CLERK'S NOTICE	DOCKET NUMBER 1981CV01763	Trial Court of Massachusetts The Superior Court

CASE NAME:
Matthew Sutton on behalf of Themselves and all others similarly situated et al vs. Jordan's Furniture, Inc.

Michael A. Sullivan, Clerk of Court
Middlesex County

TO:
Hillary Schwab, Esq.
Fair Work, P.C.
192 South St
Suite 450
Boston, MA 02111

COURT NAME & ADDRESS
Middlesex Superior - Lowell
370 Jackson Street
Lowell, MA 01852

You are hereby notified that on 12/22/2020 the following entry was made on the above referenced docket:

MEMORANDUM & ORDER:

On Plaintiff's Motion for Class Certification

CONCLUSION AND ORDER:

Having determined that plaintiffs satisfy the requirements of Rule 23, the motion for class certification is ALLOWED. The following class is certified for purposes of this action:

All individuals whom Jordan's Furniture, Inc. has employed in the positions of "sales consultant" or "sleep technician," at one or more of its retail stores located in Massachusetts, during the time period between June 19, 2016 and August 1, 2019 and who worked more than forty hours in any workweek or on any Sunday.

SO ORDERED

(See scanned Memorandum and Order for full text)

Date: December 21, 2020

Judge: Barry-Smith, Hon. Christopher K

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
12/22/2020	**Hon. Christopher K Barry-Smith**	**(978)656-7819**

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1981cv01763

MATTHEW SUTTON

vs.

JORDAN'S FURNITURE, INC.

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

The plaintiff, Matthew Sutton, a former salesperson at Jordan's Furniture, Inc., alleges that Jordan's failed to pay "separate and additional compensation" to its commissions-based sales employees when they worked overtime or on Sundays. Sutton seeks class certification for all sales employees whose compensation was 100% commission-based and who worked overtime or Sundays. Jordan's paid these sales employees a "sales draw" each week, which paid an hourly rate for every hour worked. This sales draw then was deducted from commissions the sales employees earned. Although this system facially accounted for all hours worked, Sutton alleges that Jordan's violated the Wage Act and minimum wage law because employees did not receive "separate or additional compensation" for their overtime and Sunday hours; instead the hourly compensation was drawn from commissions. This approach to compensation, Sutton contends, runs afoul of the Supreme Judicial Court's decision in *Sullivan v. Sleepy's, LLC*, 482 Mass. 227 (2019) (holding that commissioned employees must receive "separate and additional" overtime pay regardless whether employee receives a recoverable draw equal to 1.5 times hours worked).

Presently before the court is the plaintiff's motion for class certification, in which they seek to certify a class of all persons who served as commissioned salespersons for Jordan's

between June 19, 2016 and August 1, 2019. After hearing and careful consideration of the parties' positions, the motion for class certification is **ALLOWED**, for the reasons summarized below.

ANALYSIS

In order to be certified as a class action, the plaintiffs must show that: (1) the class is so numerous the joinder of all members is impracticable, (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately represent the interests of the class. Mass. R. Civ. P. 23(a).[1] If those criteria are satisfied, then I must also determine that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Mass. R. Civ. P. 23(b). See *Weld v. Glaxo-Wellcome, Inc.*, 434 Mass. 81, 86 (2001).

As a threshold matter, Jordan's contends that the Supreme Judicial Court's recent decision in *Donis v. American Waste Services, LLC*, 485 Mass. 257 (2020) forecloses Sutton's claims based on Sunday or holiday pay, whether advanced as a class or individually. In *Donis*, the SJC held that the Prevailing Wage Act was not among the statutes that can be enforced through the Wage Act, G.L. c. 149, §§ 148, 150. Because the Commonwealth's Blue Laws mandating premium pay for Sunday and holiday work, like the Prevailing Wage Act, are not on the list of statutes that may be enforced through the Wage Act, see G.L. c. 149, § 150, 2d para., Jordan's contends that Counts II and III must be dismissed. I disagree. The SJC's determination

