COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court Department of the Trial Court.

MATTHEW SUTTON, *et al.*,[1] on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	
	)	Case No. 19-01763
v.	)	
JORDAN'S FURNITURE, INC.,	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT THEREOF

[1] The second named plaintiff in this action, Amie Arestani, was dismissed on jurisdictional grounds on June 4, 2020. *See* Memo. & Order dated June 4, 2020 (docket no. 16).

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Introduction

Summary judgment is an "excellent device" for the "prompt disposition" of this matter because none of the material facts are in dispute. *Community Nat. Bank v. Dawes*, 369 Mass. 550, 553 (1976). Plaintiff Matthew Sutton worked as a retail sales employee for Jordan's Furniture, Inc. ("Jordan's") in Natick, Massachusetts. On behalf of himself and a certified class of retail sales employees who have also worked for Jordan's in Massachusetts,[2] he claims that Jordan's violated the Massachusetts Wage Act, M.G.L. c. 149, § 148, and the overtime provision of the Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, § 1A, by failing to pay its sales employees separate and additional compensation when they worked overtime and Sundays. Those claims are uniquely suited for summary disposition because the manner in which Jordan's paid its sales employees is uncontroverted. Quite simply, Jordan's either paid its sales employees "separate and additional compensation" for overtime and Sundays, as required by the Supreme Judicial Court's decision in *Sullivan v. Sleepy's LLC*, 482 Mass. 227 (2019), or it did not. And the facts here demonstrate, beyond any genuine dispute, that it did not.

The undisputed facts are these. Jordan's paid its sales employees [redacted]. (*See* Fact Stmt. ¶¶ 6, 14-15, 17, 32-35).[3] [redacted]

[2] On December 21, 2020, the Court (the Hon. Christopher Barry-Smith, presiding) certified the following class in this case pursuant to Massachusetts Rule of Civil Procedure 23: all individuals whom Jordan's Furniture, Inc., employed as sales consultants or sleep technicians at one or more of its retail stores in Massachusetts during the time period between June 19, 2016 and August 1, 2019, and who worked more than 40 hours in any workweek or on any Sunday. For reference, a copy of that decision is included with this Motion as **Exhibit A**.

[3] Citations to Plaintiff's Statement of Material Facts, filed herewith, are denoted as "Fact Stmt. ¶ [paragraph number]."

[redacted]. (*Id.* at ¶¶ 16, 35). [redacted]. (*Id.* at ¶¶ 8-10, 37). [redacted] (*Id.* at ¶¶ 15, 17, 32). In this manner, Jordan's pay plan failed to provide the sales employees with "separate and additional compensation specifically" for the overtime and Sundays they worked. *Sleepy's*, 482 Mass. at 235.

Such a scheme is, in a word, illegal under the Massachusetts wage laws. As the Supreme Judicial Court held in *Sleepy's*, employers of commission-based sales employees do not achieve compliance with the overtime or Sunday pay statutes when they "credit" draw payments and commissions toward their statutory premium pay obligations. *Id.* at 233. Instead, "separate and additional" compensation for such time is owed. *Id.* Jordan's failed to comply with that mandate, plain and simple. Plaintiff and the certified class members are therefore entitled to judgment as a matter of law as to liability on Counts I and II of the Class Action Complaint.

Standard of Review

"Summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group*, 469 Mass. 800, 804 (2014). Summary judgment may be granted to plaintiffs. *See*, *e.g.*, *White v. City of Boston*, 428 Mass. 250, 251(1998); *Yeretsky v. City of Attleboro*, 424 Mass. 315, 316 (1997). Furthermore, courts may

enter summary judgment on liability alone, leaving the calculation or measure of damages for later proceedings. Mass. R. Civ. P. 56(c) ("A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages"); *SKW Real Estate Ltd. v. Gold*, 428 Mass. 520, 526 (1998).

Summary of Relevant Facts[4]

Jordan's owns and operates a regional chain of eponymous furniture stores with locations in Avon, Natick, and Reading, Massachusetts. (Fact Stmt. ¶ 1). It employs retail salespeople to work at these stores as "sales consultants" and "sleep technicians." (*Id.* at ¶ 2). Matthew Sutton, the class representative in this action, was one such sales consultant. (*Id.* at ¶ 3). He worked for Jordan's in Natick from about February 2016 until January 2019. (*Id.*).

Until August 1, 2019, Jordan's compensated its retail sales employees [redacted] (*Id.* at ¶ 6). [redacted] (*Id.*). [redacted] (*Id.* at ¶¶ 8, 17). [redacted] (*Id.* at ¶ 16). [redacted]

[4] This summary is taken from Plaintiff's Statement of Material Facts, filed herewith.

[redacted] (*Id.* at ¶ 8). [redacted] (*Id.* at ¶ 9). [redacted]. (*Id.*).

Jordan's explained its pay plan to the sales employees in a number of documents that it periodically updated, and which were available to the employees on Jordan's intranet computer system. (*Id.* at ¶ 7). One such document was called the "Sales Draw Plan." (*Id.*). The Sales Draw Plan [redacted]. (*Id.* at ¶ 10). A related document called "Sales Compensation Definitions," which Jordan's also provided to the sales employees, defined the term [redacted] (*Id.* at ¶¶ 13-14).

Jordan's also provided the sales employees with examples of how this system would work in practice. For example, the Sales Draw Plans dated March 12, 2018, and January 1, 2019, include the following "Draw Recovery Sample" table:

(*Id.* at ¶ 17).

Jordan's required all sales employees to sign documents confirming that they understood the terms of Jordan's pay plan, including, specifically, that they would [redacted] (*Id.* at ¶¶ 18-20).

Unsurprisingly, Jordan's actually paid the sales employees in a manner consistent with these policy statements. Specifically, for each pay period, Jordan's would [redacted]. (*Id.* at ¶ 32). [redacted]. (*Id.* at ¶ 33). [redacted]

[redacted]”[5] (*Id.* at ¶ 34). [redacted]

[redacted]. (*Id.* at ¶¶ 35-36).

Approximately two months after this lawsuit was filed, Jordan’s modified its sales employee pay plan. [redacted]. (*Id.* at ¶ 38).

Argument

1. Massachusetts law requires employers to pay employees additional compensation apart from their draws and commissions for overtime and Sundays.

Mr. Sutton has asserted two claims on behalf of himself and the certified class for the time period prior to August 1, 2019, when Jordan’s original pay plan was in effect. The first claim arises under the overtime statute, M.G.L. c. 151, § 1A. The overtime statute requires employers to pay employees 1.5 times the “regular rate at which [they are] employed” when they work “in excess of forty hours” in a work week. M.G.L. c. 151, § 1A. The second claim arises under the Sunday pay provision of the “Blue Laws,” M.G.L. c. 136, §§ 6(50) & 13. That statute requires retail employers to pay their employees premium compensation when they work

[5] [redacted]

Sundays.[6] *Id.* Employees who are owed such compensation may sue to recover it as "wages earned" under the Massachusetts Wage Act, M.G.L. c. 149, § 148, which is what Mr. Sutton is doing here on behalf of himself and the certified class.[7] Both the overtime statute and the Sunday pay law share similar purposes, which are to "reduce the number of hours of work, encourage the employment of more persons, and compensate employees for the burden of a long workweek." *Mullally v. Waste Mgmt. of Mass., Inc.*, 452 Mass. 526, 531 (2008); *see also Sullivan v. Sleepy's LLC*, 482 Mass. 227, 238-239 (2019) (overtime statute and Sunday pay law have "similar purposes").

In 2015, the Massachusetts Department of Labor Standards issued regulations concerning the manner in which employers could calculate premium pay for overtime and Sundays pursuant to the above statutes. Those regulations define the term "regular rate," as used in the overtime statute, as the "amount that an employee is regularly paid for each hour of work." 454 CMR § 27.02. They go on to state that employees who are not paid by the hour shall have their regular rate "determined by dividing the employee's total weekly earnings by the total hours worked during the week." *Id.* However, "sums paid as *commissions*, *drawing accounts*, *bonuses*, or *other incentive pay based on sales* or production" are excluded from this calculation. *Id.* (emphasis

[6] The statutory premium rate for Sundays was decreased from 1.5 times to 1.4 times the minimum wage on January 1, 2019. *See* M.G.L. c. 136, § 6(50), St. 2018, c. 121, §§ 5, 10, eff. Jan. 1, 2019.

