

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JESSICA GESSELE, ASHLEY GESSELE,
NICOLE GESSELE, and TRICIA TETRAULT,
on behalf of themselves and all others similarly
situated,

Civil No. 10-960-ST

ORDER

Plaintiffs,

v.

JACK IN THE BOX INC., a Corporation of
Delaware,

Defendant.

HAGGERTY, District Judge:

Magistrate Judge Stewart has issued a Findings and Recommendation [16] in this action. She recommends granting defendant's Motion to Dismiss the First through Fifth Claims [8], with leave to amend the deficiencies in those claims. Plaintiffs filed timely objections, and the case was referred to this court. For the following reasons, the Findings and Recommendation is adopted.

1- ORDER

STANDARDS.

When a party objects to any portion of a Findings and Recommendation, the district court must conduct a *de novo* review of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Bus. Mach. Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). The court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Unchallenged portions of the Findings and Recommendation will be adopted unless clear error appears on the face of the record. *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974).

DISCUSSION

The Findings and Recommendation detailed the factual history of this matter and summarized the legal standards relevant to the issues in this case. These summaries are adopted.

Plaintiffs essentially reiterate their response to defendant's motion to dismiss in their objections to the Findings and Recommendation. Plaintiffs do not specify which aspects of the Magistrate Judge's findings were erroneous, and they ultimately agree with the Magistrate Judge's recommendation that plaintiffs be granted leave to replead their claims with specificity.

After conducting a *de novo* review of the record and plaintiff's objections, this court adopts the Findings and Recommendation. Plaintiffs' Complaint does not include factual allegations that are "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). As the Magistrate Judge noted, plaintiffs fail to allege several factual aspects of their First, Second, Third, Fourth, and Fifth claims, including: when plaintiffs' employment began, how many hours they worked, which hours were uncompensated, and how defendant's practices resulted in violations of the minimum wage and overtime laws.

Although plaintiffs cite to *Goal v. Retzer Resources Inc.*, No. 5:09-CV-00137, 2009 WL 5174181 (E.D. Ark. Dec. 22, 2009), this case is unhelpful. In *Goal*, the district court concluded that the plaintiff's claim under the Fair Labor Standards Act (FLSA) contained enough factual allegations to survive a motion to dismiss. *Id.* at *4. The court distinguished cases in which a class of FLSA plaintiffs made conclusory allegations regarding lost wages that were meant to apply broadly to the entire class, rather than to an individual plaintiff. *Id.*

However, as the Magistrate Judge explained, plaintiffs have represented that they can cure their conclusory allegations through amendment. Findings and Recommendation at 7-8. This court agrees with the Magistrate Judge's recommendation that plaintiffs be granted leave to amend their First, Second, Third, Fourth, and Fifth claims.

CONCLUSION

For the reasons provided, the Findings and Recommendation [16] is adopted in its entirety. Defendant's Motion to Dismiss the First through Fifth Claims [8] is GRANTED. Plaintiffs are granted leave to amend the deficiencies in those claims within thirty days of this Order.

IT IS SO ORDERED.

Dated this 11 day of April, 2011.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge