

Notice

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

SUPERIOR COURT
CIVIL ACTION
NO. 2016-3477-BLS2

DEREK WRIGHT and NATHANIEL TOWSE,
on behalf of themselves and all others similarly situated,
Plaintiffs

vs.

BALISE MOTOR SALES COMPANY et al.,¹
Defendants

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION FOR
PARTIAL JUDGMENT ON THE PLEADINGS

Notice sent

10.28.19

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Plaintiffs, two former car salesmen for defendant Balise Motor Sales Company (Balise),

brought this putative class action alleging among other things that Balise violated the
Massachusetts Overtime Statute, G.L.c. 151 §1A. It did so by crediting commissions and draws
against the overtime compensation owed to plaintiffs instead of providing for separate overtime

payments. The instant motion, brought pursuant to Rule 12(c), asks this Court to determine that

Balise's method of paying overtime to its commissioned salesmen is lawful. This Court

concludes that the SJC's decision in Sullivan v. Sleepy's, LLC, 482 Mass 227 (2019) (Sleepy's)

compels the conclusion that the payment arrangement is a violation of the Overtime Statute.

The defendants' Motion is therefore **DENIED.**

¹ Cape Hy, Inc., James E. Balise, Jr, William Peffer, Steven M. Mitus, and Allen Thomalla.

BACKGROUND

The following is taken from the Complaint as well as those documents of which the Court may take judicial notice. Balise is located in West Springfield, Massachusetts and operates a chain of over 20 auto dealerships known as the "Balise Auto Group." Balise employed plaintiff Derek Wright as a car salesman in its Hyannis, Massachusetts dealership from July 2014 until December 2015. It employed plaintiff Nathaniel Towse in its West Springfield dealership from September 2013 until February 2014. Balise regularly required both Towse and Wright to work more than 40 hours per week.

Balise paid Towse and Wright entirely by commission. Their wages took the form of a weekly draw and any sales commissions in excess of the draw. Balise credited the draws and commission payments toward any owed overtime compensation. The plaintiffs' pay plans in effect beginning in January 2014 specifically provided that:

Sales Associates will receive a gross payment of \$600 per week as a draw or advance against commissions to be earned each calendar month, which shall be subject to Balise's regular required deductions (*i.e.*, taxes, FICA, etc.)

In the unusual situation where the \$600 draw would be insufficient to cover Federal and/or Massachusetts minimum wage and applicable overtime or premium pay due to an Associate in a given week, an additional draw or advance will be paid for that week so that all minimums are met.

At the end of each calendar month, Balise will compare the total gross amount of draws or advances paid during that month against the total commission earned by the Sales Associate that same month. . . .

In the event that the Associate's monthly commission exceeds the draws, the overage will be paid in the next weekly payroll cycle. In the event that the commissions earned for a particular calendar month does not cover the draws paid, Balise reserves the right to carryover all amounts owed to be paid back at the end of the next month or months in which the commission earned sufficiently exceeds the draws paid.

Def. Supp. Brief, Ex. 2, at 1.²

On March 27, 2018, the defendants filed the instant Motion, which seeks dismissal of those portions of the plaintiffs' claims arising from the failure to make separate overtime payments. This Court (Salinger, J.) heard oral argument on the Motion in June 2018 and took the matter under advisement. While the Motion was pending, the plaintiffs filed a motion to stay the action until the SJC answered two certified questions sent to it from the federal court in Sullivan v. Sleepy's, LLC, No. 17-12009-RGS (D. Mass). The motion to stay the proceedings was allowed. In May 2019, the SJC issued the Sleepy's decision, the stay was lifted and the Motion is once again before this Court with supplemental briefing.

DISCUSSION

Because the parties agree that this Court's interpretation of Sleepy's is critical to resolving this Motion, a detailed discussion of that case is in order. The plaintiff employees in Sleepy's worked as salespeople at retail stores operated by the defendant employer between 2014 and 2016. The employees were paid on a one hundred percent commission basis: their wages took the form of a draw of \$125 per day and any sales commissions in excess of the draw. On least one occasion, the employees worked more than forty hours in a week and on one Sunday. They did not receive any additional compensation beyond the daily draw and any commissions. However, the amount they received always equaled or exceeded the minimum wage times the number of hours they worked up to forty hours together with time and a half for hours worked over forty hours or on Sunday. The defendant employer maintained that because of that fact,

² The parties agree that for the purposes of the Motion, the Court may take judicial notice of certain documents in the Defendants' supplemental exhibits, including the payment plan and the plaintiffs' pay stubs.

there could be no violation either of the Overtime Statute or of the statute requiring Sunday premium pay.

The case came before the SJC in the form of two certified questions from the Massachusetts Federal District Court. The first certified question concerned overtime pay and asked:

If a [one hundred percent] commission inside sales employee [i.e., an employee who makes sales at the employer's place of business] works more than forty hours in a given work week, is the employee entitled to any additional compensation specifically for overtime hours worked when the employee's total compensation (through draws and commissions) for that work week is equal to or greater than 1.5 times the employee's regular rate or at least 1.5 times the minimum wage for all hours worked over [forty] hours in a work week? . . .

