UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 09-00190-JVS (RNBx)	Date	March 7, 2013
Title	Robino Abad, et al. v. General Nutrition Centers, Inc., et al		

Present: The Honorable	James V. Selna
Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) Order Granting in Part and Denying in Part Defendant's Motion for Partial Summary Judgment as to Claims of Phase 1 Plaintiffs' in Counts IV through VII of the Second Amended Complaint (Fld 2-4-13)

Defendant General Nutrition Centers, Inc. ("GNC") moves this Court for summary judgment as to the fourth, fifth, sixth, and seventh claims of Plaintiffs Robino Abad, Frances Abrams, Ashley Abramson, Lester Acevedo, Jorge Alamanzar, Maria Alvarez, Golnaz Amirnasri, Greta Ansine, Isaac Bailey, and Amelie Bernard (collectively, "Phase 1 Plaintiffs" or "Plaintiffs") of the Second Amended Complaint ("SAC"). (Mot., Docket No. 69.) For the following reasons, the motion is GRANTED in part and DENIED in part.

I. Background[1]

GNC is a specialty retailer of nutritional products that operates stores throughout California. (Def.'s Statement of Uncontroverted Facts ("SUF") ¶ 1, Docket No. 70.) Plaintiffs are ten former and current employees of GNC. (Id. ¶¶ 10–19.) They are among ninety-five current and former employees of GNC who filed this action against GNC for various violations of the California Labor Code. (Notice of Removal, Ex. A ("Compl."),

[1] Unless otherwise noted, the facts set forth in this section are uncontroverted. To the extent that challenged evidence is material to the Court's decision, meritorious objections are resolved herein. The Court does not rely on any legal conclusions presented as facts by the parties.

Docket No. 2.) As agreed upon by the parties and approved by the Court, the litigation is conducted in phases with the first phase comprising of the Phase 1 Plaintiffs. (SUF ¶ 9.)

Plaintiffs SAC includes claims for (1) failure to pay wages; (2) failure to provide meal periods; (3) failure to provide rest periods; (4) failure to pay wages due upon termination; (5) failure to provide itemized wage statements; (6) unfair competition; and (7) violations of the Private Attorney General Act ("PAGA"). (SAC, Docket No. 10.) The parties have stipulated to dismiss the first claim for failure to pay wages as to the Phase 1 Plaintiffs. (See Docket No. 68.)

GNC now moves for summary judgment on Plaintiffs' fourth, fifth, sixth, and seventh causes of action. (See Mot.)

II. Legal Standard

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.[2]

[2] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

The moving party has the initial burden of establishing the absence of a material fact for trial. Anderson, 477 U.S. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][3] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 323. Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

III. Discussion

A. Fourth and Fifth Claim — Failure to Pay Wages Upon Termination and Failure to Provide Accurate Wage Statements

Plaintiffs' fourth claim alleges that GNC failed to pay all wages due upon termination in violation of California Labor Code §§ 201–202, therefore entitling Plaintiffs to "waiting time" penalties pursuant to section 203. The fifth claim alleges that GNC failed to provide accurate wage statements in violation of section 226(a).

GNC argues that summary judgment as to the Phase 1 Plaintiffs' fourth and fifth claims of the SAC should be granted for several reasons. First, GNC contends that meal and rest period compensation does not constitute a "wage" under the Labor Code for purposes of sections 201–203 and 226. Second, it argues that Plaintiffs cannot demonstrate that GNC willfully violated the Labor Code as required for their fourth claim. Lastly, GNC contends that Plaintiffs cannot demonstrate that they suffered any actual injury as required under their fifth claim. (Mot. Br. 2–5.)

1. Whether Meal and Rest Period Compensation is a "Wage"

Plaintiffs' fourth and fifth claims are derivative of their allegations in the second and third claims, which allege that GNC failed to provide meal and rest periods in

[3] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

violation of California Labor Code § 226.7. First, Plaintiff alleges that because they were not paid for missed meal and rest periods at the time of termination, GNC is liable for this failure to pay wages due upon termination pursuant to California Labor Code §§ 201, 202, and 203. Second, Plaintiffs contend that because this meal and rest compensation was not listed on wage statements, GNC violated California Labor Code § 226(a). The issue in question is whether meal and rest period compensation is a "wage" that must be paid upon termination and reported in wage statements.

