19-P-1332 Appeals Court

SIEW-MEY TAM[1] & another[2] vs. FEDERAL MANAGEMENT CO., INC., & others.[3]

No. 19-P-1332.

Suffolk. October 9, 2020. - January 6, 2021.

Present: Milkey, Blake, & Henry, JJ.

Practice, Civil, Deposition, Summary judgment, Statute of limitations, Class action, Costs. Rules of Civil Procedure. Massachusetts Wage Act. Labor, Overtime compensation. Employment, Retaliation.

Civil action commenced in the Superior Court Department on June 27, 2013.

The case was heard by Mitchell H. Kaplan, J., on motions for summary judgment, and a motion for costs was considered by him.

Frederick T. Golder for the plaintiffs.
Cyrus Max Perlman (Richard S. Loftus also present) for the defendants.

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[1] On behalf of herself and all others similarly situated.

[2] Mary Jane Raymond.

[3] Jay R. Schochet, Richard Henken, David Flad, and Peter Lewis.

MILKEY, J. In this wage and hour class action, the lead plaintiff, Siew-Mey Tam, made numerous damaging admissions during her deposition. In the face of the defendants' efforts to decertify the class based on her admissions, Tam sought to rescind the admissions by filing an errata sheet pursuant to Mass. R. Civ. P. 30 (e), as appearing in 477 Mass. 1403 (2017) (rule 30 [e]).[4] Multiple Superior Court judges rejected her efforts, and summary judgment eventually was allowed in the defendants' favor. On appeal, Tam argues that she was entitled to retract her admissions. For the reasons that follow, we disagree. Discerning no more merit in the various additional arguments that Tam and a second plaintiff have raised on appeal, we affirm the judgment dismissing all claims and the postjudgment order on the defendants' motion for the taxing of costs.

Background. The defendant Federal Management Co., Inc. (Federal), is a landlord that provides low-income housing at various locations in the Commonwealth. Tam was employed by Federal as a "property manager" at Mason Place, a 127-unit housing complex in downtown Boston. In 2013, Tam brought an

[4] The parties' briefs cite to the current rule. We note that although a different version of the rule was in effect at the time of Tam's deposition, the differences are not material here.

action against Federal and certain of its officers alleging various employment-law violations. The following year, Mary Jane Raymond, a former property manager at a different site, was added as a plaintiff, and in 2015, a Superior Court judge certified the case as a class action.

Although the operative complaint initially alleged fifteen counts, eleven counts were dismissed in 2015. At the heart of what remained was the claim that Federal failed to pay overtime to Tam, Raymond, and other similarly situated property managers. The complaint framed the overtime claims as a violation of G. L. c. 151, § 1A, and, as such, a derivative violation of the Wage Act, G. L. c. 149, § 148. It was uncontested that Tam worked more than forty hours per week but generally was not paid overtime. Instead, the dispute was whether the nature of Tam's job meant that she was an exempt administrative employee to whom overtime pay was not due.[5]

Because Tam's base salary exceeded $455 per week, she qualified as an exempt administrative employee if her "primary duty [was] the performance of office or non-manual work directly related to the management or general business operations of [Federal] or [its] customers," and her "primary duty include[d]

[5] The parties also disputed whether Tam was an exempt "executive" employee. That issue, which the judge opted not to reach, is not before us.

the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(2) & (3) (2005).[6] In response to pointed questioning at her deposition in May of 2016, Tam made numerous admissions that directly supported Federal's position that she was an exempt administrative employee. As but one example, Tam acknowledged that it was accurate to describe her "main responsibilities" as property manager as including "[o]verseeing all day-to-day operation of the property [and] maintenance and repairs on the property[,] . . . manag[ing] all maintenance staff at the property[,] . . . [and] assist[ing] and monitor[ing] all subcontractors working on the property."[7] In addition to making such admissions, Tam gave other answers that raised serious concerns about how the case and a related discrimination case against Federal were being litigated. For example, confronted

[6] The payment of overtime is governed by G. L. c. 151, § 1A, a statute that was "intended to be 'essentially identical' to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 207(a)(1) (2000)." Mullally v. Waste Mgt. of Mass., Inc., 452 Mass. 526, 531 (2008), quoting Swift v. AutoZone, Inc., 441 Mass. 443, 447 (2004). "Accordingly, in interpreting the State law, we look to how the FLSA has been construed." Vitali v. Reit Mgt. & Research, LLC, 88 Mass. App. Ct. 99, 103 (2015). Both sides have accepted the appropriateness of looking to the Federal regulations implementing the FLSA as a source of guidance in interpreting the State statute.

