Docket: **SUCV2016-00572-BLS2**
Date: **November 7, 2018**
Parties: **DAKOTA HICKMAN & MATTHEW D'AGOSTINO, individually and on behalf of all others similarly situated, Plaintiffs vs. RIVERSIDE PARK ENTERPRISES, INC., doing business as SIX FLAGS NEW ENGLAND, & JOHN WINKLER, Defendants**
Judge: **Janet L. Sanders, Justice of the Superior Court**

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This putative class action alleges that Riverside Park Enterprises, Inc., doing business as Six Flags New England (Six Flags) violated Massachusetts wage and hour laws by not paying its seasonal employees overtime wages and by not paying them for their meal breaks. The second contention rests on plaintiffs' allegation that Six Flags requires its employees to remain on premises for their meal breaks or otherwise limits where they can take those breaks— a restriction which, if true, means (as alleged by plaintiffs) that the meal break must be compensated. Now before the Court is plaintiffs' motion to certify two classes of Six Flags employees. The first group pertains to the alleged overtime violation, whereas the second group consists of those who, because of restrictions allegedly placed on where they could take their meal break, should have been compensated for that time. This Court concludes that the Motion must be ALLOWED as to the first group but DENIED as to the second.

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BACKGROUND

In deciding the instant motion, the Court relies on the pleadings but has also reviewed numerous affidavits, depositions excerpts, and other materials submitted by the parties. See Weld v. Glaxo Wellcome Inc., 434 Mass. 81, 85-86 (2001) (in exercising its discretion to certify a class, a court may review materials beyond the pleadings). Much of this testimony is summarized in a Compendium attached as Exhibit 1 to the Declaration of Lisa M. Lewis dated August 17, 2018. Those materials reveal the following.

Six Flags operates an amusement park and water park located in Agawam, Massachusetts. The park operates on a seasonal basis with a fluctuating schedule. Six Flags employs both full time and seasonal employees to accommodate this schedule. Its seasonal employees are paid on an hourly basis and have different job responsibilities. They are not paid overtime. In support of that policy, Six Flags relies on G.L. c. 151, § 1A(20), which excuses amusement parks from paying overtime if they do not operate more than 150 calendar days each year. In support of their allegation of an overtime violation, plaintiffs cite to facts suggesting that Six Flags recorded attendance at the park as follows: 148 days in 2013; 147 days in 2014; 152 days in 2015; 150 days in 2016; and 162 days in 2017. In addition to these "Attendance Days," Six Flags employees also work at the park on other days, including days when the park is not open to the public or is open for a special event. If these days are added to the total, the putative overtime class would (according to plaintiffs) include 18,455 seasonal employees over the relevant time period.

Six Flags seasonal employees receive a meal break of 30 to 45 minutes but this time is unpaid. Plaintiffs contend that this is a violation of the Massachusetts Wage Act because Six

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Flags has required its employees to take their meal breaks at a designated break area that is inside the park, thus restricting their activity. Defendants do not dispute (at least for purposes of this motion) that, if this were indeed true, the meal break must be compensated. They vigorously deny that Six Flags has any such policy, however.

During the relevant time period, Six Flags provided seasonal employees with an employee handbook, which states, in part:

> When on designated breaks, hourly employees are expected and required to use this time to relax, recharge, and refresh themselves. This time is your time and is not to be used for work related activities including walking to your next assignment, providing directions, picking up trash, or assisting guests and coworkers. Employees will be instructed as to which areas may be used for their designated breaks.

The policy thus does not contain any express prohibition against leaving the premises. In addition to being provided with this handbook, however, Six Flags employees also attended new hire orientations called "Discovery Training" as well as departmental trainings where this policy may have been discussed. Plaintiffs have submitted 49 almost identical affidavits from current and former employees who state that they understood (and sometimes were specifically instructed) that they could not leave park grounds during their meal breaks.

Defendants have submitted numerous affidavits together with deposition testimony from other witnesses which directly contradict that claim. According to Six Flags, all that the policy required was that employees take their meal breaks out of the sight of guests (in part to avoid interruption of their free time) and that if they do leave the park, they return within the time allotted. Six Flags does provide employees with a break area/employee cafeteria where employees can purchase food at a discount, but there was no requirement that employees eat

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there. Some employees stated in their affidavits that they simply preferred to stay at the park during breaks because they did not have enough time to leave and get food.

Dakota Hickman and Matthew D'Agostino are the named plaintiffs and putative class representatives in this case. Hickman worked for Six Flags as a seasonal employee from 2012 through 2015. He worked primarily in the rides department as a team member, team lead, and ride supervisor. At times, Hickman left the park during his meal breaks. D'Agostino worked for Six Flags from March 2015 to September 2015 as a team member in the foods department. He claims that during training, he was told that breaks must be taken in certain areas of the park. D'Agostino, however, never attempted to leave the park during his breaks because he believed that there would not be enough time to do so. Hickman and D'Agostino both claim that they did not receive proper overtime and meal break payments from Six Flags.

