COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT

MATTHEW SUTTON,
on behalf of himself and all others similarly situated,

Plaintiff,

v.

JORDAN'S FURNITURE, INC.,

Defendant.

Civil Action No. 19-01763

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On April 20, 2021, Plaintiff Matthew Sutton ("Sutton"), on behalf of himself and the certified class, served a Motion for Partial Summary Judgment, asking the Court to rule, as a matter of law, that the commission-based pay plan used by Defendant Jordan's Furniture, Inc. ("Jordan's") during the class period violated the Massachusetts Overtime Law, M.G.L. c. 151, § 1A, and the Massachusetts Payment of Wages Act, M.G.L. c. 149, § 148, in light of Sullivan v. Sleepy's LLC, 482 Mass. 227 (2019).[1] On the same day, Jordan's served its own Motion for Summary Judgment, asking the Court to make the opposite ruling, and to enter judgment as a matter of law in favor of Jordan's on all three counts of the Complaint.

The memorandum that Jordan's served in support of its own summary judgment motion comprehensively addresses Sutton's summary judgment arguments. Consequently, rather than

[1] Sutton has not moved for summary judgment on Count III of the Complaint, in which he asserts a claim for purportedly requiring employees to work on Sundays. See M.G.L. c. 136, § 6(50). Jordan's has moved for summary judgment in Count III (and Counts I and II), because: (1) there is no private right of action for alleged violations of the Massachusetts Blue Laws; and (2) on the undisputed facts, Sutton cannot make out a claim that he, or any class members, were required to work on Sundays or were subject to any retaliation for refusing to do so.

burden the Court with a duplicative opposition brief, Jordan's relies on, and incorporates herein, its Memorandum of Law in Support of Defendant's Motion for Summary Judgment ("Def. Memo"). To the limited extent that any further response is needed, it is set out below.

A. Sutton Inaccurately Describes the Post-Sleepy's Decisions.

In his summary judgment brief, Sutton makes the following statement, which he "supports" by citing two Superior Court decisions and one arbitration award: "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." Plaintiff's Motion for Partial Summary Judgment and Memorandum in Support Thereof ("Pl. Memo"), at 12. Sutton's categorical assertion is incorrect for several reasons. First, the post-Sleepy's cases that Sutton references involve automobile dealerships with different pay plans than Jordan's, different methods of reporting hours and pay, and different ways in which the pay plan was communicated and explained to employees. See Shoemaker v. Clay Family Dealerships, Inc., 2021 WL 800095 (Mass. Super. Ct. Jan. 20, 2021); Martinez v. Burlington Motor Sports, Inc., 2020 WL 4607574 (Mass. Super. Ct. June 18, 2020). Second, in a number of post-Sleepy's cases, the court has found disputed issues of fact necessitating a trial. See Shoemaker, 2021 WL 800095, at *4 (disputed issue of fact regarding characterization of payments); Adem v. M11 Motors, LLC, 2020 WL 8766384, *2 (Mass. Super. Ct. Dec. 9, 2020) (disputed issue of fact regarding how employees were scheduled).[2] Third, the arbitration award cited by Sutton is inapposite. In that proceeding, it was "undisputed that [the employee] was not paid 1½ times his hourly rate of pay for overtime work, as well as for the work that he performed on Sundays and holidays." Pl. Ex. D, at 4. In the present case, just the opposite is true; it is undisputed that Sutton ***was*** paid 1.5-times his hourly

[2] In Adem, Judge Sanders also denied class certification because the named plaintiff – like Sutton – did not work overtime and, therefore, was not an adequate class representative. Adem, 2020 WL 8766384, at *4.

rate for overtime and Sunday work. See Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment ("Def. SOF"), ¶¶ 19-25.

B. Sutton's Hypothetical Wage Calculation is Not Admissible Evidence.

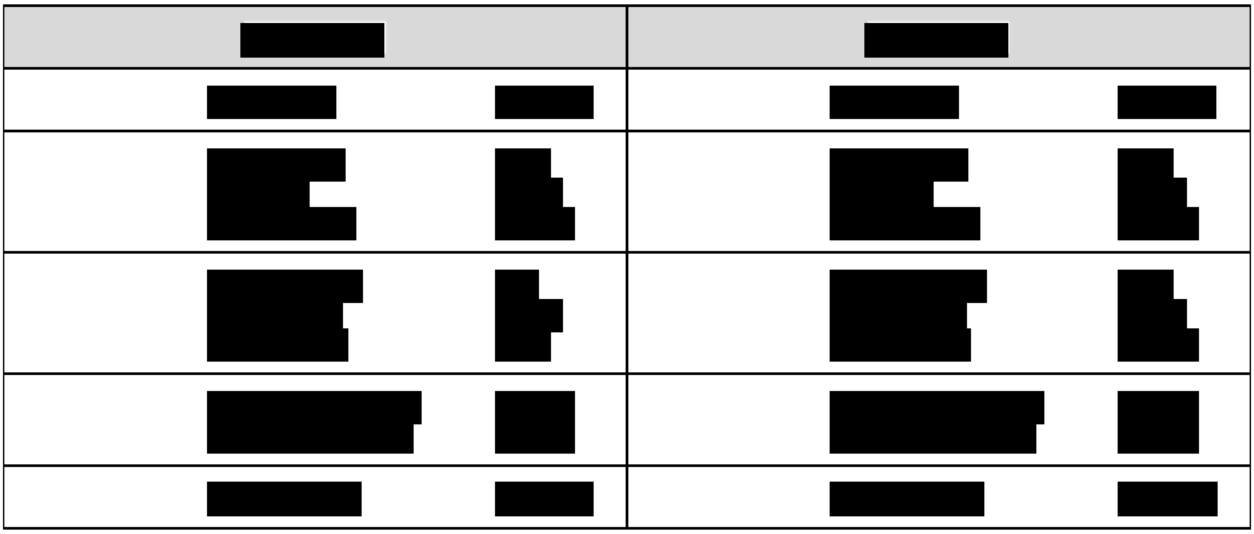
The time is past for Sutton to rely upon hypothetical violations of Massachusetts wage and hour laws with respect to the administration of Jordan's compensation plan to sustain his claims. At the summary judgment stage, Sutton bears the burden of providing admissible evidence of an ***actual*** violation. See, e.g., Hopkins v. F.W. Woolworth Co., 11 Mass. App. Ct. 703, 707 (1981) ("The burden is on the moving party to establish that there is no dispute over a material fact"); Badaracco v. Liner, 2010 WL 3279533, *3 (Mass. Super. Aug. 4, 2010) (rejecting hypothetical claim by plaintiff because, "at summary judgment, the plaintiff must come forward with evidence from which a jury could reasonably return a verdict"); M&R Indus. Park Trust v. Goldrosen, 2006 WL 4322730, *2 (Mass. Super. Dec. 21, 2006) ("Hypotheses, vague allegations, conclusory statements, and unsupported inferences" do not constitute evidence at summary judgment).