The remedy for a violation the obligation to provide meal and rest periods is "one additional hour of pay at the employee's regular rate of compensation fo reach work day that the meal or rest period is not provided." Cal. Lab. Code § 226.7(b). Plaintiffs argue that this additional hour of pay is within the Labor Code definition of "wages" as set forth by Murphy v. Kenneth Cole Prods, Inc., 40 Cal. 4th 1094 (2007). Thus, Plaintiffs can base the two wage claims on GNC's failure to pay meal and rest compensation.

In contrast, GNC argues that the additional hour of pay remedy is not a "wage" for purposes of sections 201–203 and section 226(a). GNC cites the recent California Supreme Court decision Kirby v. Immoos Fire Prot., Inc., 53 Cal. 4th 1244 (2012) for this proposition. However, GNC's reading of Kirby is incorrect. In Kirby, the California Supreme Court held that a party who prevails on section 226.7 for an alleged failure to provide rest breaks may not be awarded attorneys' fees under section 218.5. Section 218.5 authorizes the award of fees who prevails in an "action brought for the nonpayment of wages." Cal. Lab. Code § 218.5. The court decided that a claim for failure to provide statutorily mandated meal and rest periods is not an "action brought for the nonpayment of wages." Id. at 1255.

In its reasoning, the court distinguished between the cause of action for violations of meal and rest period obligations, and the remedy for such actions. For purposes of section 218.5, "an action brought for the nonpayment of wages" refers to the alleged legal violation, not the desired remedy. Id. at 1256. And since nonpayment of wages "is not the gravamen of a section 226.7 violation," but rather the violation is based on failure to provide meal and rest breaks, it does not fall under section 218.5. Id. 1256–57.

Significantly, the Kirby court noted that the reading of section 218.5 is not at odds with its previous decision in Murphy. Id. at 1257. The issue before the court in Murphy was whether the three-year statute of limitations in the California Code of Civil

Procedure § 338(a) governs section 226.7 claims; namely, whether the "additional hour of pay" remedy for section 226.7 violations is considered a "wage" or a "penalty." 40 Cal. 4th at 1102. After reviewing the statutory language, administrative and legislative history, and the compensatory purpose of the remedy, the Murphy court held that the "additional hour of pay" remedy is defined as a "wage," thus falling under the section 338(a) three-year statute of limitations. Id. at 1114. The Kirby court affirmed the holding in Murphy, noting that the court "held in Murphy that [the section 226.7 remedy] is a 'wage,'" 53 Cal. 4th at 1256, while making the distinction that "[t]o say that a section 226.7 remedy is a wage, however, is not to say that the legal violation triggering the remedy is nonpayment of wages." Id. at 1257.

Thus, the holding in Murphy remains controlling in this case: the "additional hour of pay" owed for violations of section 226.7 constitutes a "wage." See 40 Cal. 4th at 1114; see also Avilez v. Pinkerton Gov't Servs., 286 F.R.D. 450, 465 (C.D. Cal. 2012) ("[T]he Court concludes that Kirby did not abrogate the holding in Murphy nor disturb the settled law that an employer who fails to provide appropriate meal breaks in violation of Section 226.7 and also fails to record the premium accrued as a result of this section 226.7 violation also violates Section 226(a).").[4]

Therefore, Plaintiffs' section 203 claim for failure to pay wages upon termination and section 226(a) claim for failure to provide accurate wage statements can be based on amounts owed under section 226.7. See Alvarez, 286 F.R.D. at 465 (recognizing section 226(a) claim based on missed meal breaks); Swanson v. USProtect Corp., 2007 WL 1394485, at *4–5 (N.D. Cal. May 10, 2007) (rejecting defendant's assertion that amounts owed under section 226.7 are not wages and thus not covered under section 203); Espinoza v. Domino's Pizza, LLC, 2009 WL 882845, at *14 (C.D. Cal. Feb. 18, 2009) (recognizing that, under Murphy, payments for missed meal periods "would be wages due at the termination of employment pursuant to section 203"); see also In re Bank of America Wage and Hour Emp't Litig., 2010 WL 4180567, at *10 (D. Kan. Oct. 20, 2010) ("Nothing in the Murphy opinion evidences an intent or effort by the court to limit its