[7] The quoted language is taken from a form that Tam completed while working at Federal before this litigation began. She acknowledged at her deposition that, as completed, the form was "correct."

with a factual misstatement in her interrogatory answers filed in the discrimination case, Tam attempted to address the misstatement by explaining that she had signed the answers without actually reading them, because she "trust[ed her] lawyer."

When Federal's counsel finished his questioning of Tam, he indicated that he was suspending rather than terminating the deposition because of the possible need for additional inquiry in two areas. First, he expressed his view that Tam's answers "identified certain deficiencies in the production." Second, he expressed concern that Tam's counsel at various points had instructed her not to answer his questions for reasons that he was evaluating to determine whether to seek judicial review. After stating his intent to suspend the deposition, Federal's counsel invited Tam's counsel to cross-examine her. Tam's counsel declined the invitation, stating that he was "going to reserve all of [his] questions for the time of trial."

On June 8, 2016, the court reporter certified the transcript of the May 26, 2016 deposition, and distributed it to Tam's counsel with instructions on how to prepare an errata sheet. The deposition resumed on June 16, 2016, although the

transcript of the resumed portion is not before us and does not appear to be pertinent.[8]

Around the same time, Federal brought the transcript to the attention of a Superior Court judge.[9] Observing that Tam's deposition testimony "call[ed] into credibility essential issues that were considered by the court in certification," the judge stayed the case pending briefing on and a hearing to consider whether Tam's answers warranted decertification of the class.

In September of 2016, Federal filed a formal motion to decertify the class. In response, Tam moved to strike the transcript of her May 26, 2016 deposition. According to her, a signed errata sheet was not yet due pursuant to rule 30 (e), because the deposition had not yet concluded. Her motion expressed her intention to amend her deposition answers, and it propounded a "provisional," unsigned, draft thirty-one page errata sheet. A different Superior Court judge denied Tam's motion to strike the deposition transcript and allowed Federal's motion to decertify the class. The judge explained that "Tam,

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[8] At a court hearing held the following week, Federal's counsel recounted to the judge that the deposition had been reopened for only a limited purpose, that Tam's counsel again declined to take the opportunity to cross-examine his client, and that "the deposition is at this point closed." Tam's counsel disputed that the deposition formally had concluded.

[9] This judge was different from the one who had certified the case as a class action.

as a class representative, is so impaired by her admitted falsehoods and recklessness with respect to her sworn statements that the credibility of the claims by the putative class would be adversely affected."[10]

In June of 2017, Federal filed a motion for summary judgment against Tam. In opposition to that motion, Tam submitted another draft errata sheet "correcting" and "clarifying" her deposition answers. This one contained a signed statement, dated May 8, 2017, that "[t]hese are the changes I intend to make to the May 26, 2016, portion of my deposition when my deposition has been completed and 'fully transcribed.'" Through that errata sheet, Tam sought to change a "no" answer to "yes" (or vice versa) over sixty times. She also submitted a new affidavit that sought to contradict what she had admitted in her deposition testimony. A judge who had not been involved in the previous disputes over class

[10] At the point the class was decertified, Raymond remained as a plaintiff. However, Federal already had raised its defense that Raymond's overtime claim was untimely, which called into question Raymond's own ability to serve as a class representative. The judge also recognized that if Federal's statute of limitations defense prevailed, it would affect a majority of claims in the purported class, calling into question whether the class could satisfy the numerosity requirement necessary to maintain a class action. Mass. R. Civ. P. 23 (a), as amended, 471 Mass. 1491 (2015). For these reasons, the judge concluded that the statute of limitations issues should be resolved first, but reserved the possibility of reviving a class action should Federal not prevail on that defense.

certification allowed Federal's motion for summary judgment.[11] In so ruling, the judge relied on the principle that a party opposing summary judgment cannot create a dispute of material fact by contradicting her own deposition answers, a doctrine sometimes known as the "sham affidavit rule." Benvenuto v. 204 Hanover, LLC, 97 Mass. App. Ct. 140, 144 (2020).