Sleepy's, 482 Mass. at 228. The second asked essentially the same question with regard to Sunday pay. The SJC answered both questions in the affirmative. With regard to overtime pay in particular, it held that it did not matter that the amount the plaintiff employees received fully compensated them for time worked, including overtime: the plaintiffs were entitled to "separate and additional payments" for overtime, and the draws and commissions they received could not be "retroactively allocated" to cover this overtime obligation. Id.

In reaching this conclusion, the Court relied on three earlier decisions -- Mullally v. Waste Mgt. of Mass., Inc., 452 Mass. 526 (2008) (Mullally); Somers v. Converged Access, Inc., 454 Mass. 582 (2009) (Somers); and Dixon v. Malden, 464 Mass. 446 (2013) (Dixon). As explained in Mullally, the purpose of the overtime requirement is to "reduce the number of hours of work, encourage the employment of more persons, and compensate employees for the burden of a long work week." 452 Mass. at 529. A compensation arrangement that pays the employee the same amount regardless of whether he worked forty or fifty hours a week undermines those purposes. Id. at 532. Using similar reasoning, the SJC in Somers held that a plaintiff

misclassified as an independent contractor still had a claim for a violation of the Wage Act, G.L.c. 149, §§ 148 and 150, even though he was actually paid more than he would have been paid had he been properly classified as an employee. The SJC explained that to interpret the statute otherwise would provide employers with a “safe harbor” and remove any financial incentive to ensure employer compliance. 454 Mass. at 592. In Dixon, the SJC held that, even though the plaintiff employee had received a salary together with “gratuitous, after-the-fact payments” following his termination that exceeded the amount he was owed for unpaid vacation time, the arrangement still violated the Wage Act. 464 Mass. at 452. In support of that conclusion, the SJC in Dixon noted that the municipal employer had not characterized the continued salary payments as payment for accrued vacation or otherwise communicated that to the employee.

In addition to these three earlier decisions, the SJC in Sleepy’s relied on 454 C.M.R. §27.03(3). That regulation states: “[W]hether a nonexempt employee is paid on an hourly, piece work, salary, or any other basis, such payments shall not serve to compensate the employee for any portion of the overtime rate for hours worked over 40 in a work week...” Interpreting this regulation according to its “plain and ordinary meaning,” the SJC construed the regulation “to prohibit the retroactive ‘crediting’ of payments against an employer’s overtime obligations when those payments were made for a different purpose.” 482 Mass at 236. In support of its position that there was no violation of the Overtime Statute, the defendant employer cited two Opinion Letters issued by the Department of Labor Standards (DLS). The SJC acknowledged that those letters are “less than a model of clarity and may have misled the employers,” but they did not change its conclusion that “retroactive allocation and crediting is impermissible” and that

commissioned sales people must be separately compensated for overtime. 482 Mass at 232.

The same conclusion is compelled here with regard to Balise.

As in Sleepy's, Balise paid its salespeople exclusively through commissions and weekly draws, with no separate and additional amounts allocated as payment for overtime. Balise's claim that it complies with the Overtime Statute so long as the total amount paid to its employees was sufficient to cover any overtime is precisely what the SJC rejected. The defendants attempt to distinguish their pay arrangement from that which was held unlawful in Sleepy's on the grounds that the Balise pay plan provided: "[i]n the unusual situation where the \$600 draw would be insufficient to cover Federal and/or Massachusetts minimum wage and applicable overtime or premium pay due . . . in a given week, an additional draw or advance will be paid for that week so that all minimums are met." Def. Supp. Brief, Ex. 2, at 1. This difference is immaterial, however.

As an initial matter, the employee under the Balise plan would be entitled to an additional draw only in the "unusual" event that the standard weekly draw was lower than what Balise characterizes as the legally required minimums. Thus, in most instances, the plaintiffs and other employees were only paid the standard weekly draw, even though they may have worked overtime; there was no separate and additional overtime compensation – precisely what the SJC in Sleepy's determined to be unlawful. That an employee would be entitled to receive an additional draw if the standard draw was not sufficient does not cure the flaws in the payment arrangement. Although it is purportedly intended to ensure that "all [statutory wage] minimums are met," the additional draw, like the standard weekly draw, is nonetheless an advance on commissions and thus may be used to offset an employee's commission payment in a later week. The SJC in Sleepy's, however, made it clear that employers may not retroactively

allocate payments made for one purpose to a different purpose. 482 Mass. at 236-237. Because the additional draw serves a purpose other than the payment of overtime hours and may be used to offset the commission payment in the next pay cycle, it does not satisfy the defendants' obligations under the Overtime Statute.