[4] GNC also relies on Jones v. Spherion Staffing LLC, 2012 WL 3264081 (C.D. Cal. Aug. 7, 2012), which discussed both Kirby and Murphy and concluded that the plaintiff could not advance section 226(a) or section 203 claims based on alleged violations of section 226.7. However, given the clear holding in Murphy, and the fact that the court in Kirby reaffirmed that holding, the Court declines to follow the reasoning in Jones.

analysis to the statute of limitations context."); Lopez v. United Parsel Serv., Inc., 2010 WL 728205, at *10 (N.D. Cal. Mar. 1, 2010) ("[T]he Court was unable to locate a single case holding that meal and rest break premiums are not 'earned' wages.").

In sum, GNC has not demonstrated that it is entitled to summary judgment for the third and fourth claims based on its argument that meal and rest compensation is not a "wage" under the relevant California Labor Code sections.

2. Willful Violation or Actual Injury

GNC also argues that it is entitled to summary judgment for Plaintiffs' fourth claim because Plaintiffs cannot establish that GNC failed to pay them any "wages" in a timely manner upon termination or that this alleged failure was willful. (Mot. Br. 4–5.) Furthermore, GNC argues that it is entitled to summary judgment on Plaintiffs' fifth claim because Plaintiffs cannot show that they experienced any actual injury as a result of the failure to include meal and rest period premiums. (Mot. Br. 5–6.)

However, GNC does not point to any facts or evidence showing that Plaintiffs' claims fail, but merely argues that Plaintiffs cannot provide the necessary showing without further elaboration. Under the summary judgment standard, GNC does not carry its initial burden. See Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1105 (9th Cir. 2000) ("[A] moving party may not require the nonmoving party to produce evidence supporting its claim . . . simply by saying that the nonmoving party has no such evidence."). GNC cites both Fairbank v. Wunderman Cato Johnson, 212 F.3d 528 (9th Cir. 2000) and Stewart v. Wachowski, 574 F. Supp. 2d 1074, 111 n.6 (C.D. Cal. 2006) for the proposition that GNC only needs to "point out through argument" that there is an absence of evidence to meet its initial burden. See 212 F.3d at 532. However, none of the cited cases go so far as to say that GNC can simply state that there is an absence of evidence with a conclusory statement. Under Celotex,

> a party seeking judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)) (emphasis added). Celotex illustrates what a party must do to "point out" an absence of evidence. Celotex claimed that the plaintiff Catrett had never been exposed to asbestos. But it did not merely assert the absence as GNC does here. Rather, "[it] was sufficient, for this purpose, for Celotex to direct the district court's attention to Catrett's answer to interrogatories admitting that she had no witnesses who could testify that her husband had been exposed during the statutory period to asbestos manufactured by Celotex, and to the absence of any other evidence of exposure in the materials compiled during discovery."[5] Nissan Fire, 210 F.3d at 1105. GNC has not met this initial burden because it does not make any showing as to why Plaintiffs do not have enough evidence to carry the ultimate burden of persuasion at trial. See id. at 1102.

In sum, GNC is not entitled to summary judgment with respect to Plaintiffs' fourth and fifth claims.

B. Seventh Claim — PAGA

GNC contends that it is entitled to summary judgment for Plaintiffs' PAGA claims because (1) it is barred by the applicable statute of limitations; (2) it is barred by res judicata; and (3) Plaintiffs cannot establish the Labor Code violations upon which the PAGA claims are derived. (Mot. Br. 6.) The Court discusses these arguments in turn.

