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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-5652-GHK (DTBx)	Date	November 13, 2012
Title	*Baltazar Mendez v. H.J. Heinz Company, L.P. et al.*		

Presiding: The Honorable	**GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE**	
Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers) Order re:** Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Dkt. No. 16)

This matter is before us on Defendants H.J. Heinz Company, L.P., H.J. Heinz Company, and H.J. Heinz Operating Partnership's ("Defendants") Motion to Dismiss Plaintiff Baltazar Mendez's ("Plaintiff") First Amended Complaint. We have considered the papers filed in support of and in opposition to this Motion and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Background

On June 29, 2012, Plaintiff filed this putative wage and hour class action against Defendants, his former employers. On September 5, 2012, Plaintiff, on his own initiative, filed a First Amended Complaint ("FAC"). In the FAC, Plaintiff alleges that he "is a former non-exempt hourly Factory Employee . . . who worked as a 'Cook/Cold Mixer'" in Defendants' Irvine Factory. (FAC ¶¶ 5, 15). Plaintiff alleges that "Defendants utilized a policy and practice of rounding Factory Employees' time records while also utilizing a policy and practice of penalizing and disciplining Factory Employees for clocking in past scheduled start times or clocking out before scheduled end times, disproportionately favoring the employer." (FAC ¶ 6). In particular, Plaintiff points to the relevant portion of the Employee Policy Handbook showing that "Clocking in 6 minutes or more late" or "Clocking out early 1 minute or more" subjects the employees to discipline. (FAC, Ex. 1). Plaintiff alleges that "[d]ue to [Defendants' policy of] rounding . . . time entries, coupled with the policy of disciplining employees for clocking in 6 minutes or more late or clocking out 1 minute or more early, [Plaintiff] was not compensated for all hours worked." (*Id.* ¶ 15). Plaintiff explains that "[f]or example, Plaintiff often worked an eight hour shift, and clocked in approximately five minutes prior to his scheduled start time and did not clock out until after his scheduled end time. Due to the rounding of time entries[,] he was only compensated for eight hours, yet he often worked over eight hours. In this example, he worked at least eight hours and five minutes." (*Id.*).

Plaintiff further alleges that he "believes that the policy and practice of rounding time records applied to all Factory Employees," based on his experience working "alongside other Factory Employees." (*Id.* ¶ 7). Plaintiff also alleges that he believes "the policy and practice of disciplining employees for 'Clocking in 6 minutes or more late' or 'Clocking out early 1 minute or more' also applied to all Factory Employees," based on his recollection that "the company held a meeting to discuss the attendance discipline policy, and other Factory Employees were present." (*Id.*).

Based on these allegations, Plaintiff seeks to represent both a California Class and a Nationwide Fair Labor Standards Act ("FLSA") Collective Class. The California Class includes "all persons . . . who were employed by [Defendants] in California as non-exempt hourly Factory Employees at any time during the four years prior to the filing of the Complaint in this action." (*Id.* ¶ 9). The Nationwide FLSA Collective Class includes "all persons who were employed by Defendants nationwide as Factory Employees" within the same four-year period.[1] (*Id.* ¶ 10). Plaintiff asserts the following 6 claims against Defendants on behalf of the California Class: (1) violation of California Labor Code § 204 (failure to pay all wages); (2) violation of California Wage Order Numbers 1 and 3, and Labor Code §§ 204, 1194, and 1197 (failure to pay all minimum wages owed); (3) violation of California Wage Order Numbers 1 and 3, and Labor Code §§ 510 and 1194 (failure to pay overtime wages); (4) violation of Labor Code §§ 201, 202, and 203 (failure to timely pay wages at separation); (5) violation of California Wage Order Numbers 1 and 3, and Labor Code §§ 226, 1174, and 1174.5 (failure to provide accurate wage statements); and (6) violation of California Business and Professions Code § 17200, *et seq.* In addition, Plaintiff asserts a claim for violation of the FLSA, 29 U.S.C. § 201, *et seq*. on behalf of the Nationwide FLSA Collective Class. All of Plaintiff's claims appear to be based on his theory that the rounding policy, together with the attendance and disciplinary policy, results in an underpayment of wages, which in turn results in Defendants' failure to pay overtime, provide accurate wage statements, etc.