Meanwhile, Raymond's overtime claims were dismissed on statute-of-limitations grounds. Her separate retaliation claim was dismissed on the ground that the complaints she had raised to Federal, which she alleges triggered her firing, did not constitute protected activity. With the class having been decertified and the claims brought by the named plaintiffs dismissed, judgment entered for the defendants.

Discussion. Tam, and her coplaintiff Raymond, raise numerous arguments on appeal. We begin with Tam's challenge to the allowance of summary judgment against her, including the key subsidiary questions whether it was proper for the judge to disregard her efforts to amend her deposition answers and to deny her motion to strike the deposition transcript.

1. Summary judgment as to Tam. Tam argues that she could amend her deposition answers as of right pursuant to rule 30

[11] Yet another judge imposed $75,000 in sanctions against Tam. The imposition of those sanctions is the subject of a separate pending appeal.

(e). If so, she maintains, summary judgment could not enter against her, because the corrected version of her transcript -- at a minimum -- created a dispute of fact as to the nature of her job responsibilities as property manager.

The Supreme Judicial Court provided guidance on this subject in its 2012 opinion in Smaland Beach Ass'n v. Genova, 461 Mass. 214 (2012). We turn, therefore, to what Smaland establishes with respect to a deponent's right to submit errata sheets.[12]

In Smaland, supra at 229, the Supreme Judicial Court recognized that a "growing minority of courts" had adopted a narrow view: that a deponent presented with her deposition transcript could use an errata sheet to correct only typographical and transcription errors in that transcript, or to offer clarifying but not contradictory changes. However, the court expressly rejected that narrow view. Id. Instead, it adopted the majority approach: that deponents may make substantive changes to their answers, even to the point of contradicting their previous testimony. Id. at 228-229.

[12] As the Smaland court observed, the errata sheet issue was not directly raised by the appeal before it. Smaland, 461 Mass. at 227. However, especially in light of the Supreme Judicial Court's general superintendence powers, we are bound by the court's pronouncements on the topic.

At the same time, the Smaland court recognized that its broad reading of a deponent's right to submit an errata sheet potentially could lead to abuse.[13] Id. at 229. The court sought to curb such abuse in several respects. Id. at 229-230. It reminded counsel to advise deponents that any changes must be made in good faith. Id. at 229. It also observed that in order to utilize rule 30 (e), a deponent must comply with the procedural requirements set forth there. Id. at 230. In particular, the court highlighted the need for the errata sheet to be accompanied by a statement of reasons that "must be advanced in good faith and provide an adequate basis from which to assess their legitimacy; that is, they must not be conclusory." Id., citing Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 119-120 (D. Mass. 2001). In addition, the court "adopt[ed] certain remedial measures." Smaland, 461 Mass. at 230. First, it stated that the original version of the deponent's answers would not be struck, but would remain part of the record and be available for impeachment. Id. Second, the court recognized the potential right of the deposing attorney to "reopen the examination for the purposes of exploring matters

[13] The court also appears to have recognized that its interpretation of rule 30 (e) lay in some tension with the sham affidavit rule, deferring consideration of the interplay between them to cases that -- unlike Smaland itself -- arose on summary judgment. This is such a case.

raised by the substantive changes in testimony and the origins of those changes." Id. Third, the court cautioned that attorneys who did not proceed in good faith could be subject to sanctions. Id. The court implored the bar to use rule 30 (e) "sparingly." Id.

Here, Tam's errata sheet included a statement of reasons for each putative correction. For example, for forty-six changes, the errata sheet stated that Tam misunderstood, or was confused by, the question. For purposes of this appeal, we pass over the significant question whether Tam's proffered reasons satisfied rule 30 (e), or whether they improperly were "conclusory."[14] We turn instead to whether Tam's efforts to amend her deposition testimony were timely.

Rule 30 (e) specifies the process through which deponents are to review the transcript of their testimony and to make changes to it.[15] It gives them thirty days after the court

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[14] We do note that where a deponent is making a substantive change based allegedly on misunderstanding the question, at a minimum, the better practice would be to offer more, such as how the relevant question lent itself to being misunderstood.

