

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES—GENERAL

Case No. **CV 14-1242-JGB-(VBKx)**

Date February 22, 2016

Title *Alexander Brown et al. v. Abercrombie & Fitch Co. et al.*

Present: The Honorable **JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE**

MAYNOR GALVEZ

Deputy Clerk

Adele C. Frazier

Court Reporter

Attorney(s) Present for Plaintiff(s):

Hallie Von Rock

Attorney(s) Present for Defendant(s):

Mark A. Knueve

**Proceedings: Order GRANTING Plaintiffs' Motion for Approval of Notice of Pendency of Class Action (Doc. No. 124) (HEARING HELD)**

On July 16, 2015, the Court entered an Order granting Plaintiffs' motion for class certification. ("Order," Doc. No. 108.) The Order certified four subclasses:

(1) Subclass 1: the Labor Code § 450 Subclass:

All persons who were employed in California as non-exempt, hourly employees at Abercrombie & Fitch, abercrombie kids, Hollister, and/or Gilly Hicks stores after September 16, 2009, and who purchased AAA clothing during their employment after September 16, 2009 (as shown by Abercrombie's records). This subclass excludes those purchase made while an employee held the managerial position of Store Manager or Assistant Manager.

(2) Subclass 2: the Minimum Wage Subclass:

All persons who were employed in California as non-exempt, hourly employees, earning no more than minimum wage at Abercrombie & Fitch, abercrombie kids, Hollister, and/or Gilly Hicks stores after September 16, 2009, and who purchased AAA clothing during their employment after September 16, 2009 (as shown by Abercrombie's records). This subclass excludes those purchase made while an employee held the managerial position of Store Manager or Assistant Manager.

(3) Subclass 3: the Uniform Subclass:

All persons who were employed in California as non-exempt, hourly employees at Abercrombie & Fitch, abercrombie kids, Hollister, and/or Gilly

Hicks stores after September 16, 2009, and who purchased Abercrombie clothing during their employment after September 16, 2009 (as shown by Abercrombie's records).

(4) Subclass 4: the Footwear Subclass:

All persons who were employed in California as non-exempt, hourly employees at Abercrombie & Fitch, abercrombie kids, Hollister, and/or Gilly Hicks stores after September 16, 2009, and who purchased Abercrombie footwear during their employment after September 16, 2009 (as shown by Abercrombie's records).

(Order at 27-28.)

On January 15, 2016, Plaintiffs filed a Motion for Approval of Notice of Pendency of Class Action. ("Mot.," Doc. No. 124.) Defendants filed an Opposition on February 1, 2016. ("Opp'n," Doc. No. 125.) Plaintiffs filed a Reply on February 8, 2016. ("Reply," Doc. No. 126.)

The parties are for the most part in agreement concerning Plaintiffs' proposed Notice of Pendency of Class Action ("Notice"). Defendants dispute only whether the Notice should include Plaintiffs' claims for inaccurate wage statements and waiting time penalties under California Labor Code § 226 and §§ 201-03, respectively. Defendants contend that the Court did not perform a Federal Rule of Civil Procedure 23 ("Rule 23") analysis with respect to these claims, therefore the Court did not certify them and the Notice should not include them. Plaintiffs argue that the inaccurate wage statement and waiting time penalty claims were presented in their motion for class certification, and are properly certified by the Court's Order, because they are derivatives of the claims the Court certified for the minimum wage subclass. Plaintiffs assert that, if they successfully prove a minimum wage violation under Labor Code Section 450, they necessarily establish inaccurate wage statement and waiting time penalty claims: "If a worker was underpaid wages during employment, then, perforce, they were not paid in full upon termination of employment; if a worker did not in fact receive the minimum wage stated on the wage statement, then the wage statement is inaccurate." (Reply at 5.)

The Court agrees with Plaintiffs. Although the Court did not explicitly address the inaccurate wage statement and waiting time penalty claims in the Order granting class certification, these claims stand and fall on Plaintiffs' claim that Defendants' dress code policy effectively reduced the subclass members' salaries to below the minimum wage.<sup>1</sup> Because the

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<sup>1</sup> Defendants contend the claims for inaccurate wage statements and waiting time penalties are not derivative of Plaintiffs' minimum wage claim, because, to establish a claim for waiting time penalties, an employee must additionally demonstrate that the failure to provide all wages upon termination was "willful." (Opp'n at 2-3.) Defendants overstate the significance of the "willfulness" requirement. As it pertains to California Labor Code § 203, "'willful' . . . merely means that the employer intentionally failed or refused to perform an act which was required to be done." Armenta v. Osmose, Inc., 135 Cal. App. 4th 314, 325, 37 Cal. Rptr. 3d 460, 469 (2005) (emphasis in original) (internal quotation marks and citations omitted). An (continued . . . )