[7] *See Drive-o-Rama, Inc. v. Attorney General*, 63 Mass. App. Ct. 769, 770 (2005) (affirming trial court judgment that employer was "obligated to pay holiday pay to its nonexempt employees who work on the holidays enumerated in G.L. c. 136, § 13, and that failure to do so violates G.L. c. 149, § 148 (Wage Payment Act)."); *Shoemaker v. Clay Family Dealerships, Inc.*, 2021 WL 800095, at *3 (Mass. Super. Jan. 20, 2021) (holding that employees are entitled to recover Sunday premium as "wages earned" under the Wage Act); *Galloway v. SimpliSafe, Inc.*, 2019 WL 7707965, at *5 (Mass. Super. 2019) ("the Court concludes that Plaintiffs have a private right of action under the Wage Act to seek compensation from SimpliSafe for any unpaid Sunday Premium Pay."); *Bassett v. Triton Technologies, Inc.*, 2017 WL 1900222, at *2 (Mass. Super. 2017) ("Since Plaintiffs have an explicit right to sue for violations of the Wage Act, and failure to pay wages for work on Sundays as required by G.L.c. 136, § 6(50), is a violation of the Wage Act, the private right of action created by G.L.c. 149, § 149, allows Plaintiffs to sue for non-payment of the higher wages they claim to have earned for working on Sundays.").

added). Thus, when it comes to calculating premium pay, an employee who is paid solely through draws and commissions has an effective "regular rate" of zero.

The Supreme Judicial Court addressed this framework with respect to commission-based inside sales employees two years ago, in *Sullivan v. Sleepy's LLC*, 482 Mass. 227 (2019). There, the Court ruled that inside sales employees who are paid on a commission basis with a recoverable draw are owed "separate and additional compensation" when they worked overtime or Sundays *regardless* of whether their total compensation, paid through draws and commissions, always equaled or exceeded 1.5 times the Massachusetts minimum wage. *Id.* at 228. In terms of how much additional compensation was owed, the Court held that such employees are entitled to 1.5 times the statutory minimum wage multiplied by the number of premium (i.e., overtime or Sunday) hours worked. *Id.* at 229.

The employer in *Sleepy's* was a bedding and mattress retailer that paid its sales employees on a commission basis with a recoverable draw. *Id.* at 229. This plan ensured that the sales employees always received total compensation that equaled or exceeded the required statutory rates for overtime and Sundays. *Id.* at 230. Nonetheless, the Court ruled that employers must pay "separate and additional" compensation, "beyond [the employees'] draws and commissions," for overtime and Sunday. *Id.* at 233, 237. The Court explained that this outcome was required by the "language and purposes" of the overtime and Sunday pay statutes, "the regulatory guidance, and our previous case law establishing that, in most circumstances, employers may not retroactively reallocate and credit payments made to fulfill one set of wage obligations against separate and independent obligations." *Id.* at 233. To hold otherwise, the Court said, would undermine the statutes' legislative purposes, which are to economically disincentivize overtime work and work on Sundays, encourage employers to hire more

employees, and provide greater compensation to employees for the burden of having worked longer hours. *Id.* at 235-236.

The "previous case law" referenced in *Sleepy's* included *Mullally v. Waste Management of Massachusetts, Inc.*, 452 Mass. 526 (2008), where the Court held that an employer's payroll formula violated the overtime statute even though it accounted for the "number of overtime hours an employee actually worked" because it resulted in employees receiving "approximately the same hourly wage regardless [of] whether [they] work[ed] overtime." *Id.* at 234, *quoting Mullally*, 452 Mass. at 529, 532. It also included *Dixon v. City of Malden*, 464 Mass. 446 (2013), where the Court "elaborated on the reasons why employers may not retroactively reallocate or 'credit' payments in the context of the Wage Act." *Id.* at 235. There, the employer argued that it did not owe an employee compensation for his unused vacation time because it had made "undifferentiated gratuitous weekly payments" to him following his termination, the total amount of which exceeded the value of his unused vacation time. *Id.*, *quoting Dixon*, 464 Mass. at 446. The Court disagreed, ruling that the weekly post-termination payments could not be "credited" against the employee's unused vacation time because the "city did not characterize the continued salary payments as payment for vacation accrual, and … did not communicate in any way that the salary continuation was payment for accrued vacation time." *Id.* 451. "The *Dixon* decision," the Court explained, "makes clear the importance of an upfront communication of the breakdown of the amounts to the employees" when it comes to making wage payments. *Sleepy's*, 482 Mass. at 236; *cf. Somers v. Converged Access, Inc.*, 454 Mass. 582, 591-592 (2009) (defendant's argument that employee misclassified as independent contractor had no damages because he earned more an independent contractor than he would have as an employee was "analogous to (and as unpersuasive as) an employer's argument that, despite the clear mandate of G.L. c. 151, §

1A, it should not be obliged to pay its employees one and one-half times the regular rate for overtime work, because, had it realized that it had this obligation, it would have paid its employees a lower base wage.").

2. Jordan's has violated the overtime and Sunday pay statutes.

The sole question as to liability in this case is whether Jordan's paid its sales employees premium compensation when they worked overtime or Sundays. The answer to that question is no, it did not. The record evidence adduced in discovery amply demonstrates, beyond any dispute, that Jordan's paid its sales employees solely through draws, commissions, and other types of sales-based incentive pay. (Fact Stmt. ¶ 4). As the Code of Massachusetts Regulations plainly state, however, such sums may *not* be credited towards employees' regular rate of pay. 454 CMR § 27.02 ("regular hourly rate" for minimum wage and overtime purposes "shall include all remuneration for employment paid to, or on behalf of, the employee, but shall not include: (a) sums paid as *commissions*, *drawing accounts*, bonuses, or *other incentive pay based on sales* or production[.]") (emphasis added). Thus, when it comes to overtime and Sundays, Jordan's was effectively paying its sales employees nothing. Their only compensation for such hours worked were their draws and commissions, neither of which, per the Supreme Judicial Court's holding in *Sleepy's*, satisfy the overtime or Sunday pay statutes. *See Sleepy's*, 482 Mass. at 236-237. Accordingly, Jordan's owes its sales employees additional compensation, separate from their draw payments and commissions, at the appropriate statutory rates for the overtime and Sundays they worked.

No reasonable factfinder could look at the evidence in this case and conclude otherwise. Why? There are several reasons. First, far from providing its sales employees with separate or additional compensation for overtime and Sundays, Jordan's treated the sales employees'

commissions as a pool of money from which it could withdraw funds to "cover" its statutory premium pay obligations. That compensation was neither added to nor paid separately from the sales employees' draws or commissions – they *were* the sales employees' commissions given a different name for payroll purposes. (*See* Fact Stmt. ¶¶ 31-37). Using this system, Jordan's was able to bypass the overtime and Sunday pay statutes' mandates that employees receive greater compensation "for the burden of a long workweek," while simultaneously evading the Legislature's goal of economically disincentivizing overtime and Sunday work. *Mullally*, 452 Mass. at 531.

Second, Jordan's was always clear with its sales employees that they were being paid exclusively by on a commission basis with a recoverable draw. The pay plans provided by Jordan's to the sales employees [redacted] (Fact Stmt. ¶ 10). [redacted]. (*See id.* at ¶¶ 18-22). [redacted]. (*Id.* at ¶ 17). Those examples leave no room for ambiguity; they demonstrate as clear as day that the sales employees were not receiving compensation for overtime or Sundays apart from or on top of their commissions, but were, instead, being advanced a portion of their commissions in the form of a recoverable draw for the overtime and Sunday hours they worked. (*See id.*).

Take the example provided by Jordan's in its Sales Draw Plan from March 12, 2018. (*Id.*). In that example, [redacted]

[redacted]. (*See* Fact Stmt. ¶¶ 24, 37).

Nor is there any dispute that Jordan's actually paid its sales employees in this manner. As the company's payroll manager of 15 years testified, [redacted]. (*Id.* at ¶¶ 32-33). [redacted]. (*Id.* at ¶ 16). In this manner, Jordan's avoided paying additional compensation, separate from commissions, to the sales employees for overtime or Sundays, in direct contravention of the Supreme Judicial Court's holding in *Sleepy's*. (*Id.* at ¶¶ 36-38).

Third, Massachusetts courts in cases decided since *Sleepy's* have all concluded that pay plans similar to Jordan's violate the overtime and Sunday pay laws. For example, over the past

year, two justices presiding in the Business Litigation Session for the Suffolk Superior Court granted summary judgment in favor of a commissioned sales employee. *See Martinez v. Burlington Motor Sports, Inc.*, 2020 WL 4607574 (Mass. Super. June 18, 2020) (attached as **Exhibit B**); *Shoemaker v. Clay Family Dealerships, Inc.*, 2021 WL 800095 (Mass. Super. Jan 20, 2021) (attached as **Exhibit C**). Similarly, an arbitrator in *Ramos v. Autofair, Inc.*, AAA Case No. 01-20-0003-9697 (Interim Award, Jan. 27, 2021) (David C. Salinger, Arb.) (attached as **Exhibit D**), recently determined that an employer's pay plan, which bore a marked similarity to Jordan's, violated the overtime statute and Sunday pay law as interpreted by the Supreme Judicial Court in *Sleepy's*. All these decisions find direct purchase here.

