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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Nisha **Brown** and Kathy Williamson, individually and on behalf of all others similarly situated, Plaintiffs–Appellees,

v.

Wal–Mart Stores, Inc., Defendant–Appellant.

No. 12–17623

|

Argued December 2, 2013

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Submitted June 8, **2016** San Francisco, California

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FILED June 08, **2016**

Synopsis

Background: Retail cashiers brought putative class action against their retailer employer under California Private Attorneys General Act (PAGA), alleging violation of suitable seating law. The United States District Court for the Northern District of California, Edward J. Cavila, J., 2012 WL 3672957, certified class. Retailer appealed.

Holdings: The Court of Appeals held that:

[1] proposed class met commonality requirement for class certification;

[2] PAGA did not defeat commonality or predominance requirements for class certification;

[3] district court did not abuse its discretion by excluding affidavits from certain witnesses submitted by retailer.

Affirmed.

West Headnotes (3)

[1] **Federal Civil Procedure**
Employees

Proposed class of retail cashiers met commonality requirement of class certification rule, as required for class certification in cashier's action against their retailer employer under California Private Attorneys General Act, alleging violations of suitable seating law, where cashiers spent majority of their time working at registers during class period, work done by cashiers at registers was generally same across retailer's **stores**, and retailer had common policy of not providing seats for its cashiers. Cal. Lab. Code § 2699(a); Fed. R. Civ. P. 23(a)(2).

Cases that cite this headnote

[2] **Federal Civil Procedure**
Employees

California Private Attorneys General Act (PAGA) called for a case-wide, rather than individualized, inquiry for determining amount of civil damages to impose on a party that violated California Labor Code, and thus did not defeat commonality or predominance requirements for purposes of certification of class of retail cashiers who brought action against their retailer employer under PAGA for violation of suitable seating law. Cal. Lab. Code §§ 2699(e)(2), 2699(f); Fed. R. Civ. P. 23(a)(2), 23(b)(3).

Cases that cite this headnote

[3] **Federal Civil Procedure**
Failure to respond;sanctions

District court did not abuse its discretion by excluding affidavits from certain witnesses submitted by retailer employer in its response to retail cashier's motion for class certification in their action against retailer under California Private Attorneys General Act, alleging violation of suitable seating law,

where retailer failed to disclose the witnesses to cashiers before attempting to rely on their statements in response to cashier's motion for class certification, retailer did not raise any issues with cashiers' request for discovery sanctions before district court, and retailer did not demonstrate that its failure to disclose was substantially justified or harmless. Cal. Lab. Code § 2699(a); Fed. R. Civ. P. 23, 26(a) and (e).

Cases that cite this headnote

*673 Appeal from the United States District Court for the Northern District of California, Edward J. Davila, District Judge, Presiding, D.C. No. 5:09–cv–03339–EJD

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Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

Wal–Mart Stores, Inc. appeals the district court's order granting class certification to all **Wal–Mart** cashiers in California. We affirm.

1. The district court did not abuse its discretion by certifying the class. **Wal–Mart** challenges the district court's decision to certify the class with respect to its conclusions on commonality, *see* Fed. R. Civ. P. 23(a)(2), and predominance, *see* Fed. R. Civ. P. 23(b)(3). The commonality rule requires a plaintiff to show that "there are questions of law or fact common to the class." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (quoting Fed. R. Civ. P. 23(a)(2)). Moreover, such common questions of law or fact "must be of such a nature that it is capable of classwide resolution." *Id.* at 350, 131 S.Ct. 2541. Rule 23(b)(3)'s predominance requirement "is even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