II. Legal Standard

To survive a motion to dismiss for failure to state a claim, a complaint must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must contain factual allegations sufficient to "state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Although the Court must accept the allegations of the Complaint as true and construe them in the light most favorable to Plaintiff in resolving this Motion, the Court need not accept as true legal conclusions "cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

[1] As defined, this Nationwide FLSA Collective Class appears to encompass members of the California Class. We caution Plaintiff to carefully consider the logistical complications this might create, given the opt-in nature of an FLSA class and the opt-out nature of a Rule 23 class. Plaintiff should use the opportunity to amend to carefully structure the proposed classes to avoid unnecessary complications down the line.

III. Analysis

Defendants argue that the FAC is factually insufficient on three grounds: (1) Plaintiff fails to sufficiently allege the rounding policy; (2) as to the FLSA claim, Plaintiff fails to sufficiently allege the hours for which wages were not received; and (3) Plaintiff fails to sufficiently allege his class allegations. Additionally, Defendants argue that Plaintiff's request for injunctive relief should be stricken because he has no standing to seek injunctive relief as a former employee.

A. The Rounding Policy

Rounding policies may be permissible if they, "on average, favor neither overpayment nor underpayment" of wages. *Alonzo v. Maximum, Inc.*, 832 F. Supp. 2d 1122, 1126 (C.D. Cal. 2011).[2] Thus, rounding policies are unlawful "if they systematically undercompensate employees." *Id.* at 1127.

Defendants primarily argue that the FAC fails to satisfy the minimum pleading requirements because Plaintiff fails to allege "any actual facts, not even bare-bone facts, describing the rounding policy or practices." (Mot. 1). We agree. A review of the relevant authorities shows that to survive a motion to dismiss based on allegations of a rounding policy, Plaintiff must, at minimum, allege what the rounding policy is. *See McClean v. Health Sys., Inc.*, 2011 WL 2650272, *3 (W.D. Mo. July 6, 2011) (practice of rounding time to the nearest quarter hour); *Austin v. Amazon.com, Inc.*, 2010 WL 1875811, *1-2 (W.D. Wash. May 10, 2010) (same). Additionally, Plaintiff must allege sufficient facts that would plausibly suggest that the rounding policy, whether on its own or in combination with other policies, lead to a systematic underpayment of wages. In *McClean*, the plaintiffs plausibly showed that the defendants' alleged policy of rounding to the nearest quarter hour systematically favored the defendants because the plaintiffs also alleged that the defendants "had a computerized timekeeping system in place and could have easily recognized and paid [p]laintiffs [for the] actual hours [they] worked." 2011 WL 2650272, at *3. Thus, the court could plausibly infer, based on these allegations, that the defendants "chose to round time because it would be more favorable than paying for actual time worked on a minute by minute basis." *Id.* In *Austin*, the plaintiff likewise plausibly showed that the defendant's rounding policy benefitted the defendant in practice because the plaintiff alleged that an employee who clocked in "seven minutes or less before their scheduled shift [would] be paid from their scheduled start time going forward" while an employee who clocked in within seven minutes after their scheduled shift time received only a three-minute "grace" period, "as opposed to the seven minutes of grace time

[2] While no California statute or regulation appears to squarely address the permissibility of rounding policies, *see Alonzo*, 832 F. Supp. at 1126, federal regulation under FLSA states that rounding may be permissible so long as "it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked," 29 C.F.R. § 785.48(b). In the absence of controlling or conflicting California law, California courts look to federal regulations under the FLSA for guidance. *See Huntington Mem'l Hosp. v. Superior Court*, 131 Cal. App. 4th 893, 903 (Ct. App. 2005).

afforded the employee who clock[ed] in too early." 2010 WL 1875811, at *1-2. Thus, these allegations plausibly suggested that the policy could, overall, result in a systematic underpayment of wages.