In sum, no reasonable factfinder could conclude, based on the record evidence in this case, that Jordan's pay plan complied with the overtime and Sunday pay statutes. Rather than paying its sales employees separate and additional sums of money for overtime or Sundays, Jordan's simply "utilized [the sales employees'] earned commissions to satisfy [its] weekly Overtime Pay and Premium Pay obligations." *Shoemaker*, 2021 WL 800095, at *2. *Sleepy's* prohibits such pay practices. Plaintiff is therefore entitled to summary judgment.

3. Jordan's pay plan operated in direct opposition to the legislative purposes behind the overtime and Sunday pay statute.

Plaintiff anticipates that Jordan's will argue that its pay plan complied with the overtime and Sunday pay statutes because it facially accounted for the hours worked by the sales employees and provided them [redacted] Any such argument would do no more to save Jordan's than it has saved other employers who have attempted to recharacterize their pay practices in order to shoehorn their way into statutory compliance.

In *Dixon*, for example, the Supreme Judicial Court rejected an employer's argument that it was not liable for failing to pay a former employee his unused vacation time at the time of his termination because it had gratuitously continued paying him his salary for several weeks after his termination, and the value of those payments exceeded the amount owed to him in vacation pay. *Dixon*, 464 Mass. at 451 ("The city's primary argument is that the [Wage Act] allows for mitigation of unpaid vacation payments by later payments. It asserts that it fully compensated the plaintiff for his vacation pay because it paid him, after his termination, salary payments totaling approximately $19,700, which is more than the amount of his vacation pay of approximately $13,615."). As the Court explained, the "city's payment of salary and benefits after the plaintiff's termination … does not provide a substitute for payment for accrued vacation time." *Id.* at 451-452.

Likewise, in *Somers*, the Supreme Judicial Court rejected an employer's argument that a plaintiff was owed no damages as a result of his employer's failure to properly classify him as an employee (rather than as an independent contractor) because he was paid more as an independent contractor than he would have been as an employee. *Somers*, 454 Mass. at 591. "This argument," the Court held, "is analogous to (and as unpersuasive as) an employer's argument that, despite the clear mandate of G.L. c. 151, § 1A, it should not be obliged to pay its employees one and one-half times the regular rate for overtime work, because, had it realized that it had this obligation, it would have paid its employees a lower base wage." *Id.* at 591-592.

Here, Jordan's explicitly characterized the payments it made to its retail sales employees for overtime and Sundays as a [redacted]

[redacted]. In this manner, Jordan's violated not just the letter but also the purposes of the overtime and Sunday pay statutes. As the Court explained in *Sleepy's* and *Mullally*, the goal of those statutes is to provide covered employees with greater compensation for the "burden of a long workweek" and to create an "economic disincentive" for employers to have their employees work more than 40 hours per week or on Sundays. *Sleepy's*, 482 Mass. at 233-234 & n.16; *Mullally*, 452 Mass. at 531-532.[8] Jordan's compensation system – both on its face and as applied – ran directly afoul of these principles.

How? One of the examples provided by Jordan's to its sales employees in its sales draw plan documents is illustrative. Per that example, [redacted] (*See* Fact Stmt. ¶ 17). [redacted] (*Id.* at ¶¶ 4, 17, 27-29). [redacted] (*Id.* at ¶¶ 15, 17, 24). Thus, Jordan's had no economic disincentive to have its sales employees work overtime or Sundays,[9] and no

[8] The Massachusetts Legislature further emphasized this goal in the Sunday pay statute itself, wherein it provided that employees may not be "required to perform [] work" on Sundays and cannot be punished for "refusal to work … on Sunday." M.G.L. c. 136, § 6(50).

[9] The apparent absence of a disincentive to schedule sales employees for work on Sundays is further demonstrated by Jordan's rotational scheduling system, whereby sales employees are required to work most weekends, including Sundays, before getting a weekend off. Employees can request certain days off for personal reasons, but the "expectation" is that all Jordan's sales employees would be available to work weekends in the regular course. (Fact Stmt. ¶¶ 4-5).

incentive to hire more employees, because from a labor budget perspective its current roster of sales employees cost the same amount of money irrespective of how many hours they worked. At the same time, the employees themselves received no greater compensation for having worked longer hours or on Sundays because *all* of their compensation was being taken from their earned commissions.

Once again, Jordan's own pay plan documents confirm how this is true. In those plans, a hypothetical sales employee is listed as having earned total commissions of [redacted] and is paid [redacted]. (*Id.* ¶¶ 17, 24). But applying those figures to a 40-hour workweek and a 50-hour workweek yields the same total gross compensation ([redacted]), as follows:

[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

(*Id.*).

For all the reasons articulated by the Supreme Judicial Court, this sort of compensation system is patently "untenable." *Mullally*, 452 Mass. at 531. The employee does not receive any additional compensation "based on whether [he] works overtime," *Sleepy's*, 482 Mass. at 236, nor is he compensated for the "burden of a long workweek," *Mullally*, 452 Mass. at 531. Furthermore, such a system enabled the employer – here, Jordan's – to "evade the economic

disincentive" to have the employee work more than 40 hours or Sundays because the employee is getting paid the same amount regardless. *Id.* at 532. Finally, "unlike employers who may hire more employees in order to avoid paying existing employees overtime," Jordan's had no "need to hire additional employees" because its existing employees can be stretched to cover any amount of work time, provided they earn enough commissions to "cover the draw." Thus, despite whatever argument Jordan's may raise concerning the distinctions between its pay plan and the pay plan at issue in *Sleepy's*, the fundamental truth of the matter is that Jordan's sales employee pay plan did everything that the Supreme Judicial Court has said a pay plan cannot do.

Conclusion

Plaintiff is entitled to summary judgment on liability because the compensation system at Jordan's, [redacted], plainly violated the overtime statute and Sunday pay law. Accordingly, Plaintiff respectfully requests that the Court grant this motion and enter judgment as a matter of law in favor of Plaintiff Matthew Sutton and the certified class pursuant to Massachusetts Rule of Civil Procedure 56 on Counts I and II of the Class Action Complaint.

Respectfully submitted,
MATTHEW SUTTON, *et al.*,
on behalf of himself
and all others similarly situated,

By their attorneys,

/s/ Brant Casavant

Hillary Schwab, BBO #666029
Brant Casavant, BBO #672614
FAIR WORK P.C.
192 South Street, Suite 450
Boston, MA 02111
Tel. (617) 607-3261
Fax. (617) 488-2261
hillary@fairworklaw.com
brant@fairworklaw.com

Dated: April 20, 2021.

CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for the defendant on April 20, 2021, prior to serving this motion. The parties were unable to narrow the areas of their disagreement.

/s/ Brant Casavant
Brant Casavant

CERTIFICATE OF SERVICE

I certify that, on April 20, 2021, one copy of this motion was served by email on counsel for the defendant at the following addresses:

Julie B. Brennan, Esq.
Brian H. Lamkin, Esq.
Manchel & Brennan, P.C.
100 River Ridge Drive, Suite 308
Norwood, MA 02062
jbrennan@manchelbrennan.com
blamkin@manchelbrennan.com

Ariel D. Cudkowicz, Esq.
Seyfarth Shaw LLP
Seaport East
Two Seaport Lane, Suite 300
Boston, MA 02210
acudkowicz@seyfarth.com

/s/ Brant Casavant
Brant Casavant

Exhibit A

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.

Exhibit B

2020 WL 4607574
Only the Westlaw citation is currently available.
Superior Court of Massachusetts,
Suffolk County, Business Litigation Session.

Stephen MARTINEZ, on Behalf of
Himself and All Others Similarly Situated
v.
BURLINGTON MOTOR SPORTS, INC.,
Russell Lyon Individually dba Lyons-
Waugh Auto Group, and Warren Waugh,
Individually dba Lyons-Waugh Auto Group

1984CV01876BLS1
|
June 18, 2020

DECISION ON DEFENDANTS' MOTION
TO DISMISS AND PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

Karen F. Green, Justice of the Superior Court

***1** This is a putative class action against the defendants, Burlington Motor Sports, Inc. ("Burlington") [1] and Russell Lyon ("Lyon") and Warren Waugh ("Waugh"), each d/b/a Lyon-Waugh Auto Group ("Lyon-Waugh"). [2] In his two-count, First Amended Complaint ("FAC"), the plaintiff, Stephen Martinez ("Martinez"), alleges that the defendants violated G.L.c. 151, §§ lA and 1B ("Overtime Statute"), by failing to pay him and other similarly-situated car salespeople separate and additional overtime wages. [3]

The defendants have moved to dismiss the FAC pursuant to Mass.R.Civ.P. 12(b)(6). Martinez, in turn, has moved for partial summary judgment as to liability on Count I of the FAC as to Burlington pursuant to Mass.R.Civ.P. 56. [4] After hearing, the defendants' motion is denied and Martinez's motion is allowed.

