs argue that NAC 608.102 is “unworkable,” it is the standard by which
2 the Nevada Supreme Court interprets the MWA. See, e.g., MDC Restaurants, LLC v. Eighth
3 Judicial Dist. Court, 383 P.3d 262, 268 (Nev. 2016) (“In this case, with regard to whether
4 employers must ‘offer’ or ‘enroll’ employees in health benefit plans to pay the lower-tier wage,
5 our holding is consistent with the Labor Commissioner’s promulgations, see NAC 608.102
6 (2007) (providing that an employer must ‘offer’ health benefits), and the language of the MWA
7 is plain: employers need only offer health benefits to pay the lower-tier wage. Thus, we
8 announce no new principle of law as to this issue, and its resolution could clearly have been
9 foreshadowed.”); W. Cab Co. v. Eighth Judicial Dist. Court of State in & for Cty. of Clark, 390
10 P.3d 662, 670–71 (Nev. 2017) (defining and interpreting the term “health benefits” pursuant to
11 NAC 608.102(1)). As such, the Court will consider the MWA in concert with NAC 608.102.

12 According to NAC 608.102, to qualify to pay an employee the minimum wage, an
13 employer must meet each of the following requirements: (1) the employer must offer a health
14 insurance plan that covers those categories of health care expenses that are generally deductible
15 by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and
16 any federal regulations relating thereto; (2) the health insurance plan must be made available to
17 the employee and any dependents of the employee; (3) the waiting period for the health
18 insurance plan is not more than six months; and (4) the share of the cost of the premium for the
19 health insurance plan paid by the employee must not exceed ten percent of the gross taxable
20 income of the employee attributable to the employer under the Internal Revenue Code. NAC
21 608.102. The Court will address the four factors in turn.

22 **1. The Health Insurance Must Cover Those Categories of Health Care**
23 **Expenses that are Generally Deductible.**

24 Defendants argue that 26 U.S.C. § 213 governs this factor as it “sets forth two categories
25 of health care that are generally deductible: (1) medical care; and (2) medicine or drugs that are

1 a prescribed drug or insulin.” 26 U.S.C. § 213 (a)–(b); (MSJ 9:13–10:8). Moreover,
2 Defendants assert that Treasury Regulation § 1.213(e) clarifies § 213 by setting forth specific
3 examples of appropriate lodging expenses and medical care such as, inter alia, hospital
4 services, nursing services, medical, laboratory, surgical, and dental. 26 CFR 1.213-1(e); (MSJ
5 10:9–26). Defendants contend that if a health insurance plan covers these things, “then it
6 covers categories of health care expenses that are generally deductible by an employee on his
7 individual federal income tax return,” thereby meeting this first factor. (MSJ 10:28–11:2).

8 In response, Plaintiffs state that § 213 does not describe any categories at all, but “it
9 establishes the tax deduction for expenses paid for medical care generally.” (Resp. 18:1–4).
10 Plaintiffs continue that “[t]here are, in fact, dozens of categories of health care expenses that are
11 deductible” and state that “Defendants’ [p]lans do not provide coverage for the range of
12 categories of health care expenses that individuals could deduct on their federal tax returns.”
13 (Id. 18:8–16). Further, Plaintiffs argue that “Defendants do not get to select which of these
14 categories their [p]lans can ‘cover,’ and which they need not” because Plaintiffs assert that
15 NAC 608.102 requires “those categories of health care expenses.” (Id. 18:16–19). Based on
16 these assertions, Plaintiffs seemingly argue that “those” implies “all.”

17 When interpreting a statute, legislative intent “is the controlling factor.” *Robert E. v.*
18 *Justice Court*, 664 P.2d 957, 959 (Nev. 1983). The starting point for determining legislative
19 intent is the statute’s plain meaning; when a statute “is clear on its face, a court can not go
20 beyond the statute in determining legislative intent.” *Id.*; see also *State v. Catanio*, 102 P.3d
21 588, 590 (2004) (“We must attribute the plain meaning to a statute that is not ambiguous.”);
22 *Arguello v. Sunset Station, Inc.*, 252 P.3d 206, 209 (Nev. 2011).

23 The text of NAC 608.102(1)(a) states that an employer must offer a health insurance
24 plan that “[c]overs those categories of health care expenses that are generally deductible by an
25 employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any

1 federal regulations relating thereto, if such expenses had been borne directly by the employee.”
2 NAC 608.102(1)(a) (emphasis added).

3 In this section, “those” does not imply “all,” but instead narrows what qualifies as health
4 care expenses; “those” defines the specific categories that are generally deductible on a
5 person’s federal income tax pursuant to § 213, and therefore can be covered by employers’
6 health plans. The word “those” does not indicate that every service or health care expense that
7 is deductible must be included, but rather, that what is included has to be deductible. As such,
8 the Court holds that in regards to the word “those,” the statute is clear on its face and Plaintiffs’
9 alleged interpretation of the word is not reasonable to render the plain meaning ambiguous.
10 Therefore, in order for the health insurance to be adequate under NAC 608.102, the categories
11 of health care expenses included must be generally deductible pursuant to § 213, but the
12 categories need not include every type of health expense generally deductible under § 213.