[1] These requirements serve as "guideposts" for determining whether class certification will protect the interests of class members and be a cost-effective means of resolving multiple claims. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

in *Donis* whether the Wage Act's private right of action could be employed to enforce the Prevailing Wage Act did not turn exclusively on whether that statute was listed in Section 150. Central to the court's decision was that the Prevailing Wage Act provided a comprehensive regulatory scheme, including "its own distinct private right of action." *Donis*, 485 Mass. at 263. In contrast, the Sunday and Holiday laws that undergird Counts II and III do not provide a private right of action as does the Prevailing Wage Act. *Donis* therefore does not mandate dismissal. Moreover, I agree with plaintiff that, whatever impact the *Donis* decision ultimately may have is an issue that can be litigated on a class-wide basis.[2]

Although Jordan's challenges whether Sutton satisfies *any* of the requirements for class certification, the arguments that most warrant scrutiny concern: i) typicality—whether Sutton's claims are typical of the class; and ii) commonality—whether common questions of law or fact predominate over questions affecting only individual members.

With respect to typicality, Jordan's argues that Sutton worked precious little overtime and Sunday hours, especially compared to sales employees who logged many more hours than Sutton. Therefore, even if Sutton has a claim (which Jordan's disputes), his claims are not typical of sales employees due to his sparse record of overtime and Sunday hours. Closely related to this argument, Jordan's contends Sutton is a poor representative of the class, again because of his limited overtime and Sunday hours. It appears that Sutton's stake in the lawsuit, if measured by potential recovery, is likely to be far less than other sales employees because his overtime and Sunday hours appear to be far less than most other sales employees. The typicality standard, however, does not require that Sutton be among those who will benefit *most* from a recovery. Instead, typicality turns on whether Sutton was impacted by the challenged policies,

[2] Accordingly, this decision does not conclusively determine whether and how *Donis* may impact Sutton's claim; it determines only that *Donis* does not mandate dismissal and does not preclude class certification.

not on the severity of the alleged harm. See *Weld*, 434 Mass. at 87 (typicality established where there is "a sufficient relationship . . . between the injury to the named plaintiff and the conduct affecting the class" and that claims of plaintiff and class "are based on the same legal theory."). A named plaintiff's claims can be typical even if they are not strong, relative to other class members. In light of Jordan's compensation plan and the plaintiff's legal theory on why that plan violates the rule set forth in the *Sleepy's* decision, Sutton's claims satisfy the typicality requirement.

With respect to commonality and predominance, Jordan's argues that, even though it employed a single compensation plan challenged here, application of the plaintiff's claim to Jordan's employees will be individualized and fact-intensive. Some sales employees worked overtime and some did not; some, but not all, worked Sundays. And, whether plaintiff's theory would result in damages for any employee must be determined on a week-to-week basis. However, application of plaintiff's claims to hundreds of employees and their schedules, is the type of damages calculation that often arises in employment class actions. Where liability will turn on common questions of law or fact, the need for individual calculation of damages will not prevent class certification. See *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 402 (2004) ("difficult issues with respect to determining the appropriate amount of [damages] . . . do not preclude class certification"); *Weld*, 434 Mass. at 92. Here, most of the case will turn on common questions of fact—including Jordan's compensation plan—and common questions of law, including whether sales employees are entitled to "separate and additional compensation" for overtime and Sunday hours, which is not satisfied by deducting a draw from commissions. These common questions of law and fact predominate over the potential calculation of damages, which may be fact-intensive but is not necessarily complex.

In sum, exercising my discretion and after carefully considering the parties' positions, I find that: (1) the class is sufficiently numerous that joinder of all members is impracticable,[3] (2) nearly all factual and legal questions in the case are likely to be common to the class rather than unique to certain members, such that there are questions of law or fact common to the class,; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately represent the interests of the class. Further, the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, because the "individualized" aspects of the case appear to concern only the different calculation of damages. Finally, I have determined that a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

CONCLUSION AND ORDER

Having determined that plaintiffs satisfy the requirements of Rule 23, the motion for class certification is **ALLOWED**. The following class is certified for purposes of this action:

> All individuals whom Jordan's Furniture, Inc. has employed in the positions of "sales consultant" or "sleep technician," at one or more of its retail stores located in Massachusetts, during the time period between June 19, 2016 and August 1, 2019 and who worked more than forty hours in any workweek or on any Sunday.

So ordered.

Christopher K. Barry-Smith
Justice of the Superior Court

DATE: December 21, 2020

[3] I will adjust the class definition proposed by plaintiff, consistent with plaintiff's suggestion at p. 3 n.3 of Plaintiff's Reply brief, to include only those sales employees who worked more than 40 hours per week or on any Sunday.