The defendants also argue that the instant case is distinguishable from Sleepy's because, as evidenced by the language in Balise's pay plan concerning the additional draw, Balise expressly informed its employees that the draws were intended to satisfy its overtime obligations; therefore, it was not trying to "retroactively allocate" wage payments as the Sleepy's plan did. Put differently, the defendants contend that the employer was found to be liable in Sleepy's only because it failed to communicate to its employees -- at least until a lawsuit was filed -- that it was using draws and commissions to satisfy its overtime obligations. But this Court is not convinced that Sleepy's can be interpreted so narrowly. Certainly, the SJC emphasized "the importance of an upfront communication of the breakdown of the amounts [owed] to the employees." Sleepy's, 482 Mass. at 236, citing Dixon, *supra*. However, what rendered the employer's use of draws an improper retroactive reallocation of wages was not merely the failure to communicate the purpose of those payments at the time they were made, but rather the use of the payments for one purpose (offsetting commissions) in order to satisfy another purpose (overtime obligations).

The defendants argue in the alternative that the Sleepy's holding should not apply retroactively.³ Generally, when the SJC construes a statute, its interpretation reflects the court's view of its meaning as of the date the statute was enacted, so that its holding applies to all cases

³ The SJC chose not to address this issue even though the suggestion that it be given only prospective application was apparently raised in an amicus belief.

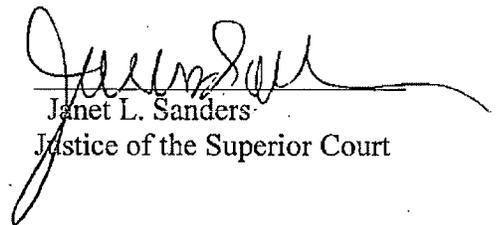
arising since that date. Eaton v. Federal Nat. Morg. Ass'n, 462 Mass. 569, 587 (2012) (emphasis added). See also In re McIntire, 458 Mass. 257, 261 (2010). Because the Overtime Statute was enacted well before events in the instant case, the holding of Sleepy's would certainly apply to Balise's pay plan if this Court were to follow the general rule. A departure from this general rule is occasionally necessary in order to "protect the reasonable expectations of parties." American Intl. Ins. Co. v. Robert Seuffer GMBH & Co. K.g., 468 Mass. 109, 120 (2014) (internal quotation marks omitted). To determine whether such a departure is warranted, the court is to examine "the extent to which a decision creates a novel rule, whether retroactive application will serve the purposes of that rule, and whether hardship or inequity would result from retroactive application." Id. at 120-121. The Court concludes that none of these factors supports limiting the Sleepy's decision to a prospective application.

First, Sleepy's did not create a novel rule. A court's holding will be considered "novel" only where it "marks a substantial departure from prior precedent...." American Intl. Ins. Co., 468 Mass. at 121. See also Shapiro v. Worcester, 464 Mass. 261, 269 (2013). Sleepy's, however, did not reflect a dramatic shift in the law. The decision did not contradict or overrule prior precedent but in fact relies on recent SJC rulings on the same issue. Among those rulings is Mullally, which discussed the purposes of the Overtime Statute and rejected a pay plan similar to the one in Sleepy's because it did not guarantee greater pay for each hour of overtime. The defendants note that the federal court certified the issue addressed in Sleepy's because it was of the view that there was no controlling Massachusetts precedent. "The fact that the question had not been answered before . . . does not mean that it represented a 'new' interpretation," however. In re McIntire, 458 Mass. at 262.

Second, retroactive application of the Sleepy's holding is consistent with the purposes of the law that the SJC was interpreting in that case. Indeed, the SJC in Sleepy's specifically relied on the language and purposes of the Overtime Statute in reaching the conclusion that it did. 482 Mass. at 233. It would make little sense for the SJC to hold that the Legislature intended a certain result when it enacted the Overtime Statute years ago and then for this Court to limit the Sleepy's holding so that it applied prospectively only.

Finally, this Court sees no undue hardship or inequity created by applying the Sleepy's decision to the defendants. Defendants argue that it should be applied prospectively because they relied on the DLS Opinion Letters in formulating their pay plan and should not be penalized for their reliance on these letters. In particular, they point to Example 1 that the DLS gave in its 2003 Opinion Letter regarding how an employer should compensate a fully commissioned employee for overtime. That example appears to suggest that so long as the draw on commissions exceeds what the employee is due as a minimum wage and for overtime, then the compensation plan is permissible. Neither the Opinion Letter nor the example, however, address the question of whether the overtime payment must be separately stated. Indeed, contrary to the defendants' position, the SJC in Sleepy's did not read the 2003 Opinion Letter as permitting the practice that the Court held to be unlawful. Of far greater importance to the SJC was 454 C.M.R. 27.03 which by its plain language prohibited (in the SJC's view) the practice of crediting payments made for one purpose (i.e. commissions) against the employer's overtime obligations. 482 Mass. at 236-237. That regulation was enacted in 2015, twelve years after the 2003 Opinion Letter.

Dated: October 25, 2019


Janet L. Sanders
Justice of the Superior Court