UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 11-0394-DOC Date October 6, 2011

Title MONET BEAUCHEMIN -V- TOM L. THEATERS, INC., ET AL.

Present: The Honorable DAVID O. CARTER, U.S. District Judge

Julie Barrera	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Christopher Ridout Caleb Marker	Jonathan Goldstein

Proceedings: PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [15]

Tentative ruling issued, of which a copy is hereto attached.

The case is called and counsel make their appearances. The motion is argued and taken under submission.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MONET BEAUCHEMIN, individually, and on behalf of all others similarly situated,	**CASE NO. SACV 11-00394 DOC (RNBx)**
Plaintiff(s),	**[TENTATIVE] O R D E R [DENYING] CLASS CERTIFICATION**
v.	
TOM L. THEATERS, INC., et al.,	
Defendant(s).	

Before the Court is Plaintiff's Motion for Class Certification filed in the above-captioned case ("Motion") (Docket 15). After considering the moving and opposing papers and [oral argument], and for the reasons described below, the Court hereby [DENIES] the Motion for Class Certification.

I. BACKGROUND

Plaintiff Monet Beauchemin ("Plaintiff") on behalf of herself and a purported class of similarly situated individuals (collectively, "the Purported Class"), alleges that Tom L. Theaters ("Theaters") and Stephen A. Kozub ("Defendant Kozub") (collectively,

"Defendants") misclassified the Purported Class as independent contractors instead of employees while members of the Purported Class worked as dancers at Fantasy Topless, an adult nightclub. Complaint, ¶ 3. As such, Plaintiff alleges that members of the Purported Class were not paid the minimum wages required under the Fair Labor Standards Act ("FLSA") or the California Labor Code ("the Labor Code"). Plaintiff defines the Purported Class as "[a]ll individuals, who at any time from the date four years prior to the date the Complaint was originally filed continuing through the present, worked as an exotic dancer at Fantasy Topless in Colton, California, but was designated as an independent contractor and therefore, not paid any minimum wages." *Id.* at ¶ 64.

No Purported Class member has ever received any wages or compensation from Defendants; rather, Plaintiff alleges that Purported Class members generated all income through customer tips given after exotic table, chair, couch, and/or lap dances (collectively, "customer tips"). Motion, 7. Moreover, Plaintiff avers that Defendants and other Fantasy Topless employees kept a portion of the Purported Class members' tips, in violation of Labor Code § 351. Complaint, ¶ 28-31, 41. Specifically, Defendants are alleged to have demanded a portion of all table dance tips as "stage fees" and to have required Purported Class members to pay a portion of their tips to non-dancer employees who would not typically receive tips. Motion, 7.

Defendants admit that all dancers who do not perform waitress functions "have signed a contract stating they want to remain independent and do not want to follow a

schedule." Motion, 6 (quoting Kozub Dep., 25-26). Defendants further explain that every dancer who is hired is asked to and does sign such a contract, under which she is not paid minimum wage. *Id.*

On this basis, Plaintiff alleges violations of the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq.; California Labor Code §§ 2802; and California Business and Professions Code § 17200, et. seq. *Id.* at ¶ 1. Plaintiff seeks damages, backpay, restitution, liquidated damages, civil penalties, prejudgment interest, reasonable attorneys' fees and costs, and all other relief the Court deems equitable. *Id.* at ¶ 3. Plaintiff, however, only seeks to certify her Second and Third causes of action – for violations of the California Labor Code and the California Business and Professions Code - under Federal Rule of Civil Procedure 23 in the present Motion. Motion, 2.

II. Legal Standard

Federal Rule of Civil Procedure 23 governs class actions. Fed. R. Civ. P. 23. A party seeking class certification must demonstrate the following prerequisites: "(1) numerosity of plaintiffs; (2) common questions of law or fact predominate; (3) the named plaintiff's claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citing Fed. R. Civ. P. 23(a)). A district court must engage in a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of Rule 23(a). *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996) (quoting *In re Am.*

Med. Sys.,75 F.3d 1069, 1079 (6th Cir. 1996)). The party may not rest on mere allegations, but must provide facts to satisfy these requirements. *Doninger v. Pac. Northwest Bell, Inc*., 564 F.2d 1304, 1309 (9th Cir. 1977).

In addition to satisfying the four prerequisites of numerosity, commonality, typicality, and adequacy, a party must also demonstrate either: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; or (2) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. Fed. R. Civ. P. 23(b).

The decision to grant or deny a motion for class certification is committed to the trial court's broad discretion. *See, e.g*., *Yamamoto v. Omiya*, 564 F.2d 1319, 1325 (9th Cir. 1977). In determining whether a plaintiff has satisfied the requirements of Rule 23, a court may not inquire into whether the plaintiff will prevail on the merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S. Ct. 2410 (1974). However, though a court must accept the substantive allegations in the complaint as true, *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig*., 691 F.2d 1335, 1342 (9th Cir. 1982), in some cases it may be necessary for the court to look beyond the

pleadings to determine whether the plaintiff has satisfied the certification requirements. *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364 (1982).