[1] The district court did not abuse its discretion by concluding that the proposed class met Rule 23(a)(2)'s commonality requirement. The district court concluded that "**Wal–Mart** had a common policy of not providing seats for its cashiers." The district court also concluded that there was a common nature of work among the proposed class, finding that (1) "**Wal–Mart** cashiers spent the majority of their time working at registers during the class period," [1] and (2) the work done by cashiers at *674 registers was generally the same across **stores**, register locations and configurations, shifts, and physical activities. These findings support the district court's conclusion that "a trier of fact could determine whether these common tasks could reasonably be performed while seated, and such a determination would apply to all **Wal–Mart** cashiers at its California **stores**." The answer to this question would either establish a violation of California Wage Order 7–2001 § 14(A), or preclude finding one, for all class members. Likewise, the district court did not abuse its discretion by concluding that the proposed class met Rule 23(b)(3)'s predominance requirement. Based on the district court's factual findings, individual issues will not predominate in determining whether **Wal–Mart** has violated California Wage Order 7–2001 § 14(A). [2]

1 By reviewing whether cashier's spent the majority of their time working at registers, the district court

appears to have applied a "holistic approach" in interpreting California Wage Order 7–2001 § 14(A). Such an interpretation is inconsistent with the California Supreme Court's recent guidance in *Kilby v. CVS Pharmacy, Inc.*, 63 Cal.4th 1, 201 Cal.Rptr.3d 1, 368 P.3d 554 (**2016**). However, this error does not undermine the district court's class certification decision, because the California Supreme Court's interpretation of the Wage Order appears to be more beneficial for Plaintiffs than the holistic interpretation used by the district court.

2 **Wal–Mart** asks us to take judicial notice of an Amicus Brief of the California Labor Commissioner that addresses how the California Labor and Workforce Development Agency interprets the Wage Order. In light of the California Supreme Court's recent guidance, this motion for judicial notice is DENIED as moot.

[2] 2. California's Private Attorneys General Act of 2004 ("PAGA") does not require individualized penalty inquiries that would defeat the commonality or predominance requirements for purposes of class certification.[3] PAGA specifies civil penalties for violations of California's Labor Code. *See* Cal. Labor Code § 2699(f). Although these civil penalties are "mandatory, not discretionary," *see Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 78 Cal.Rptr.3d 572, 617 (2008), "a court may award a lesser amount than the maximum civil penalty ... based on the facts and circumstances of the particular case," Cal. Labor Code § 2699(e)(2). However, even if the district court decides to reduce the mandatory civil penalty, section 2699(e)(2) calls for a case-wide (rather than individualized) inquiry. *See* Cal. Labor Code § 2699(a) ("[A]n aggrieved employee on behalf of himself or herself and other current or former employees" may bring a civil action.); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 138 Cal.Rptr.3d 130, 150 (2012) (applying section 2699(e)(2) to reduce the civil penalty based on the facts of the case as a whole, as opposed to on an employee-by-employee basis).

3 We also note that PAGA's system for determining civil penalties is readily distinguishable from *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). In *Hilao*, we permitted the use of a statistical sample of a class to estimate damages. *Id.* at 782–86. Such statistical sampling is not used to estimate penalties under PAGA. Instead, PAGA establishes a specific penalty "for each aggrieved employee." Cal. Labor Code § 2699(f).

[3] 3. The district court did not abuse its discretion by excluding affidavits from certain witnesses submitted by **Wal–Mart** in its response to Plaintiffs' motion for class certification. **Wal–Mart** was obliged under Federal Rules of Civil Procedure 26(a) and (e) to disclose these witnesses to Plaintiffs before relying on their statements in response to Plaintiffs' motion for class certification. Further, **Wal–Mart** did not raise any issues with Plaintiffs' request for discovery sanctions before the district court and did not demonstrate that its failure to disclose was substantially justified or harmless. *Cf. Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.)*, 627 F.3d 376, 386 (9th Cir. 2010) ("[F]or Plaintiffs to fail to respond to Defendants' objections, and ***675** to then challenge the district court's evidentiary rulings on appeal, is to invite the district court to err and then complain of that very error. We cannot countenance such a tactic on appeal.").

AFFIRMED.

All Citations

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