[15] The full text of rule 30 (e) is as follows:

> "Submission to witness; changes; signing. When the testimony is fully transcribed the deposition transcript and any audio-visual recording thereof shall be submitted to the witness for examination and the deposition transcript shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the

reporter has submitted the transcript to them to make such changes. It is uncontested that Tam's signed errata sheet was not submitted until almost a year after she received the transcript of her May 26, 2016 deposition session.[16] Tam argues, however, that the thirty-day clock never began to run, because her deposition was suspended, not terminated. In support of this position, she cites rule 30 (e), which speaks of the court reporter's transmitting the deposition transcript to the witness for examination "[w]hen the testimony is fully transcribed." Tam appears to be suggesting that where, as here, a deposition has been suspended, the deponent's testimony cannot be said to have been "fully transcribed."

> witness desires to make shall be entered upon the deposition transcript by the officer with a statement of the reasons given by the witness for making them. The deposition transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition transcript is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition transcript may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part."

[16] Even the unsigned, "provisional" errata sheet was not filed within thirty days of her receiving the deposition transcript.

We are unpersuaded. For one thing, as a practical matter, the fact that a deposition nominally has been suspended does not mean that it necessarily ever will resume. In such circumstances, Tam's reading of the rule would toll a deponent's obligation to review, correct, and sign her deposition transcript indefinitely. For another thing, as the circumstances of this case well illustrate, where a deponent seeks to exercise her ability to amend -- indeed, contradict -- her sworn testimony, it obviously makes sense to require her to do so promptly, so that the litigation can proceed in orderly fashion. We therefore hold that absent an agreement by the parties to the contrary,[17] or an extension allowed by a judge pursuant to Mass. R. Civ. P. 6 (b), 365 Mass. 747 (1974), a deponent's right to amend testimony set forth in a deposition transcript must be exercised within thirty days of receiving that transcript. We further hold that -- again, absent agreement by the parties -- this deadline is not tolled by the fact that the deposition was suspended and therefore might resume at a later time.[18] Because Tam did not comply with the

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[17] To avoid needless litigation, as with all agreements of counsel or parties, any agreement to extend the deadline for submittal of an errata sheet should be memorialized, such as by a statement on the record at the deposition or by a writing.

[18] We discern no unfairness in applying this holding to the case at hand, even though the issue was not definitively resolved prior to our opinion. The damaging nature of Tam's

procedural terms of rule 30 (e), the uncorrected transcript of her May 26, 2016 deposition stands as her deposition testimony.[19]

A deponent's failure to correct her deposition with respect to a particular fact does not necessarily mean that the sham affidavit rule therefore stands as an absolute bar to her asserting that there is a factual dispute as to that issue. Indeed, we have observed, including recently, that there are limits to the application of that rule. See Zaleskas v. Brigham & Women Hosp., 97 Mass. App. Ct. 55, 60 (2020) (declining to invoke sham affidavit rule where declaration at issue was sworn before deposition testimony was given, and where it was possible to reconcile statements made in each). See also Benvenuto, 97 Mass. App. Ct. at 144-146 (declining to invoke sham affidavit rule with respect to conflicting testimony by nonparty deponent in same deposition).

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admissions was obvious from their inception, and counsel's declining to seek to amend them was reckless at best. To the extent that counsel in other pending cases contend that they held off having a deponent submit an errata sheet based on a good faith, but mistaken understanding that their deadline for doing so was tolled because the deposition had been suspended, they may present such reliance arguments to the trial court judge in support of a request for an extension of the deadline.

[19] In fact, as Smaland, 461 Mass. at 230, makes clear, even if Tam had submitted a timely errata sheet, the uncorrected version would remain part of the record. The judge plainly did not err in declining to strike the deposition transcript.

However, having scrutinized the deposition transcript and other record materials, we discern no reason to conclude that it would be unfair or otherwise inappropriate to invoke the sham affidavit rule here. Nothing in the deposition transcript suggests that the relevant questions were posed to Tam in a manner that overbore her will or that even could be characterized as intimidating,[20] that the questions themselves were unclear, or that she failed to understand them.[21] Nor is this a case like Zaleskas, 97 Mass. App. Ct. at 60, where close scrutiny of the deponent's answers reveals ways in which they could be harmonized with her affidavit. Instead, what is most damning about Tam's deposition testimony is the particular trajectory of her answers. On each topic of inquiry, she initially tried to adhere to the lawyerly statements that had been included in her earlier affidavit, such as her averments that she "did not supervise any employees for [Federal and] . . . did not assist, monitor, and/or supervise subcontractors

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[20] Even when confronted with Tam's admission that she signed interrogatory answers under the pains and penalties of perjury without reading them, Federal's counsel continued to use measured language. To the extent Tam takes issue with certain aspects of the documents used to cross-examine her, we perceive no merit in these arguments.