III. Discussion

The only point of contention between the parties is whether Plaintiff is actually a member of the above-described class. It is well-settled that Plaintiff must be a member of the class for which she seeks class certification, in order to satisfy both the typicality and adequacy prongs of Federal Rule 23 class certification requirements. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208 (1974)). There, the Supreme Court reversed class certification because the named plaintiffs lacked the qualifications necessary for promotion and thus were not actually part of the applicant pool harmed by the employer's alleged discrimination. *See also Rodriguez v. West Publishing Corp.,* 563 F.3d 948, 959 (9th Cir. 2009); *Solis v. Regis Corp.,* No. C 05-03039 CRB, 2006 WL 2925682, at *7-8 (N.D. Cal. Oct. 12, 2006) ("In order to satisfy Rule 23's adequacy requirement, a plaintiff must, at a minimum, belong to the class she purports to represent.").

Plaintiff defines the Purported Class as "[a]ll individuals, who at any time from the date four years prior to the date the Complaint was originally filed continuing through the present, worked as an exotic dancer at Fantasy Topless in Colton, California, but was

designated as an independent contractor and therefore, not paid any minimum wages." Complaint, ¶ 64. Plaintiff asserts that she "is members (sic) of the Class" and "like other members of the Class, was both misclassified as independent contractors (sic) and denied her rights to wages and gratuities under the wage and hour laws." Complaint, ¶ 67, 68. She alleges that her misclassification "resulted from the implementation of a common business practice which affected all Class members in a similar way." *Id.* Defendants' primary opposition is that "plaintiff is not a member of the class for she did not actually work at Fantasy Topless, and was not designated as an Independent Contractor, and was not entitled to receive minimum wages." Opposition, 14.

The Court's inquiry is thus focused on whether Plaintiff "worked as an exotic dancer at Fantasy Topless" where she was "designated as an independent contractor" who was "not paid any minimum wages." The burden of proving each of the four requirements of Federal Rule of Civil Procedure 23(a) – including the adequacy and typicality prongs – falls on the party seeking class certification. *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186 (9th Cir. 2001). Here, Plaintiff has not met her burden of proving that she is actually a member of the purported class she seeks to represent.

Defendants have pointed to numerous sources of evidence indicating that Plaintiff was neither an employee nor an independent contractor who worked for Defendants. During his deposition, Defendant Kozub explained that Plaintiff's pseudonym "Ms. Behaved" appeared seventh on one of Fantasy Topless' performer list and further

elaborated that the number seven next to Plaintiff's pseudonym was crossed out because Plaintiff was never hired by Defendants. Kozub Dep., 38-39. Defendant Kozub's deposition also indicates that all dancers hired by Defendants are required to obtain licenses from the City of Colton. *Id.* at 19-21. It is undisputed that Plaintiff's name does not appear on the City's list of licensed dancers. Defendant Kozub's deposition additionally explains that all women hired by Defendants are required to sign a contract stating that they wish to remain independent contractors and, as such, are not paid minimum wages. *Id.* at 25-26. It also appears undisputed that Plaintiff never signed such a contract. Finally, in Defendant Kozub's Declaration, he states that he has the final authority on which dancers to hire and that "[i]n the case of plaintiff Monet Beauchemin, I made the decision not to let her work at Fantasy Topless, and she never worked, and was never hired, either as an employee or independent contractor." Kozub Dec., 2-3.

Most of Defendant's assertions are not in dispute. Plaintiff herself admits to only working two days, for a combined total of less than eight hours. Beauchemin Dep., 44-45. Earlier in her deposition, Plaintiff states that she only auditioned for one day and that the audition lasted a few hours. *Id.* at 13. Plaintiff additionally indicates in her deposition that she did not pay any fee to dance and only performed one dance for approximately three minutes. *Id.* at 14. Plaintiff finally states that she was not paid any money by Defendants and only received a few dollars in tips for her one dance, which she was not forced to share. *Id.* at 15.

Plaintiff's only response to Defendants' arguments is that "Defendants' 'audition' argument (a *de minimis* argument of sorts) lacks credibility given the duration of her work at Fantasy Topless." Reply, 4. Plaintiff goes on to compare herself to day laborers, temporary workers, and contract employees who are entitled to the protections of the FLSA. *Id.* Yet, Plaintiff does not even seek class certification for her FLSA claim and can point to no case law where someone who merely auditions for a job has been entitled to the protections of the California Labor Code and California Business and Professions Code.

Plaintiff has accordingly failed to meet her burden of proving that she is an adequate class representative and that she possesses claims typical of the class. There is no indication that Plaintiff ever signed an independent contractor agreement, Plaintiff was never paid by Defendants, and Plaintiff was not forced to share her few dollars in tips with Defendants or any other Fantasy Topless employee. As such, she could not have been misclassified as an independent contractor, like the remainder of the Purported Class, and she suffered no injury from the Defendants' tip-sharing policy, unlike the remainder of the Purported Class. This Court does not wish to unduly hamper the potential success of the rest of the Purported Class by approving Plaintiff as class representative when she appears not to fall within the her own definition of the Purported Class. The Court expresses no judgment on the likelihood of obtaining class certification on the basis of the above-described claims with a different member of the Purported Class serving as class representative.

IV. Disposition

For the foregoing reasons, Plaintiff's Motion for Class Certification is hereby [DENIED].

IT IS SO ORDERED.

DATED: October 6, 2011

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DAVID O. CARTER
United States District Judge