Here, Plaintiff alleges only that Defendants have an unspecified "rounding policy" that, together with Defendants' disciplinary policy, results in the nonpayment of wages for all hours worked, because the disciplinary policy incentivizes employees to arrive at work early. However, without more information about the rounding policy, Plaintiff has not plausibly showed that the alleged policies result in a systematic underpayment of wages. For instance, suppose the rounding policy works in 15-minute increments, whereby 7 minutes or below are rounded down and 8 minutes and above are rounded up. Under such a policy, even if the employee is incentivized to arrive at work early by the disciplinary policy, rounding could still lead to a neutral outcome: while the employee's hours are rounded down on days he arrives 5 minutes early, depriving him of wages earned for those 5 minutes, he is compensated for the 5 minutes he has not worked on days he arrives 10 minutes early, because his hours are rounded up under the rounding policy. Thus, to survive a motion to dismiss, Plaintiff must not only allege what the rounding policy is, but also additional facts that would plausibly suggest that the policy results in a systematic underpayment of wages.

Plaintiff's Opposition alleges that Defendants had an "electronic time keeping system" that could "accurately track[] the precise time when employees clock in and clock out," (Opp'n 6), giving rise to the inference that Defendants chose to employ the rounding policy because it produces a more favorable result for Defendants, as was the case in *McClean*. Because this allegation suggests that Plaintiff can allege additional facts in support of his theory, we hereby **GRANT** Defendants' Motion **with leave to amend** as to Plaintiff's rounding policy allegations.

B. Plaintiff's FLSA Claim

The FLSA mandates that employers pay their employees at least the statutory federal minimum wage and overtime compensation. 29 U.S.C. § 201, *et seq*. Citing two out-of-circuit district court cases, *Jones v. Casey's General Stores*, 538 F. Supp. 2d 1094, 1102-03 (S.D. Iowa 2008) and *LePage v. Blue Cross & Blue Shield of Minnesota*, 2008 WL 2570815, *2 (D. Minn. June 25, 2008), Defendants argue that Plaintiff fails to sufficiently plead his FLSA claim because he "has not alleged the number of hours for which he claims he has not received wages." (Mot. 17). In response, Plaintiff argues that the cases cited by Defendants require such specific allegations only for minimum wage claims under the FLSA, not overtime claims. Moreover, Plaintiff asserts that by providing only rounded time entries to Plaintiff rather than actual time entries, Defendants have made it difficult for Plaintiff to estimate the number of hours for which he has not received wages. (Opp'n 9).

As a preliminary issue, the Parties' briefing highlights an ambiguity in Plaintiff's FLSA claim – it is unclear whether Plaintiff asserts both an overtime claim and a minimum wage claim under FLSA. Under his Seventh Cause of Action, Plaintiff asserts that Defendants have violated FLSA, 29 U.S.C. § 201, *et seq.*, which include both overtime and minimum wage provisions. However, because the specific allegations under this cause of action suggest that Plaintiff is asserting only an overtime claim

under § 207 and a record-keeping claim under § 211(c), (*see* FAC ¶¶ 65-66), and Plaintiff's Opposition is consistent with this interpretation, we construe Plaintiff's FAC as asserting an overtime, but not minimum wage, claim under FLSA.[3]

To state an overtime claim under FLSA, the complaint must allege that the plaintiff "(1) worked compensable hours in excess of forty hours per week and (2) was not properly compensated for this overtime when (3) Defendants knew or should have known that he or she was working overtime." *Wolman v. Catholic Health Sys. of Long Island, Inc.*, 853 F. Supp. 2d 290, 302 (E.D.N.Y. 2012). Moreover, "[t]o survive a motion to dismiss, the [complaint] must also approximate the number of overtime hours worked per week in excess of forty for which the . . . [plaintiff] did not receive overtime pay." *Id.* at 304.