[21] Although it was uncontested that English was Tam's second language, there is no evidence that any language barrier prevented Tam from understanding the questions. In fact, it came out during the deposition that Tam was once employed as a teacher of "English as a second language."

who performed work at [the property for which she served as property manager]." Then, in response to granular questioning about the underlying details, she admitted to subsidiary facts that contradicted her earlier statements, and then ultimately had to acknowledge the opposite of what she initially had asserted.

Given that the sham affidavit rule applies, Tam's admissions about the nature of her job stand uncontradicted. There is, therefore, no genuine dispute as to the material fact that her job qualified as an exempt administrative position. As Federal maintains, the summary judgment record establishes that:

> "Tam managed and directed the work of staff; had the discretion to approve or deny time off and time sheets; prepared and made recommendations regarding [Mason Place's] budget; planned capital improvement projects; selected vendors and managed their payment; requisitioned job openings; interviewed and played an integral role in hiring [job] candidates; evaluated employees to help determine their bonuses; had the authority to sign legally binding leases; handled resident complaints; ensured safety and security; interfaced directly with government agencies for legal and regulatory compliance; prepared and certified reports on behalf of [Federal]; and interfaced with lawyers to assist in legal matters."

Moreover, Tam herself confirmed in a form she filled out well before this litigation began that "[i]n the absence of [her] immediate supervisor, [she was] authorized to make decisions regarding [Mason Place]," and that she had "reasonable discretion" in her position. Given these facts, the judge did not err in allowing Federal's motion for summary judgment with

respect to Tam. See Reich v. Avoca Motel Corp., 82 F.3d 238, 239 (8th Cir. 1996) (affirming allowance of summary judgment that motel managers were not entitled to overtime where they managed motel's daily operations, including interviewing and hiring job applicants, training, evaluating, scheduling, and overseeing employees, addressing guest concerns, and making strategic aesthetic decisions).

2. Summary judgment as to Raymond. A. Statute of limitations on the overtime claim. Raymond's statutory claims seeking unpaid overtime are subject to a two-year statute of limitations. G. L. c. 151, § 20A.[22] It is uncontested that this case was filed on June 27, 2013, which is more than two years after Raymond left Federal's employ. Raymond nevertheless argues that the statute of limitations should be tolled because Federal made statements that constitute "fraudulent concealment." See G. L. c. 260, § 12. We disagree. Assuming, as we must, the truth of Raymond's averment that Federal had led Raymond to believe that she was not entitled to overtime, such a characterization of Raymond's rights would not amount to fraudulent concealment even if it proved false. At the time Raymond left her job at Federal, she was aware of all of the

[22] The statute of limitations subsequently was increased to three years effective November 18, 2014. See St. 2014, c. 292. Raymond makes no claim that the amendment applies.

facts needed to appreciate that Federal may have owed her unpaid overtime.[23] Nothing more is required for the statute of limitations clock to begin to run. See Crocker v. Townsend Oil Co., 464 Mass. 1, 9 (2012).

B. Common-law claims. Raymond initially brought common-law claims for overtime in addition to her statutory claims. She agreed to dismiss the common-law claims in favor of the statutory claims. With the statutory claims failing on statute-of-limitations grounds, she now seeks to revive her common-law claims, which have a longer statute of limitations. G. L. c. 260, § 2. However, as the judge reviewing the motion to dismiss correctly concluded, Raymond has not put forth a plausible factual basis to support such common-law claims, such as a promise by Federal to pay Raymond overtime. To the contrary, Raymond herself emphasizes that Federal repeatedly told her that she was a salaried employee who was not entitled to overtime. Nor does Raymond present any serious argument otherwise on appeal.[24] See Mass. R. A. P. 16 (a) (9) (A), as

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[23] As the judge who allowed Federal's motion for summary judgment with respect to Raymond's claims put it: "It is undisputed that [Raymond] knew she was classified as exempt, she would not be paid overtime, . . . she received the same salary regardless of the hours she worked . . . [and] she knew how many hours she worked and the nature of her job duties."

[24] The whole of her argument is a single conclusory sentence: "Taking the facts in the light most favorable to the

appearing in 481 Mass. 1628 (2019) ("The appellate court need not pass upon questions or issues not argued in the brief").