Background

Timothy Daley filed this action on June 12, 2019. On September 6, 2019, plaintiff's counsel filed the FAC, substituting Martinez as the named plaintiff. Martinez alleges that: he was a car salesperson at the Mercedes Benz of Burlington dealership between April 2018 and September 2019; he routinely worked more than 40 hours per week; the defendants did not pay him "separate and additional" overtime wages; and "[a]s confirmed by *Sullivan v. Sleepy's, LLC,* [482 Mass. 227 (2019) (*Sleepy's*)]," such conduct violated the Overtime Statute. FAC, ¶43. He further alleges that although Burlington issued his paychecks, Lyon-Waugh and Burlington jointly employed him. [5]

In connection with their motion to dismiss, the defendants have provided the court with a copy of Martinez's pay plan ("Pay Plan"), entitled "Commission and Bonus Plan for Client Advisors 2018" and dated April 13, 2018. The Pay Plan, which describes the conditions under which Martinez would receive commission and bonus payments, provides:

K. MINIMUM WAGE AND OVERTIME PAY:

***2** Following the end of each payroll period and as required by applicable law, a Plan Participant will receive at least (1) the applicable minimum wage for every hour worked in a workweek (up to forty (40) hours) during the applicable payroll period, and (2) time and one half the applicable minimum wage rate for every hour worked by the Plan Participant in a workweek above forty (40) hours during the applicable payroll period. [6]

The defendants have also provided "exemplars" of Martinez's paystub records ("paystubs").

In support of his cross motion for partial summary judgment, Martinez has provided additional paystubs. The paystubs reflect that the amounts paid by Burlington to Martinez were categorized as: (1) "REG," (2) "BONUS," (3)"UCOMM," (4)"NCOMM," (5) "PERSN," (6) "VAC," (7) "OT," (8) "HOL," (9) "Sick," or (9) "BON3," and that between April 20, 2018 and May 31, 2019, no payment amount appears for "OT." [7] For purposes of the motion, it is undisputed that between April 20, 2018 and May 31, 2019: Burlington tracked the number of "OT" hours Martinez worked in each pay period and reported it on his paystub for that period; Martinez worked "OT" hours in every

pay period but one; [8] and Burlington did not pay Martinez a salary. [9]

Discussion

A. Defendants' Motion to Dismiss

To survive the defendants' Rule 12(b)(6) motion, the FAC must allege facts that, if true, would "plausibly suggest[ ] ... an entitlement to relief." *Lopez v. Commonwealth,* 463 Mass. 696, 701 (2012), quoting *Iannacchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008), and *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557 (2007). The court assumes that the FAC's factual allegations are true and draws "every reasonable inference in favor of the plaintiff." *Rafferty v. Merck & Co., Inc.,* 479 Mass. 141, 147 (2018). The parties agree that in addition to the factual allegations appearing in the FAC, the court may consider the Pay Plan and the paystubs in deciding the motion.

Martinez's theory of liability rests on the SJC's holding in *Sullivan v. Sleepy's, LLC,* 482 Mass. 227 (2019). In *Sleepy's,* the Supreme Judicial Court ("SJC") considered "whether retail salespeople who are paid entirely in commission or draws (i.e., advances on commissions) are entitled to additional overtime or Sunday pay pursuant to G.L.c. 151, § 1A (overtime statute) and G.L.c. 136, § 6 (50) (Sunday pay statute)." *Id.* at 228. The SJC held that: "[D]raws and commissions cannot be retroactively allocated as hourly and overtime wages and Sunday pay even if these draws and commissions equaled or exceeded the minimum wage for the employees' first forty hours of work and one and one-half times the minimum wage for all hours worked over forty hours or Sunday. Rather, the employees are entitled to *separate and additional* payments of one and one-half times the minimum wage for every hour the employees worked over forty hours or on Sunday." *Id.* (emphasis added). [10] The Court further held that the "regular rate" of a one hundred percent commission employee, for purposes of calculating overtime pay, is one and one-half times the minimum wage, given that commissions and draws are excluded from the computation of an employee's regular rate under the Overtime Statute and 454 Code Mass. Regs. § 27.02. *Id.* at 238. [11]

***3** In their motion to dismiss, the defendants first argue that the Complaint fails to state a claim because *Sleepy's* does not apply. More particularly, they contend that *Sleepy's* held only that employers "cannot—*after the employee has earned the wages and without an upfront communication to the employee as to which wages were being paid*—simply label or characterize such payments, including commissions, as satisfying" their overtime obligation. [12] They further argue that *Sleepy's* is factually distinguishable on the basis that Paragraph K of their Pay Plan "unambiguously" informed Martinez "that commissions and additional wage payments [would be] made to satisfy any Overtime Statute obligation." [13] I disagree.

As an initial matter, Paragraph K of the Pay Plan is not "unambiguous." [14] Even if it were, however, the defendants' argument would fail. The SJC stated in *Sleepy's* that its prior decision in *Dixon v. Malden,* 464 Mass. 446 (2013) "makes clear the importance of an upfront communication" of the breakdown of the amounts [paid] to ... employees." *Sleepy's,* 482 Mass. at 236. However, it held that employers cannot use commission payments to satisfy their overtime obligations, "based on the language and purposes of the overtime statute, the regulatory guidance, and [its] previous case law establishing that, in most circumstances, employers may not retroactively reallocate and credit payments made to fulfill one set of wage obligations against separate and independent obligations." *Id.* at 233. See also *id.* at 235-37; *Wright v. Balise Motor Sales Co.,* 2019 WL 6497604, at * 3 (Mass. Super. Dec. 18, 2019) (Sanders, J.) (rejecting similar argument). The paystubs reflect that Burlington: (a) used commissions to compensate Martinez for overtime hours worked during pay periods from April 20, 2018 and May 31, 2019; and (b) identified no separate payment to Martinez for "OT" until his paycheck dated June 14, 2019. Thus, the defendants' contention that *Sleepy's* does not apply lacks merit. [15]

The defendants' alternative argument that *Sleepy's* should apply only prospectively is also unavailing. See *Shoemaker v. Clay Family Dealerships, Inc.,* 2020 WL 2198037, at *1 (Mass. Super. Feb. 13, 2020). [16] Accordingly, defendants' motion to dismiss is *denied.*

B. Martinez's Motion for Partial Summary Judgment on Count I Against Burlington

***4** Summary judgment shall be granted when all material facts have been established and the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); *Miller v. Mooney,* 431 Mass. 57, 60 (2000). The moving party has the burden of affirmatively demonstrating the absence of a genuine issue of material fact on every relevant issue. *Sullivan v. Liberty Mut. Ins. Co.,* 444 Mass. 34, 39 (2005).

Martinez argues that he is entitled to partial summary judgment as to Burlington's liability on Count I because his paystubs demonstrate that between April 20, 2018 and May 31, 2019, he worked more than 40 hours per week and Burlington did not pay him separate and additional overtime wages. In opposing the motion, the defendants maintain that "[p]er [the Pay Plan], Burlington issued 'gross-up' payments to Plaintiff when his earned commissions did not satisfy any obligation owed under the Overtime Statute" and that "Burlington did not offset or credit the gross-up payments against commissions, including future commissions."[17] They argue summary judgment should be denied because as a result of these gross-up payments, Martinez received separate and additional payments for overtime hours worked. I am not persuaded.

First, it is undisputed that Martinez did not make any separate or additional payment, whether or not characterized as a "gross up," to Martinez for "OT" hours worked in several pay periods because his commissions equaled or exceeded the amount to which he was entitled to be paid for overtime.[18] Second, even in those pay periods in which Burlington provided "gross-up payments," it did not indicate on Martinez's paystubs that any amount was paid for "OT" wages; instead the "gross up payments" appear under the categorization, "REG."