Here, other than conclusorily stating that Defendants failed to compensate Plaintiff "for work performed in excess of forty hours in a workweek," (FAC ¶ 65), Plaintiff has not alleged sufficient facts that plausibly suggest that Plaintiff in fact worked over forty hours a week and how often he worked over forty hours a week. As to the estimated number of overtime hours, while Plaintiff states that Defendants's rounding policy has made this estimation difficult, we do not require a scientific figure at the pleading stage. Instead, Plaintiff need only provide a plausible estimate based on his experience.

Accordingly, because we find that the deficiency of Plaintiff's FLSA overtime claim may be curable, Defendants' Motion to dismiss Plaintiff's FLSA overtime claim[4] is **GRANTED with leave to amend**.

C. Plaintiff's Class Allegations

To adequately assert class allegations, Plaintiff must allege facts that would plausibly suggest that members of the putative class are subjected to the same offending policies. *See Ovieda v. Sodexo Operations, LLC*, 2012 WL 1627237, *4 (C.D. Cal. May 7, 2012). Because Plaintiff here seeks to represent both a California and a Nationwide Class, he must allege sufficient facts to show that the rounding policy and the disciplinary policy were implemented on a statewide and nationwide basis during the relevant class period.

Defendants argue that Plaintiff's class claims are factually deficient because he "alleges no facts to demonstrate or suggest that any member of the putative class, in California or nationwide, had similar work experiences, nor could Plaintiff[,] as he alleges that he worked at the [Irvine] factory." (Mot. 18). Having reviewed Plaintiff's class allegations, we agree. In the FAC, Plaintiff alleges that he "believes that the policy and practice of rounding time records applied to all Factory Employees," based on his

[3] To the extent Plaintiff is asserting a minimum wage claim under FLSA, it is clearly deficient, as we cannot discern whether Plaintiff is asserting the claim in the FAC.

[4] Defendants do not challenge the sufficiency of Plaintiff's record-keeping claim.

experience working "alongside other Factory Employees." (*Id.* ¶ 7). Plaintiff also alleges that he believes that "the policy and practice of disciplining employees for 'Clocking in 6 minutes or more late' or 'Clocking out early 1 minute or more' also applied to all Factory Employees," based on his recollection that "the company held a meeting to discuss the attendance discipline policy, and other Factory Employees were present." (*Id.*). These allegations at most show that the policies are implemented on a factory-wide basis. They do not plausibly suggest that the policies are implemented on a statewide basis in California, much less on a national basis.

However, because we find that this deficiency may be curable by amendment, Defendants' Motion to dismiss Plaintiff's class allegations is **GRANTED with leave to amend**.

D. Injunctive Relief

Defendants argue that Plaintiff's request for injunctive relief should be stricken because he has no standing to seek injunctive relief as a former employee. In his Opposition, Plaintiff states that he does not oppose Defendants' request to strike injunctive relief. (Opp'n 9). We deem Plaintiff's non-opposition as his consent to the relief sought by Defendants. *See* L.R. 7-12. Accordingly, Plaintiff's request for injunctive relief is hereby **STRICKEN**.

IV. Conclusion

Based on the foregoing, Defendants' Motion is **GRANTED with leave to amend** so that Plaintiff can conform with the applicable pleading standards as set forth herein. Plaintiff's request for injunctive relief is hereby **STRICKEN**. In choosing to amend the Complaint, Plaintiff's counsel shall comply with their obligations under Federal Rule of Civil Procedure 11.[5] Additionally, as we cautioned in footnote one, Plaintiff should use the opportunity to amend to carefully consider the structure of his proposed classes. Plaintiff shall file a Second Amended Complaint ("SAC") **within twenty-one (21)**

[5] Rule 11(b) provides, in relevant part:

> By presenting to the court a pleading . . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (2) the claims . . . and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

Counsel is also reminded that "[i]f after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation."

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days hereof. If Plaintiff files an SAC, Defendants shall respond to it **within thirty (30) days thereafter**. If Plaintiff fails to timely file an SAC, it shall be deemed his abandonment of this action. In that event, this action will be dismissed for Plaintiff's failure to prosecute and to comply with our Order.

IT IS SO ORDERED.

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