13 Here, Plaintiffs were offered the 2012, 2013, 2014, and 2015 health insurance plans (the
14 “plans”). (Tyus Dep. 17:20–23; 61:15–62:24; and 74:5–75:9, Ex. 4 to MSJ, ECF No. 77-5);
15 (Hunsicker Dep. 37:17–38:23; 49:22–50:23; 84:17–85:20; 92:16–93:3; and 154:5–155:5, Ex. 8
16 to MSJ, ECF No. 77-9); (Davis Ins. Acknowledgement Sheet, Ex. 10, ECF No. 77-11);
17 (Kwayisi Dep., 61:20–63:15; 90:3–91:1; 92:17–95:13; 101:15–102:17; 120:1–23; and 162:2–
18 163:15, Ex. 12 to MSJ, ECF No. 77-13); (Harmon Dep. 13:22–14:10; 174:18–175:24, Ex. 6 to
19 MSJ, ECF No. 77-7); (Burton Dep. 56:25–57:24; 97:7–25; 104:7–13; and 156:1-157:10, Ex. 16
20 to MSJ, ECF No. 77-17); (McKinney Dep. 43:22–45:3; 45:23–47:16; 49:2–19; and 59:14–24,
21 Ex. 19 to MSJ, ECF No. 77-20); (Edjeou Dep. 39:23–40:23; 47:5–49:2; and 56:18–57:17, Ex.
22 22 to MSJ, ECF No. 77-23). In each of these plans, the expenses that were covered fell under
23 “medical care” pursuant to § 213, such as preventative care expenses, child health supervision,
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1 family planning services, and physician visits.² See 26 U.S.C. § 213; 26 CFR 1.213-1. Because
2 Defendants’ plans include “those categories of health care expenses that are generally
3 deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C.
4 § 213,” Defendants’ plans meet NAC 608.102(1)(a). See NAC 608.102(1)(a). Accordingly,
5 Defendants’ plans are sufficient under the first factor.

6 **2. The Health Insurance Must Be Made Available to the Employee and Any**
7 **Dependents.**

8 The text of NAC 608.102(2) states that “[t]he health insurance plan must be made
9 available to the employee and any dependents of the employee.” NAC 608.102(2). Defendants
10 state that “[a]s evidenced by the enrollment kits, questions and answer sheets, and plan
11 documents, all health insurance plans made available to . . . hourly employees earning below
12 \$8.25 per hour during the 2012 to 2015 time period[] provided coverage to those employees’
13 dependents.” (MSJ 12:19–21). Indeed, the health insurance plans offered coverage to
14 dependents. (See Aetna Affordable Health Choices Benefits Plan (2012) at 3, Ex. 25 to MSJ
15 (“Your dependents can be covered under your plan”)); (Aetna Affordable Health Choices
16 Benefits Plan (2013) at 3, Ex. 26 to MSJ (“Your dependents can be covered under your plan”));
17 and (Aetna Fixed Benefits Plan (2014) at 2, Ex. 27 to MSJ (“If you are an eligible employee,
18 you can also enroll your eligible dependents”)). Moreover, Plaintiffs do not dispute that
19 Defendants’ plans meet this factor. As such, Defendants’ plans meet the second requirement of
20 NAC 608.102.

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24 ² For an inclusive list of what was covered, see (Aetna Affordable Health Choices Benefits Plan (2012) at 12–37,
25 Ex. 25 to MSJ, ECF No. 77-26); (Aetna Affordable Health Choices Benefits Plan (2013) at 13–37, Ex. 26 to
MSJ, ECF No. 77-27); and (Aetna Fixed Benefits Plan (2014) at 3–6, Ex. 27 to MSJ, ECF No. 77-28).
Moreover, the 2015 Enrollment Plan renewed the 2014 Plan making the 2014 Plan applicable as reference for the
2015 Plan. (See MSJ 6:20–22).

1 **3. The Waiting Period for the Health Insurance Plan is Not More Than Six**
2 **Months.**

3 NAC 608.102(2)(b) requires that “[t]he waiting period for the health insurance plan is
4 not more than 6 months.” There were no waiting periods under all the plans offered to
5 Plaintiffs as the coverage eligibility date was either the effective date of the plan, the date the
6 person was hired, or the first day of the pay period that followed the pay period in which a
7 deduction occurred. (See Aetna Affordable Health Choices Benefits Plan (2012) at 3, Ex. 25 to
8 MSJ); (Aetna Affordable Health Choices Benefits Plan (2013) at 3, Ex. 26 to MSJ); and (2014
9 Aetna Enrollment Kit, Ex. 27 to MSJ). Plaintiffs do not dispute this factor, and based on the
10 evidence, the Court finds it is met.

11 **4. The Share of the Cost of the Premium for the Health Insurance Plan Paid**
12 **by the Employee Must Not Exceed Ten Percent of the Gross Taxable**
13 **Income of the Employee.**

14 The MWA provides the following: “Offering health benefits . . . shall consist of making
15 health insurance available to the employee for the employee and the employee’s dependents at
16 a total cost to the employee for premiums of not more than 10 percent of the employee’s gross
17 taxable income from the employer.” Moreover, under the plain language of this constitutional
18 provision, the MWA’s ten-percent cost cap pertains to compensation and wages paid by the
19 employer to the employee. See MDC Restaurants, LLC, 383 P.3d at 267.

20 Here, Defendants instituted a policy where they deducted “either the premium cost of
21 insurance or 10% of the employee’s income, whichever is less, from its employees’ pay checks
22 to cover their health insurance premiums.” (MSJ 14:7–9); (see Holliday Decl., Exs. 31 and 33
23 to MSJ, ECF Nos. 77-32, 77-34); (Davis Deposit Detail, Ex. 11 to MSJ, ECF No. 77-12).
24 Defendants state that “due to this policy, the health insurance plans cannot cost any employee
25 more than 10% of the employee’s gross taxable income.” (MSJ 14:19–20). Plaintiffs do not
address this factor, and pursuant to Defendants’ evidence, the Court finds that this factor is met.