C. Retaliation. In addition to seeking unpaid overtime, Raymond alleged that, in violation of the Wage Act, she was fired in retaliation for pursuing a protected activity. See G. L. c. 149, § 148A. Federal acknowledged at oral argument that if Raymond has a valid retaliation claim, it would not be barred by the applicable statute of limitations, which is three years. See G. L. c. 149, § 150 (three-year statute of limitations).

The summary judgment record establishes that Raymond complained to Federal that she felt overworked and underpaid. However, it does not establish that Raymond ever told Federal that it misclassified her as an exempt administrative employee, or that it otherwise failed to pay her overtime that she was due. We agree with the judge that Raymond's complaints were "far too general to constitute protected activity for purposes of her retaliation claim." See Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 14 (2011) (retaliation claim lies under analogous FLSA only where employee's complaint is "sufficiently clear and detailed for a reasonable employer to understand it . . . as an assertion of rights protected by the

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Plaintiffs, Defendants' motion to dismiss the common law claims should not have been granted."

statute and a call for their protection"). See also L & F Distribs. v. Cruz, 941 S.W.2d 274, 278 (Tex. App. 1996) (where employee complained about long hours and working weekends, but did not ask for overtime pay or threaten FLSA complaint, retaliation claim was improperly submitted to jury). None of this is to say that an employee must expressly invoke her statutory rights for a retaliation claim to lie. See Equal Employment Opportunity Comm'n v. Romeo Community Sch., 976 F.2d 985, 989-990 (6th Cir. 1992) (sufficient for employee to communicate substance of her allegations and her belief that employer was breaking law). However, "abstract grumblings" about pay are not sufficient; "[t]here is a point at which an employee's concerns and comments are too generalized and informal" to constitute protected activity (citation omitted). Valerio v. Putnam Assocs. Inc., 173 F.3d 35, 44 (1st Cir. 1999). That is the case here.

3. Class certification issues. With the claims of the two named plaintiffs having been dismissed, whether the judge acted within his discretion in decertifying the class is largely moot.[25] In any event, the plaintiffs have not demonstrated that the judge erred in decertifying the class. In this regard, we

[25] We similarly have no reason to reach the plaintiffs' argument that the judge erred in ruling that the Superior Court had no personal jurisdiction as to defendant Jay R. Schochet.

note that the principal ground on which the decertification order rested -- lack of an adequate class representative -- was sound.

All that remains for us to consider is the plaintiffs' argument that they unfairly were denied the opportunity to add another former property manager, Michael E. Brooks, as a substitute class representative. This argument is meritless. As Federal points out, once it became clear that Federal imminently would file summary judgment motions with regard to Tam and Raymond, plaintiffs' counsel agreed in open court that Brooks would file a separate action. He reserved his right to seek to add Brooks to the current case only if the summary judgment motions as to Tam and Raymond were "denied, in whole or in part." That contingency never came to pass. Brooks's separate action against Federal remains pending (as counsel confirmed at oral argument). There was no error regarding the court's treatment of Brooks.

4. Costs and attorney's fees. At the conclusion of the case, Federal requested that it be awarded costs, which the plaintiffs opposed. After considering the dueling submissions, a judge assessed Tam and Raymond the costs associated with their respective depositions, $2,503.35 and $2,040.20. Even if we assume arguendo that costs should be imposed sparingly against employees whose Wage Act claims are unsuccessful, we discern no

legislative intent flatly prohibiting such awards. Nor do we discern that the judge abused his discretion in the award of costs against Tam and Raymond under the circumstances of this case. See Scholz v. Delp, 473 Mass. 242, 254 (2015), cert. denied, 136 S. Ct. 2411 (2016) (award of costs reviewed for abuse of discretion).

Federal requests that it be awarded its reasonable appellate attorney's fees and double costs pursuant to G. L. c. 211A, § 15. Although some of Tam's arguments come close,[26] we ultimately conclude that Tam's arguments were not so devoid of merit to warrant such sanctions.[27]

Judgment affirmed.

Order on defendants' motion for taxing of costs affirmed.

[26] In particular, we are troubled by the argument that the judge erred in not allowing Brooks to be added as a named plaintiff when plaintiffs' counsel had agreed that Brooks instead would file an independent action. We note that any attorney's fees Federal incurred in responding to this claim presumably were nominal.

[27] Because the plaintiffs did not prevail on appeal, we deny their request for attorney's fees and costs.