DISCUSSION

With respect to what must be demonstrated in order to certify a class, plaintiffs argue as an initial matter that this Court apply requirements less rigorous than those set forth by Rule 23, Mass.R.Civ.P. They note that Section 150 of the Wage Act creates a substantive right to individuals and "others similarly situated" to seek relief for Wage Act violations on a class-wide basis. This does not mean that this Court should apply a different standard from that called for by Rule 23, however. Indeed, in the cases that plaintiffs cite for their position that a more lenient standard applies, the court used Rule 23 to decide the question of whether class certification for a Wage Act violation was proper. See e.g. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 361 (2008); see also Escorbor v. Six Flags

Co., 2017 WL 4872657 (Mass.Super.Ct. Sept. 13, 2017).

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As to what Rule 23 requires, plaintiffs must show that: (1) the class is sufficiently numerous to make joinder of all parties impracticable, (2) there are common questions of law and fact, (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the named plaintiff will fairly and adequately protect the interests of the class. Mass. R. Civ. P. 23(a). If those prerequisites are met, plaintiffs must also demonstrate that common questions of law and fact predominate over individualized questions and that the class action is superior to other available methods for fair and efficient adjudication of the controversy. Mass. R. Civ. P. 23(b). This Court concludes that plaintiffs have not met their burden with respect to the class consisting of those not paid for meal breaks because determining the defendants' liability would require an individual inquiry as to each class member.

Commonality for class certification purposes requires a demonstration that a class wide proceeding will generate common answers apt to drive resolution of the litigation. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). That is, the claim must be "of such a nature that it is capable of class wide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. Put another way, questions that go to the heart of the elements of the cause of action "will each be answered either 'yes' or 'no' for the entire class," and "the answers will not vary by individual class member." Donovan v.: [sic] Phillip Morris USA Inc., 2012 WL 957633 *21 (D. Mass. 2012). In the instant case, the written policy as contained in the employee handbook is facially neutral: it does not expressly require that employees stay on premises or limit their activities in a way which would require that they be compensated. The plaintiffs' claim that there were such restrictions turns on what each employee was told, but that varies among employees.

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Liability can only be determined on an individualized basis so that proceeding on a class basis would make no sense.

That is precisely the result reached in Romulus v. CVS Pharmacy, Inc., 321 F.R.D. 464 (D.Mass. 2017), where the court declined to certify a class. In that case, plaintiffs alleged that the defendant had a common policy that required all shift supervisors to remain on store premises for meal breaks if no other managerial employee was present, and that these breaks were not compensated. The evidence before the court was inconsistent, however, as to whether employees were in fact required to stay inside the store and, if they did, whether they had to "clock out" so as to be unpaid. Those fact questions would have to be resolved on an individualized basis. To the extent there were any common questions, the court also concluded that they did not predominate over the individualized questions. Proceeding on a class basis was not therefore superior to other available methods for fairly and efficiently adjudicating the controversy. The same is true here.

The plaintiffs are on stronger grounds with regard to the overtime violation. The plaintiffs seek to certify a class of: "all persons who were employed by the defendants at any time during the three-year period prior to the commencement of this action who worked more than 40 hours in at least one workweek, but were not paid at a rate of one and one-half times their regular rate of pay for overtime hours." If plaintiffs are able to prove that Six Flags operated more than 150 days of the year — a question common to all class members -- then the overtime class would consist (according to plaintiffs) of approximately 18,455 seasonal employees. Relying on the Declaration of its Director of Administration, Robert Matlock IV, Six Flags

says that it is clear that is entitled to the amusement park exception because it operates only 150 days per year. If it can show that the undisputed facts support that conclusion, this

would be grounds for summary judgment; it would not be grounds to deny, at this juncture in the case, a motion for class certification. Six Flags also argues that determining the amount of damages for each class member will require a separate calculation as to which year that class member worked and whether he or she worked overtime. That individual inquiries may be ultimately necessary to determine the amount of damages each member of the class is entitled to receive is not a reason to deny class certification. See Salvas v. Wal-Mart Stores, Inc., 452 Mass. at 364 (reversing lower court for denying class certification); see also Smilow v. Southwestern Bell Mobile Sys. Inc., 323 F.3d 32, 40 (Pt Cir 2003) (the amount of damages is invariably an individual question that will not defeat class action treatment). Certainly, by aggregating thousands of relatively small claims into a single case, a class action is the superior method here. In short, plaintiffs satisfy the requirements of Rule 23 with regard to alleged overtime violations.

Janet L. Sanders, Justice of the Superior Court