In *Sleepy's,* the SJC relied in part on its prior decision, *Dixon v. Malden,* 464 Mass. 446 (2013), in which the plaintiff alleged that his employer violated the Wage Act by failing to pay him for unused vacation time at the time of his termination. The employer argued it had paid him salary payments totaling more than the amount of the vacation pay owed following his termination and, therefore, no violation had occurred. The SJC rejected this argument, noting that: the employer did not "characterize the continued salary payments as payment for vacation accrual;" the employer "did not communicate in any way that the salary continuation was payment for accrued vacation time;" and "[t]he vacation balance on the pay stubs was not decreased when the [employer] paid the salary continuation." *Dixon,* 464 Mass. at 451.[19] In *Sleepy's,* the SJC reaffirmed its *Dixon* ruling and, as previously noted, observed that it "makes clear the importance of an upfront communication of the breakdown of the amounts [paid] to ... employees." *Sleepy's,* 482 Mass. at 236.

The Pay Plan and the paystubs hardly represent any such "upfront communication." The Pay Plan does not refer to any "gross up payment." Meanwhile, neither the Pay Plan nor the paystubs expressly identify the purpose of those "REG" payments. The "REG" designation suggests they were made for "regular," rather than "overtime," wages.[20] Regardless of the definition of "REG," however, Burlington made the "gross up payments" only when Martinez's commissions did not fully compensate him for the first forty hours worked at the minimum wage and for the overtime hours worked at one and one-half times the minimum wage. Thus, Burlington always credited Martinez's commissions against its obligation to pay him for his overtime hours, rather than making "separate and additional payments" for those hours as the Overtime Statute requires. *Sleepy's,* 482 Mass. at 228.

Order

***5** The defendants' motion to dismiss the FAC is *denied* and the plaintiff's motion for partial summary judgment as to liability on Count I is *allowed.*

All Citations

Not Reported in N.E. Rptr., 2020 WL 4607574

Footnotes

1 Martinez alleges that Burlington does business as Mercedes Benz of Burlington.

2 Martinez alleges that Lyon-Waugh is a joint venture controlled by Lyon and Waugh that operates six auto dealerships, including the Mercedes Benz of Burlington dealership.

3 Count I is asserted against all the defendants, while Count II is asserted only against Lyon. Although both counts seek to hold Lyon individually liable, Count II seeks to hold Lyon liable solely because he is the purported President, Treasurer, Director and Secretary of Burlington. See G.L.c. 151, § 1B ("Any employer or *the officer* or agent of any corporation who pays or agrees to pay to any employee less than the overtime rate of compensation required by section one A shall have violated this section ...") (emphasis added).

4 Although Martinez alleges that Lyon-Waugh was his joint employer and seeks to hold Lyon and Waugh individually liable on that basis, he is not moving for summary judgment against them.

5 The defendants vigorously dispute that Lyons-Waugh can be considered Martinez's employer, but do not contest Martinez's joint employment theory for purposes of their motion to dismiss.

6 Defendants' Memorandum in Support, Exhibit 1 at ¶K

7 Beginning with Martinez's paycheck dated June 14, 2019, Burlington reported paying Martinez $18 for each "OT" hour he worked.

8 The lone exception being the pay period ending June 15, 2018.

9 At the hearing, the parties agreed that Burlington's employees are "commissions only" employees.

10 The SJC explained that three of its prior "decisions all demonstrate that the overtime statute requires *separate and additional* overtime compensation to be provided to a one hundred percent commission employee regardless of whether that employee receives a recoverable draw or commission that equals or exceeds one and one-half times the minimum wage for any hours worked beyond forty." *Id.* at 235 (emphasis added). It further concluded that 454 Code Mass. Regs. § 27.03 "entitles the employees to *separate and additional overtime payments* beyond their draws and commissions. *Id.* at 237 (emphasis added).

11 In relevant part, G.L.c. 151, § 1A states:

> [N]o employer in the commonwealth shall employ any of his employees in an occupation ... for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of forty hours at a rate not less than one and one-half times the regular rate at which he is employed. Sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production, shall be excluded in computing the regular rate and the overtime rate of compensation under the provisions of this section.

Id. Although the Overtime Statute does not define "regular rate," the Department of Labor Standards has defined "regular hourly rate" to mean:

> The amount that an employee is regularly paid for each hour of work. When an employee is paid on ... any basis other than an hourly rate, the regularly hourly rate shall be determined by dividing the employee's total weekly earnings by the total hours worked during the week. Regardless of the basis used, an employee shall be paid not less than the applicable minimum wage each week.
>
> The regular hourly rate shall include all remuneration for employment paid to, or on behalf of, the employee, but shall not include: (a) sums paid as commissions, ... bonuses, or other incentive pay based on sales or production ...

454 CMR § 27.02 (2015). Title 454 Code Mass. Regs. § 27.03(3) further defines "Overtime Rate" to mean:

> One and one-half times an employee's regular hourly rate, such regular hourly rate not to be less than the basic minimum wage, for work in excess of [forty] hours in a work week, except as set forth in [G.L.]c. 151, § 1A ... *Whether a nonexempt employee is paid on an hourly, piece work, salary, or any other basis, such payments shall not serve to compensate the employee for any portion of the overtime rate for hours*

> *worked over [forty] in a work week*, except that this limitation only applies to the "one-half" portion of the overtime rate (one and "one-half" times an employee's regular hourly rate) when overtime is determined on a bona fide fluctuating workweek basis.

Id. (emphasis added).

12 Defendants' Memorandum in Support at p. 11 (emphasis in original).

13 Defendants' Opposition at p. 4. See also Defendants Memorandum in Support at p. 12 (*Sleepy's* distinguishable because the Pay Plan "clearly (1) evidences an upfront, agreed-upon communication as to the labeling and breakdown of [Martinez's] wages; and (2) provides that commissions and, if needed, separate additional wage payments satisfy statutory wage and hour obligations").

14 While the Pay Plan provides that employees, including Martinez, "will receive at least ... time and one half the applicable minimum wage rate for every hour worked ... in a workweek above forty (40) hours during the applicable payroll period," it does not state that commissions or separate additional wages will be used to satisfy the employer's overtime obligation.

15 The defendants also assert that *Sleepy's* is distinguishable because they "did not subject Plaintiff to a 'capped' payment scheme" (i.e., they provided additional payments when the amount of commissions due to Martinez did not satisfy its overtime obligation). Defendants' Memorandum in Support at p. 14. However, this alleged "distinction" likewise does not make a difference. Martinez's paystubs reflect that Burlington often credited Martinez's commissions against the amount it was obligated to pay him for the "OT" hours he worked.

16 Several other decisions of this court have rejected the defendants' argument that the SJC's holding in *Sleepy's* should apply only prospectively. See *Sanderson v. Mastria Buick,* No. 1982CV00689 (Mass. Super. Dec. 26, 2019); *Martin v. Baker Cadillac, Inc.,* No. 1985CV00683 (Mass. Super. Feb. 3, 2020); *DeFrancesco v. Jaffarian's Service, Inc.,* No. 1981CV02041 (Mass. Super. Jan. 21, 2020); *Colleton v. Sentry West, Inc.,* No. 1982CV00812 (Mass. Super. Jan. 8, 2020); *Malenbrance v. Colonial Automotive Group, Inc.,* 2019 WL 7753751, at *3 (Mass. Super. Dec. 18, 2019); *Galvin v. International Cars Ltd.,* No. 1977CV00890 (Mass. Super. Dec. 10, 2019); *Wright,* 2019 WL 6497604, at *4. The Appeals Court denied an interlocutory appeal by the defendant in *Sanderson.*

17 Defendants' Opposition at p. 5.

18 At the hearing, the defendants made this concession.

19 The SJC also noted that it was irrelevant that its ruling potentially resulted in a windfall for the plaintiff. See *id.* at 452 n.7.

20 In any event, there is no record evidence that Burlington ever communicated to Martinez that the "REG" designation was intended to reflect "gross up payments."

Exhibit C

2021 WL 800095
Only the Westlaw citation is currently available.
Superior Court of Massachusetts,
Suffolk County, Business Litigation Session.

Russel SHOEMAKER
v.
CLAY FAMILY DEALERSHIPS, INC. et al.

1984CV02005BLS1
|
January 20, 2021

Decision and Order Regarding Plaintiff's Motion for Summary Judgment as to Liability Against Defendants Clay Chevrolet, Inc., Brian J. Clay and James T. Sarno (Docket Entry No. 16)

Brian A. Davis, Associate Justice of the Superior Court

Factual and Procedural Background

***1** This is a putative Wage Act class action filed in the aftermath of the Massachusetts Supreme Judicial Court's ("SJC") decision in *Sullivan v. Sleepy's LLC,* 482 Mass. 227 (2019) ("*Sleepy's*"). The material facts, which are largely undisputed, are as follows.