1. Statute of Limitations

GNC requests that summary judgment be entered for Plaintiffs' PAGA claims accruing prior to October 31, 2007 because of PAGA's one-year statute of limitations. See Martinez v. Antique & Salvage Liquidators, Inc., 2011 WL 500029, at *7–8 (N.D. Cal. Feb. 8, 2011) (explaining the statute of limitations for PAGA). Plaintiffs sent the required notice to the California Labor and Workforce Development Agency ("LWDA") on October 31, 2008. (SAC ¶ 56.) Moreover, Plaintiffs do not dispute that the PAGA claims only cover violations occurring on or

[5] Here, for example, GNC could have carried its burden by showing that managers were unaware of the hours worked and breaks taken by employee, or that GNC management had a good faith belief that it was not violating the law. However, the present record is simply silent

after October 31, 2007. (Opp'n Br. 7).

Thus, GNC is entitled to summary judgment as to Plaintiffs' PAGA claims as to the Plaintiffs who terminated their employment with GNC prior to October 31, 2007: Frances Abrams, Jorge Alamanzar, Golnaz Amirnasi, and Amelie Bernard. (SUF ¶¶ 11, 14, 16, 19). Moreover, GNC is entitled to summary judgment for all other Plaintiffs' PAGA claims to the extent that they are based on Labor Code violations occurring in pay periods prior to October 31, 2007.

2. Res Judicata

GNC also argues that Plaintiffs' PAGA claims occurring before April 28, 2009, are barred by the doctrine of res judicata. "Claim preclusion, often referred to as res judicata, bars any subsequent suit on claims that were raised or could have been raised in a prior action." Cell Therapeutics, Inc. v. Lash Group, Inc., 586 F.3d 1204, 1212 (9th Cir. 2009). "[R]es judicata applies when there is '(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties.'" ProShipLine Inc. v. Aspen Infrastructures Ltd., 594 F.3d 681, 688 (9th Cir. 2010). The standard is the same as that applied by California courts. See Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 896–97 (2002) ("Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief.").[6] "Even if these threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed.'" Consumer Advocacy Group, Inc. v. ExxonMobil Corp., 168 Cal. App. 4th 675, 686 (2008) (quoting Citizens for Open Access etc. Tide, Inc. v. Seadrift Ass'n, 60 Cal. App. 4th 1053, 1065 (1998)).

GNC argues that this Court's April 28, 2009 summary judgment decision in Casarez v. Gen. Nutrition Ctrs., Inc., Case No. SACV 07-875 JVS (AGRx) precludes Plaintiffs from pursuing their PAGA claims accruing on or before that

[6] Nonparty employees may be bound by the judgment in an action brought under PAGA. Arias v. Superior Court, 46 Cal. 4th 969, 986 (2009). But, as Plaintiffs point out, the California Supreme Court in Arias did not change the general doctrine of res judicata as it applies to PAGA claims. (Opp'n Br. 7.)

date. (Pritchard Decl. Ex. J ("MSJ Order"), Docket No. 70-5.) In Casarez, named plaintiffs brought claims under PAGA on behalf of themselves and other GNC employees who worked at GNC stores in California during the relevant time period. (Id. at 18.) The Court granted summary judgment for plaintiffs' PAGA claims because they "failed to exhaust mandatory administrative procedures" as required under the California Labor Code before filing their claims in court, i.e., providing written notice to the LWDA and receiving notice back that the LWDA does not intend to investigate the violations. (Id.) Furthermore, given PAGA's one-year statute of limitations, the Court found that Plaintiffs were time barred from curing those procedural defects of their PAGA claims. (Id. at 19.) Additionally, Plaintiffs argued that the Court could apply a new one-year statute of limitations, so that a new PAGA claim could address violations that occurred within the past nine months. However, the Court noted that since Plaintiffs resigned more than a year ago, they could "not proceed in a representative capacity on behalf of other employees whose individual PAGA claims might be timely." (Id. at 19 n.9.)

The Court finds that the doctrine of res judicata does not bar Plaintiffs' PAGA claims because the dismissal of Casarez plaintiffs's PAGA claims was not a "final judgment on the merits" but based on their failure to exhaust administrative remedies. As the Court recognized in its summary judgment order, even after dismissal due to failure to exhaust, the Casarez plaintiffs could have provided proper notice to the LWDA and then brought a lawsuit for claims that were not time barred. (See MSJ Order 19.) Therefore, given that the plaintiffs could have cured the procedural deficiencies to bring the action again, the Court's decision could not have been a final judgment on the merits. See ProShipLine Inc., 594 F.3d at 688; see also Slack v. McDaniel, 529 U.S. 473, 485–87 (2000) (holding that a habeas petition is unadjudicated on its merits if it was dismissed for failure to exhaust state remedies).