inaccurate wage statement and waiting time penalty claims are entirely derivative of the minimum wage claim, they meet and fail the requirements of Rule 23 to the same extent and are properly certified for the reasons expressed in the Order. See, e.g., Pena v. Taylor Farms Pac., Inc., 305 F.R.D. 197, 223 (E.D. Cal. 2015), appeal dismissed (June 5, 2015) (“Because the claims of this subclass that may proceed are entirely derivative of the meal break claims of the mixed hourly worker subclass, they meet or fail to meet the commonality and predominance requirements to the same extent.”); Tokoshima v. Pep Boys – Manny Moe & Jack, 2014 WL 1677979, at \*7-8, 8 n.8 (N.D. Cal. Apr. 28, 2014) (performing Rule 23 analysis as to minimum wage claim, and granting certification as to derivative wage claims without separate inquiry). To the extent the Order granting class certification was ambiguous, the Court clarifies it now. Insofar as they are derivative of the minimum wage claims, the inaccurate wage statement and waiting time penalty claims are certified as to the minimum wage subclass.<sup>2</sup>

Having resolved the only disputed issue in the proposed Notice, the Court finds that Plaintiffs’ Notice Plan complies with the requirements set forth in Federal Rule of Civil Procedure 23(c)(2)(B), and approves Plaintiffs’ proposed Notice of Pendency of Class Action. Accordingly, Plaintiffs’ Motion for Approval of Notice of Pendency of Class Action is GRANTED.

Within 30 days from the date of this Order, Defendants shall provide to the Administrator the mailing addresses and email addresses that it has for all persons identified in the records of Abercrombie, who worked as a non-exempt employee at Abercrombie & Fitch, Hollister, Abercrombie, and/or Gilly Hicks (“Abercrombie Stores”), in California, from September 16, 2009, to the present.

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( . . . continued)

employer’s awareness of acts that had the effect of depriving an employee of a minimum wage suffices to constitute willfulness under Section 203. See id. (finding employer’s awareness of not compensating employees for nonproductive time constituted willfulness under Section 203).

Defendants’ concern that the Section 203 and 226 claims may require individual damages calculations does not impact the Court’s conclusion that these claims are properly certified. Individualized damage calculations alone do not defeat class certification. See Levya v. Medline Industries, Inc., 716 F.3d 510, 513 (9th Cir. 2013). “[I]f putative class members prove [Defendants’] liability, damages will be calculated based on the wages each employee lost due to [Defendants’] unlawful practices.” Id.; Tokoshima v. Pep Boys – Manny Moe & Jack, 2014 WL 1677979, at \*8 n.8 (N.D. Cal. Apr. 28, 2014) (granting certification as to minimum wage claim and derivative claims where individual issues related only to damages and not liability). If Plaintiffs are successful on their claim that Defendants’ dress code policy effectively deprived the subclass members of a minimum-wage salary, no additional evidence will be required to prove liability for Plaintiffs’ derivative claims of inaccurate wage statements and waiting time penalties.

<sup>2</sup> Plaintiffs have not alleged any non-derivative wage statement and waiting time penalty claims. Any non-derivative claims, should they arise, are not certified by the Order.

The Court approves Dahl Administration, LLC, as the Administrator to implement the Notice Plan. The Administrator shall do the following:

- a) Promptly after receipt, the Administrator shall update the defendant-supplied mailing addresses using the NCOA database and industry-standard address verification procedures such as Coding Accuracy Support System (CASS) and Delivery Point Validation (DPV), to flag, update, and correct, where possible, invalid addresses.
- b) Within 30 days from receipt of the mailing addresses and email addresses referred to above, the Administrator shall send to the updated mailing addresses, by United States mail, a postcard, postage prepaid, containing the information on the Summary Notice attached to Plaintiffs' Motion as Exhibit 1 (Ex. 1, Doc. No. 124-3).
- c) Within 30 days of receipt of the defendant-supplied email addresses referred to above, the Administrator shall send by email the information contained on Exhibit 2, ("Detailed Notice," Ex. 2, Doc. No. 124-3), by email to the defendant-supplied email addresses.
- d) The Administrator shall re-mail any postcard notices that that are returned by the post office with forwarding addresses.
- e) The Administrator shall create and maintain a website for use by the class members. The website shall include the Detailed Notice, (Ex. 2, Doc. No. 124-3), and shall also provide links to case information and documents, including the second Amended Complaint and the Class Certification Order. The Website shall provide an on-line opt-out form, a form for providing updated address information, and a means to contact class counsel.
- f) The Administrator shall create and maintain a toll-free telephone number for use by the class members. Class members who call this number will be able to choose options to receive a mailed copy of the Detailed Notice, to hear basic case information and frequently asked questions, to provide updated address information, and contact information for class counsel.

**IT IS SO ORDERED.**