Plaintiff Russel Shoemaker ("Plaintiff") was employed as a salesperson at defendant Clay Chevrolet, Inc.'s ("Clay Chevrolet") automobile dealership in Norwood, Massachusetts from August to at least December 2016. Joint Statement of Material Facts Pursuant to Superior Court Rule 9A(b)(5)(i) ("SOMF"), ¶1. As a salesperson, Plaintiff did not receive a salary from Clay Chevrolet. *Id.,* ¶4. Rather, Plaintiff was paid "on a 100% commission basis ..." See Clay Chevrolet "Sales Department Pay Plan & Terms and Conditions" ("Pay Plan"), Joint Appendix for Plaintiff's Motion for Summary Judgment ("Joint App."), *Exhibit B* at 1. Clay Chevrolet's Pay Plan nonetheless provided that, if Plaintiff's commissions in any given week did not "meet minimum wage and/or overtime requirements," he would be "paid the difference" by Clay Chevrolet "to bring [his] wages for the week into Federal and State Wage and Hour compliance." *Id.*

Massachusetts law provides that employees who work beyond forty (40) hours in a week must receive separate and additional overtime pay ("Overtime Pay") pursuant to G.L.c. 151A, § 1A (the "Overtime Statute"), and those who work on a Sunday or holiday must receive statutorily-defined premium pay ("Premium Pay") pursuant to G.L.c. 136, §§ 6(50), 13, and 16 (the "Premium Pay Statute"). [1] *Sleepy's*, 482 Mass. at 235, 238-39. It is undisputed in this case that Plaintiff worked more than forty hours in a week, or on a Sunday or holiday, on multiple occasions during his tenure at Clay Chevrolet. SOMF, ¶¶8-10. For the weeks when Plaintiff's commissions were sufficient to cover the amount of his earned Overtime Pay and Premium Pay, however, Clay Chevrolet did not, in fact, pay Plaintiff any separate and additional Overtime Pay or Premium Pay. *Id.*, ¶¶15-19. Only in the few instances when Plaintiff's commissions for the week were insufficient to cover the amount of his earned Overtime Pay or Premium Pay did Clay Chevrolet provide Plaintiff with additional compensation, labeled somewhat obscurely on his pay stub as "NON RECOV DR," in purported satisfaction of Clay Chevrolet's Overtime and Premium Pay obligations. *Id.*, ¶¶15-19.

Plaintiff commenced this action against Clay Chevrolet and its President and Treasurer (collectively, "Defendants") in June 2019, asserting that their failure to pay Plaintiff separate and additional Overtime Pay and Premium Pay violated the Overtime Pay Statute and the Massachusetts Wage Act, G.L.c. 149, § 148. [2] After a period of discovery, Plaintiff filed a motion for summary judgment on the issue of liability only against these Defendants (the "Motion") in August 2020. [3]

***2** The Court conducted a virtual hearing on Plaintiff's Motion on December 15, 2020. Counsel for all of the parties attended and participated in the hearing. Upon consideration of the written materials submitted by the parties, the information provided at the motion hearing, and the oral arguments of counsel, Plaintiff's Motion will be *ALLOWED IN PART* for the reasons discussed below.

Discussion

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); *Cargill, Inc. v. Beaver Coal & Oil Co.*, 424 Mass. 356, 358 (1997) ("*Cargill*"). It is the moving party's burden to affirmatively demonstrate that no triable issue of fact exists. *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989). Once the moving party demonstrates, at least preliminarily, the absence of a triable issue of fact, the party opposing summary judgment must come forward with admissible evidence showing the existence of a genuine issue of material fact in order to defeat the motion. *Id.* at 17. Opposition based solely on the allegations of the pleadings, or on "bare assertions and conclusions," is not enough. *Key Capital Corp. v. M&S Liquidating Corp.,* 27 Mass.App.Ct. 721, 728 (1989). In deciding a motion for summary judgment, the court reviews the evidence in the light most favorable to the non-moving party, but it does not weigh evidence, assess credibility, or find facts. *Kelley v. Rossi,* 395 Mass. 659, 661 (1985).

The issues raised by Plaintiff's Motion are effectively three-fold. They are: (1) Did Defendants' failure to pay Plaintiff separate Overtime Pay and Premium Pay violate the provisions of the Overtime Statute and the Wage Act?; (2) Does the Wage Act afford Plaintiff a private right of action to recover any unpaid Premium Pay that he may be due?; and (3) Assuming that Plaintiff is entitled to recover damages from Defendants for unpaid Overtime Pay and/or Premium Pay, are his damages subject to reduction based upon the compensation that he received from Clay Chevrolet in the form of "NON RECOV DR" payments? The Court addresses each of these issues, in turn, below.

1. Did Defendants' Failure to Pay Plaintiff Separate Overtime and Premium Pay Violate the Provisions of the Massachusetts Overtime Statute and the Massachusetts Wage Act?

The answer to this question is an unequivocal "yes." The SJC expressly held in *Sleepy's, supra,* that the Massachusetts Overtime Statute, G.L.c. 151A, § 1A,

> requires *separate and additional* overtime compensation to be provided to a one hundred percent commission employee regardless of whether that employee receives a recoverable draw or commissions that equal or exceed one and one-half times the minimum wage for any hours worked beyond forty.

482 Mass. at 235 (emphasis added). The Court held, at the same time, that the Commonwealth's Premium Pay Statute, G.L.c. 136, § 6(50),

> require[s] an employer to do the same thing as the overtime statute, namely to provide pay at not less than one and one-half times the employee's regular rate for hours worked on a Sunday.

Id. at 239 (internal quotation marks and citation omitted).

It is undisputed in this proceeding that Defendants paid Plaintiff on a "100% commission basis" and, on multiple occasions in 2016, utilized Plaintiff's earned commissions to satisfy their weekly Overtime Pay and Premium Pay obligations to Plaintiff. Joint App., *Exhibit B* at 1; SOMF, ¶¶15-19. In doing so, Defendants undeniably violated the Overtime Statute and the Premium Pay Statute as interpreted by the SJC in *Sleepy's*. [4]

2. Does the Wage Act Afford Plaintiff a Private Right of Action to Recover Any Unpaid Premium Pay that He May Be Due?

***3** The answer to this question also is "yes." The existence of a private right of action to recover unpaid Premium Pay under the Wage Act was implicitly recognized by the SJC in *Sleepy's* (see 482 Mass. at 230 ("In September 2017,

the employees brought suit in the Superior Court, alleging that the employers' payment policies violated G.L.c. 149, § 148 (Wage Act) ..."), and was expressly recognized by the SJC in *Crocker v. Townsend Oil Co., Inc.,* 464 Mass. 1, 6-7 (2012) (holding that employee seeking unpaid overtime pay could pursue claims under both Wage Act and the Overtime Statute). See also *Drive-O-Rama, Inc. v. Attorney General,* 63 Mass.App.Ct. 769, 769-70 (2005) (holding that employer's failure to pay time-and-a-half for work performed on legal holidays violated the Wage Act). Numerous prior decisions issued by the Massachusetts Superior Court (including by this Judge) have reached the same conclusion. See, e.g., *Bassett v. Triton Technologies, Inc.,* No. 1684CV03475-BLS2, 2017 WL 1900222, at *2 (Mass. Super. Ct. Mar. 6, 2017) (Salinger, J.) [34 Mass. L. Rptr. 174] (holding that "[t]he Wage Act requires prompt payment of all wages earned by an employee, including higher wages earned under G.L.c. 136, § 6(50), for work on Sundays ... A failure to pay one and one-half times an employee's regular wage when such bonus pay is required by statute is therefore a violation of the Wage Act"); *Galloway v. SimpliSafe, Inc.,* No. 1784CV03796-BLS1, 2019 WL 7707965, at *11 (Mass. Super. Ct. Dec. 24, 2019) (Davis, J.) [36 Mass. L. Rptr. 191] (holding that "Plaintiffs have a private right of action under the Wage Act to seek compensation from SimpliSafe for any unpaid Sunday Premium Pay"). Unless and until the SJC or the Massachusetts Appeals Court rules otherwise, this Court will continue to recognize a private right of action under the Wage Act for unpaid Premium Pay. [5]

3. Are Plaintiff's Recoverable Damages for Unpaid Overtime Pay and/or Premium Pay, if Any, Subject to Reduction Based Upon the Compensation that He Received from Clay Chevrolet in the Form of "NON RECOV DR" Payments?