Furthermore, while a dismissal based on the statute of limitations is a final judgment on the merits, see Hendereson v. Lampert, 396 F.3d 1049, 1053 (9th Cir. 2005), the dismissal of the PAGA claims in Casarez only found that those named plaintiffs' PAGA claims were time barred. (See MSJ Order 19 n.9.) The Court explicitly noted that there might be employees whose PAGA claims are timely. (Id.) And in this case, there are employees who did follow administrative procedures and do have timely claims. Furthermore, a plaintiff does not bring a PAGA claim as an individual claim, but as a representative action "on behalf of herself or himself and

other current or former employees." Cal. Lab. Code § 2699(a) (emphasis added). And GNC's argument that Plaintiffs were "clearly being represented by the Casarez plaintiffs" is incorrect. (See Mot. Br. 11). In fact, the Court found that the Casarez plaintiffs could not represent the timely claims of other employees because they themselves were time barred. (See MSJ Order at 19 & n.9.) Thus, as Plaintiffs argue, "[i]t would not be fair to bind them to a dismissal based on a technical grounds and against someone who did not have standing to act on [their] behalf." (Opp'n Br. 13.) "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971)).

Lastly, to preclude them from presenting those claims would undermine the purpose of PAGA, which was enacted to supplement enforcement actions by public agencies. Arias, 46 Cal. 4th at 986. "The relief is in large part 'for the benefit of the general public rather than the party bringing the action.'" Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489 (2011). If the Court barred the current Plaintiffs from pursuing relief on behalf of others simply because previous parties made missteps, it would be a disservice to the public interest purpose of PAGA and result in injustice. See Consumer Advocacy Group, 168 Cal. App. 4th at 686.

In sum, res judicata does not bar Plaintiffs' from bringing claims under PAGA.

3. Underlying Labor Code Violations

Lastly, GNC argues that Plaintiffs's PAGA claims cannot establish the Labor Code violations upon which their claims are based. To the extent its argument is based on the fact that meal and rest compensation are not "wages," and thus cannot form the basis of Labor Code violations, the Court rejected that argument above. Furthermore, GNC argues that the SAC fails to expressly request civil penalties based on GNC's alleged failure to provide meal and rest periods as set forth in Plaintiffs' second and third claims. (Mot. Br. 16–17 (citing SAC ¶¶ 59–60).) However, the SAC states that Plaintiffs "seek all civil penalties available under the Labor Code," which is sufficient to encompass penalties available for violations

alleged in the second and third claims. (See SAC ¶ 57.) Accordingly, GNC's third argument fails.

In conclusion, GNC is entitled to partial summary judgment on Plaintiffs' PAGA claims as to four Plaintiffs who terminated their employment with GNC prior to October 31, 2007, and for Plaintiffs' PAGA claims to the extent they are based on Labor Code violations occurring in pay periods prior to October 31, 2007.

C. Claims Four Through Seven

Finally, GNC makes a wholesale argument contending that they are entitled to summary judgment on the fourth, fifth, sixth, and seventh claims because Plaintiffs cannot establish the Labor Code Violations upon which they are predicated.[7] (Mot. Br. 17.) As discussed previously, GNC must meet its initial burden by showing the absence of evidence. Because GNC fails to include anything more than a conclusory statement, it does not meet the summary judgment standard.

IV. Conclusion

For the foregoing reasons, the Court GRANTS in part and DENIES in part GNC's motion for summary judgment.

IT IS SO ORDERED.

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[7] GNC also argues that, at a minimum, Phase I Plaintiffs Frances Abrams, Ashley Abramson, Maria Alvarez, and Greta Ansine should not be permitted to pursue those claims because they failed to testify at their depositions. (Mot. Br. 17–18.) However, the Court's order denying GNC's motion for sanctions against the four Plaintiffs, also scheduled for hearing on March 4, 2013, renders this argument untimely.