Sutton has not met that burden. Jordan's has produced all time records and pay records for the entire class for the class period, yet Sutton solely relies upon a ***hypothetical*** argument that the Jordan's commission plan "could" result in a supposedly unlawful situation where a sales employee earns the same amount of total compensation (hourly pay plus variable commissions) in different weeks in which the sales employee worked different hours. However, Sutton fails to cite to a single instance of this hypothetical scenario ***actually*** occurring. For this reason alone, Sutton's hypothetical should be disregarded.

Even if this Court were to consider Sutton's "hypothetical" violation, he has no legal authority to support his argument that a sales employee's total compensation (base hourly pay

plus variable commissions) must directly correlate to the hours worked. Sutton posits a hypothetical in which a sales employee earns the same amount in commissions for two weeks: one in which the employee works 40 hours, and one in which the employee works 50 hours.[3] Pl. Memo, at 16. In this hypothetical, the total gross compensation for each week is the same, which Sutton claims is proof that Jordan's does not pay separate overtime or Sunday premium pay. Id.

Sutton's analysis does not withstand scrutiny. First, under Sleepy's, any potentially relevant comparison is not the "Total Gross Pay" figure that Sutton uses, but rather, the total hourly pay the employee receives. The total hourly pay is higher for the 50-hour week than the 40-hour week, showing that Jordan's does, in fact, pay separate and additional premium wages for overtime and Sunday hours. Second, Sutton fails to account for the fact that an employee working a 50-hour week will have more opportunities to make sales (especially if some of those hours are on a weekend) and, therefore, will earn a higher commission. For example, if we assume that the 25-percent increase in hours from 40 to 50 translates to 25 percent higher commissions, then Sutton's hypothetical breaks down as follows:



[3] Sutton's hypothetical is even more farfetched given that [redacted]. Def. SOF, ¶¶ 48-52. In fact, Sutton worked fewer than five ***minutes*** of overtime during the entire time he was employed as a commissioned sales employee at Jordan's. Id. ¶ 50.

Under the above much more realistic comparison, the sales employee ***does*** make more money in the 50-hour week than in the 40-hour week.

C. Jordan's Went Out of Its Way to Comply With Massachusetts Law, Not Evade It.

Sutton apparently cannot resist the temptation to cast aspersions on Jordan's motives – irrelevant though they are to his claims – calling its pay plan a "scheme" to "bypass the overtime and Sunday pay statutes," thereby "ensuring [Jordan's] never had to reach into its own pockets to pay the employees' overtime and Sunday premium wages." Pl. Memo., at 2, 11, 15. Sutton's gratuitous attacks are not only unfortunate, but totally unfounded. Jordan's sought and obtained multiple opinion letters, from both the Department of Labor Standards (and its predecessor agency) and the Attorney General's Office, and structured its pay plan in precise accordance with those opinion letters. Def. SOF, ¶¶ 3-18. Until Sleepy's pulled the rug out from under retail employers across the Commonwealth, there was never even a shred of doubt about the legality of Jordan's pay plan (nor should there be now). Moreover, the suggestion that Jordan's structured its pay plan to force sales employees to pay for their own overtime and Sunday wages is patently absurd. Every dollar paid to a Jordan's employee, including the premium pay that Jordan's paid to sales employees for Sunday and overtime hours, came out of Jordan's "own pockets" and went into sales employees' "pockets," via a direct deposit into their bank account, each week.

D. Jordan's Rotational Scheduling System Ensures Equitable Distribution of Weekend Hours for the Vast Majority of Sales Employees That Want Them.

Sutton suggests also that Jordan's uses a rotational scheduling system to remove any "disincentive to schedule sales employees for work on Sundays." Pl. Memo, at 15 n.9. Nothing could be further from the truth. As with most retailers, weekends are Jordan's busiest time by far, and present the greatest opportunity for employees to make sales and earn commissions.

Def. SOF, ¶ 66. Consequently, the vast majority of sales employees – significantly more than Jordan's could accommodate in a single weekend – want to work on Saturdays and Sundays. Id. ¶ 68. The purpose of the rotational scheduling system is to ensure an equitable distribution of these desirable shifts, not to "force" employees into working on weekends. Id.

E. Conclusion.

For the foregoing reasons, and those stated in Jordan's own Motion for Summary Judgment, the Court should deny Sutton's Motion for Partial Summary Judgment.

JORDAN'S FURNITURE, INC.,

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021, I caused a copy of the foregoing to be served by email on Hillary Schwab and Brant Casavant, counsel for Plaintiffs.

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