Unlike the two previous questions, this question is not one that the Court can answer on summary judgment. There is conflicting evidence in the record concerning the nature and purpose of the "NON RECOV DR" payments that Clay Chevrolet made to Plaintiff on occasion. Plaintiff correctly notes that his pay records indicate that he consistently received "zero" Overtime Pay from Defendants in weeks when he admittedly worked in excess of forty hours, and that, in most instances, he received "zero" Premium Pay in weeks when he admittedly worked on a Sunday or holiday. [6] SOMF, ¶¶8-10, 15-19. He argues that Defendants' allegedly *post facto* attempt to apply the "NON RECOV DR" payments he received to their Overtime Pay and/or Premium Pay obligations constitutes a form of "retroactive reallocation of payments" that the SJC held is impermissible in *Sleepy's*. Plaintiff's Reply Memorandum in Support of His Motion for Summary Judgment as to Liability Against Defendants Clay Chevrolet, Inc., Brian J. Clay, and James T. Sarno, dated Aug. 3, 2020, at 5-7.

Defendants, on the other hand, assert that Clay Chevrolet's Pay Plan *prospectively* informed Plaintiff that, if his commissions in any given week did not "meet minimum wage and/or overtime requirements," he would be "paid the difference" in order to "bring [his] wages for the week into Federal and State Wage and Hour compliance," and that, notwithstanding how they were described Plaintiff's pay records, the "NON RECOV DR" payments he received were "separate and additional payments which Clay Chevrolet made for the sole purpose of satisfying its overtime, Sunday, or holiday pay obligations" to Plaintiff. Defendants' Opposition to Plaintiff's Partial Motion for Summary Judgment Against Clay Chevrolet, Inc., Brian J. Clay, and James T. Sarno, dated July 20, 2020, at 3.

***4** The conflicting evidence concerning the nature and purpose of the "NON RECOV DR" payments that Clay Chevrolet occasionally made to Plaintiff creates a genuinely disputed issue of material fact that cannot be resolved on summary judgment. See *Cargill,* 424 Mass. at 358. See also *Faram 1957 S.p.A. v. Faram Holding & Furniture, Inc.,* No. 16-CV-2430 (VSB), 2018 WL 1394178, at *12 (S.D.N.Y. Mar. 19, 2018) (in trademark action, "[t]his question of fact—the purpose of the payments from ... [one party] to ... [another party]—precludes summary judgment as to the ownership" of disputed marks). As this issue goes to the amount of Plaintiff's recoverable damages and not to the question of whether Defendants violated the Overtime Statute and the Wage Act, it does not preclude the entry of summary judgment in Plaintiff's favor on the issue of Defendants' liability. A trial is necessary, however, to determine the proper amount of damages owed to Plaintiff by Defendants. See Mass.R.Civ.P. 56(d) ("If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court ... shall thereupon make an order specifying the facts

that appear without substantial controversy, ... and directing such further proceedings in the action as are just").

Order

For the foregoing reasons, Plaintiff's Motion for Summary Judgment (Docket Entry No. 16) is *ALLOWED IN PART* solely as to Defendants' liability for failing to pay Plaintiff separate and additional Overtime Pay and Premium Pay in violation of the Massachusetts Overtime Statute, G.L.c. 151A, § 1A, and the Massachusetts Wage Act, G.L.c. 149, § 148.

The parties shall appear for a litigation control conference on February 11, 2021, at 2:00 p.m., for the purpose of establishing a schedule for the resolution of all remaining issues in this action, including issues pertaining to class certification and damages.

All Citations

Not Reported in N.E. Rptr., 2021 WL 800095

Footnotes

1 The statutory premium associated with Sunday Premium Pay traditionally has been "not less than one and one-half times the employee's regular rate." See G.L.c. 136, § 6(50), prior to amendment by 2018 Mass. Acts c. 121, § 5. Effective January 1, 2019, the Legislature began reducing the amount of the premium associated with Sunday Premium Pay, on an annual basis, by one-tenth of the employee's regular rate until the statutory premium disappears entirely. See 2018 Mass. Acts c. 121, § 5. Thus, effective January 1, 2023, the requirement of Sunday Premium Pay no longer will exist.

2 Massachusetts law provides that Clay Chevrolet's President and Treasurer are individually liable for any unpaid Overtime Pay and/or Premium Pay due Plaintiff under the Overtime Statute and the Wage Act. See G.L.c. 151, § 1B ("Any employer or the officer or agent of any corporation who pays or agrees to pay to any employee less than the overtime rate of compensation required by section one A shall have violated this section ..."); and G.L.c. 149, § 148 ("The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section"). Accordingly, this decision and order treats the obligations, if any, as Defendants' joint and several liability.

3 Plaintiff's Motion does not seek the imposition of liability, as a matter of law, against defendants Clay Family Dealerships, Inc. and Kimberly Clay-Soucy, apparently because of ongoing factual disputes regarding their status as Plaintiff's "employer(s)" for purposes of the Overtime Statute and the Wage Act.

4 To the extent Defendants continue to maintain that the SJC's decision in *Sleepy's* does not apply (or should not be applied) retroactively, the Court notes that it explicitly rejected this argument in denying Defendant's previously-filed Motion to Dismiss. See Memorandum and Order on Defendants' Motion to Dismiss, entered Feb. 26, 2020 (Green, J.) (Docket Entry No. 13).

5 The Court disagrees with Defendants that the SJC's recent decision in *Donis v. American Waste Services, LLC,* 485 Mass. 257 (2020) ("*Donis*") (holding that statutory "prevailing wages" are not wages for purposes of the Wage Act), in fact, "rules otherwise." The SJC held in *Donis* that, because the Commonwealth's "Prevailing Wage Act," G.L.c. 149, §§ 26-27H, includes its own private remedies, the plaintiffs could not "avoid the limitations that the Prevailing Wage Act places on their recovery by pursuing an otherwise duplicative claim under the Wage Act." *Id.* at 258. While the SJC's holding in *Donis* may have far-reaching implications for the applicability of the Wage Act and similarly "duplicative" remedial statutes, like G.L.c. 93A, in other contexts,

it does not affect Plaintiff's right to recover whatever Premium Pay he may be due under the Wage Act in this case because the Premium Pay Statute does not place any conflicting “limitations” on his right of recovery.

6 Plaintiff's pay records show that he did receive eighty dollars ($80.00) in “holiday” pay from Clay Chevrolet for the weeks of November 29, 2016, and December 27, 2016. SOMF, ¶17.

Exhibit D

EXHIBIT
1

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between:

Eliezer F. Ramos,

Claimant,

v Case No. 01-20-0003-9697

Autofair, Inc., Haverhill Ford, LLC, Haverhill Subaru, LLC, H. Andrew Crews and David Hamel,

Respondents.

INTERIM AWARD ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENT'S MOTION FOR STAY OF ARBITRATION

With regard to Claimant's Motion for Summary Judgment, the Arbitrator has received and considered Claimant's Motion for Summary Judgment and Memorandum of Law in Support of Same, with exhibits, dated January 7, 2021, Respondent's Opposition to Claimant's Motion for Summary Judgment, with exhibits, dated January 14, 2021, and Claimant's Reply Memorandum in Support of his Motion for Summary Judgment, with exhibits, dated January 15, 2021. With regard to Respondent's Motion to Stay, the Arbitrator has received and considered Respondent's Motion to Stay Proceedings due to Class Action Settlement, with exhibits, dated January 14, 2012, and Claimant's Opposition to Respondent's Motion for Stay Proceedings Due to Class Action Settlement, with exhibits, dated January 20, 2021. A hearing on both motions was held by videoconference on January 20, 2021, attended by Robert Richardson and Edward C. Cumbo of Richardson & Cumbo, LLP on behalf of Claimant, Douglas J. Hoffman of Jackson

Lewis, PC on behalf of Respondents, and Arbitrator David C. Singer. The Arbitrator hereby decides as follows:

Procedural History

Claimant commenced the arbitration on or about April 1, 2020 by filing a Demand for Arbitration with the American Arbitration Association (AAA). The Demand sets forth claims for (1) violation of the Overtime Laws and Wage Act, (2) violation of the Blue Laws and Wage Act, and (3) violation of the Payroll Records Laws and Wage Act.

Pursuant to Pre-Hearing Scheduling Order No. 1, signed by the Arbitrator and dated August 3, 2020, the parties proceeded with and completed discovery and other matters set forth therein. The evidentiary hearing is scheduled to be conducted on February 2-3, 2021.

In its motion, Claimant seeks summary judgment on liability on the first two of its three claims, which Respondents oppose. In their motion, Respondents seek a stay of the arbitration, which Claimant opposes.

Summary of Facts

The material facts relating to this matter are undisputed. Claimant Eliezer F. Ramos (Ramos) was employed as a 'sales associate" by Respondents Autofair, Inc. (Autofair) and Haverhill Ford, LLC (HFLLC) from May 23, 2018 until his resignation on or about June 24, 2019. At all relevant times, respondent Andrew Crews (Crews) was President of Autofair and sole manager of HFLLC and respondent Haverhill Subaru, LLC (HSLLC). At all relevant times, respondent David Hamel (Hamel) was Treasurer and Secretary of Autofair and sole manager of HFLLC and HSLLC.

During his employment, Ramos was paid on a commission basis; specifically, he was paid on a recoverable draw (minimum wage for hours worked) against commission basis. Ramos' draw was defined in the Sales Associate Commission Program as: "minimum wage for forty (40) hours or less worked during the week, time and one half minimum wage for hours worked in excess of 40 during the week and premium pay (time and one half minimum wage) for hours worked on Sunday and holidays (New Year's Day, Memorial Day, Independence Day, Labor Day, Columbus Day and Veteran's Day)." Claimant's Ex. P at EFR64

While employed, Ramos worked overtime, on Sundays and holidays. However, he was not compensated at 1½ his salary for the hours that he worked overtime or on Sundays or holidays. Instead, Ramos was compensated for such hours worked by applying his draws and commissions to such wage obligations.

Analysis

Claimant's Motion for Summary Judgment

Ramos moves for summary judgment on liability on his first two claims for violations of the (1) Overtime Laws (Mass. Gen. Laws, chapter 151, sections 1A-1B) and Wage Act (Mass. Gen. Laws chapter 149, sections 148, 150), and (2) Blue Laws (Mass. Gen. Laws chapter 136, sections 5, 6, 16) and Wage Act, respectively.

Claimant argues in his first claim that Respondents violated the Overtime Laws and Wage Act by failing to pay Claimant separate and additional compensation beyond the draws and commissions he received for the overtime hours he worked within the deadlines set forth in the Wage Act. Claimant states that employers in Massachusetts are required to pay non-exempt

employees, including inside sales employees, 11/2 their regular rate of pay for all hours worked over forty hours in a seven-day workweek. Citing G.L. c. 151, section 1A.

Claimant argues in his second claim that Respondents violated the Blue Laws and Wage Act by failing to pay Ramos separate and additional compensation beyond the draws and commissions he received for the Blue Laws hours that he worked within the deadlines set forth in the Wage Act. Claimant states that retail employers in Massachusetts are required to pay their employees premium pay for all hours worked on Sundays and certain holidays. See G.L. c. 136, sections 6(50), 16.

It is undisputed that Ramos worked as an inside sales employee; therefore, he was a non-exempt employee under the Overtime Laws and Wage Act. See G.L. c. 149, chapter 1A. It also is undisputed that Ramos was a covered employee under the Blue Laws and Wage Act. He was paid on a 100% commission basis. It also is undisputed that Ramos was not paid 1½ his hourly rate of pay for overtime work, as well as for work that he performed on Sundays and holidays.

Claimant cites as controlling *Sullivan v. Sleepy's LLC*, 482 Mass. 227 (2019), which was decided on May 8, 2019. In *Sullivan*, the Supreme Judicial Court of Massachusetts confirmed that, when an inside retail sales employee is paid entirely on a commission basis and (a) works more than 40 hours in a given workweek, the employee is entitled to be compensated for the overtime hours worked at 1½ of regular hourly pay beyond any draws and/or commission the employee received, and (b) works on Sundays or holidays, as defined by the Blue Laws, the employee is entitled to be compensated for the overtime hours worked at 1½ of regular hourly pay beyond any draws and/or commission the employee receive. *Sullivan*, 482 Mass. at 233-39.

The Court found that crediting draws against overtime wages "is impermissible and . . . separate and additional overtime is owed." *Sullivan* at 223.

Accordingly, Claimant argues that, consistent with *Sullivan*, employers in Respondents' position were obligated to pay people in Ramos' position 1½ his regular hourly pay for all overtime hours worked and premium pay for all Sunday and holiday hours worked, and that they failed to pay Ramos for such hours worked.

Respondents assert two legal arguments in opposition to Claimant's motion. The first argument is that *Sullivan* does not apply retroactively but only prospectively. Respondents acknowledge that the *Sleepys* decision does not state that it is only to be applied prospectively; indeed, the court did not address the issue of whether the decision was intended to apply retroactively. Respondents cite no cases decided subsequent to *Sleepys* that support its proposition that the ruling set forth in *Sleepys* should only be applied prospectively.

"Generally, when the SJC construes a statute, the interpretation given reflects the Court's view of its meaning from the date of the statute's enactment." *Timothy Colleton v. Sentry West, Inc.*, *et. al*. CDN 19-00812, Slip Op. (Norfolk Super. Ct. Jan. 8, 2020), citing *Eaton v. Federal Nat. Mortg. Assoc*., 462 Mass. 569, 587 (2012). Moreover, Claimant cites in its reply brief numerous Massachusetts state court decisions that expressly have held that the holding in *Sleepys* applies retroactively. Accordingly, the Arbitrator finds that Respondents first argument in opposition to Claimant's motion is without merit.

Respondents' second argument is that the applicable statute, M.G.L. c. 149, section 150, does not provide a private right of action for employees to assert claims that they were not paid 1½ their hourly wage in violation of Massachusetts Blue Laws. Respondents argue that, accordingly, Claimant is not entitled to treble damages associated with his second claim for violation of the Blue Laws and Wage Act.

In response, Claimant argues that employees have a private right of action under the Wage Act for violation of the Blue Laws. In fact, this was confirmed by the Supreme Judicial Court in *Sullivan*. *Sullivan*, 482 Mass. at 238-39.

The Wage Act requires payment of all wages earned by an employee, including higher wages earned for work on Sunday and certain holidays. A failure to pay 1½ an employee's regular wage when such pay is required by a statute is a violation of the Wage Act. For example, failure to pay 1½ pay for work performed on legal holidays, as required by Mass. Gen. Laws c. 136, section 13, violates the Wage Act. *Drive-O-Rama, Inc. v. Attorney Gen.*, 63 Mass. App. Ct. 769,769-70. The Wage Act also requires payment of all wages, including higher wages earned for work on Sundays. See *Galloway v. Simplisafe, Inc.*, Civil Docket No. 1784CV3796-BLS1 (Suffolk Super. Ct. December 18, 2019). Moreover, the Supreme Judicial Court in *Donis* stated:

> As with the Wage Act, whoever violates the Prevailing Wage Act 'shall be punished or shall be subject to a civil citation or order as provided in [section] 27C.' Id. Unlike [section] 148 of the Wage Act, however, [section] 27F is not one of the statutes to which the private right of action established in G.L.c.149 [section]150, applies. Instead, [section] 27F of the Prevailing Wage Act provides its own distinct private right of action. See G.L. c. 149, [section] 27F. This cause of action carries the same three-year statute of limitations and entitlement to treble damages and reasonable attorney's fees as is provided under the Wage Act. See id.

Therefore, Ramos has the right to sue for non-payment under the Wage Act for premium wages for work performed on Sunday and certain holidays. Accordingly, the Arbitrator finds that Respondents' second argument in opposition to Claimant's motion is without merit.

Claimant seeks liability against both Autofair and HFLLC. Respondents do not oppose this in their opposition. In addition, Claimant argues that individual liability should be found against Crews and Hamel. As President and Treasurer of Autofair, respectively, Crews and Hamel are individually liable for Autofair's non-payment. *Donis v. American Waste Services, LLC*, 485 Mass. 257, 261 (2020). Respondent has not opposed Claimant's claims against the two individuals.

Therefore, Claimant's motion for summary judgment on its first two claims for violation of the Overtime Laws and Wage Act and the Blue Laws and Wage Act is granted against Autofair, HFLLC, Crews and Hamel.

Respondent's Motion for Stay

Respondents' motion for stay is based on the argument that a class action lawsuit is pending in Massachusetts State Court and that at least a tentative settlement has been reached in that action. The class action was commenced in 2018; however, the potential impact of that action on the arbitration, or even its existence, was never conveyed to the Arbitrator until January 2021. The present arbitration was commenced on or about April 1, 2020, discovery has been completed and the evidentiary hearing is scheduled for February 2-3, 2021. A stay of this arbitration was never requested until the present motion, about nine months after the arbitration was commenced and on the eve of the evidentiary hearing.

A central benefit of arbitration is the efficient resolution of disputes. A stay of this arbitration at this late date would be counter to such benefit. Respondent's request for a stay at this time is denied.

Damages

Claimant's claims for damages and related issues not specifically addressed above are not determined in this award -- including compensatory damages, treble damages, pre-judgment interest, costs, and attorney's fees. Those and any other unresolved issues shall be considered at the evidentiary hearing that is scheduled for February 2-3, 2021. A pre-hearing conference among the Arbitrator and counsel regarding all issues yet to be determined is scheduled for January 27, 2021 at 2:00 pm.

It Is So Ordered.

s/David C. Singer, Arbitrator

Dated: January 25, 2021