

## Statistical Sampling Could Not Establish Liability in Wage-Hour Class Action, California Court Rules

By Mark S. Askanas

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Class certification is unwarranted where auto center managers and assistant managers alleged they were improperly classified as exempt and denied overtime and meal and rest breaks in violation of the California Labor Code, the California Court of Appeal has ruled. Affirming a trial court determination, the Court concluded that the class representative could not rely on random statistical samples to establish liability and that individual issues predominated over common issue in this case. *Dailey v. Sears, Roebuck and Co.*, No. D061055 (Cal. Ct. App. Mar. 20, 2013). The Court also held the class representative failed to show the employer had a uniform policy of depriving managers of meal or rest breaks.

### Background

William Dailey worked as an Assistant Manager and Manager for Sears, Roebuck and Co. at its auto center in Carlsbad, California, from 2007 to 2009. During that period, Sears had approximately 16 auto centers in the San Diego area. Depending on its sales volume, each auto center had a Manager or a Manager and one or more Assistant Managers. Sears classified its Managers and Assistant Managers as exempt from overtime and had no formal policy regarding meal or rest breaks for its exempt auto center employees.

Dailey, individually and on behalf of a proposed class of similarly situated individuals, sued and alleged the company violated California's wage and hour laws by misclassifying the auto center Managers and Assistant Managers as exempt and by denying them overtime and meal and rest periods. He maintained the company had implemented uniform policies and practices, including strict labor budgets, requiring Managers and Assistant Managers to spend the majority of their time on non-exempt work. In support of his motion for class certification, Dailey submitted his own declaration as well as the declarations of four other employees stating they spent the majority of their work time on non-exempt work. In addition, Dailey argued that a representative sampling could be used to determine both liability and damages.

Opposing the motion, the company submitted declarations or depositions of 21 putative class members and six corporate representatives that the policies and practices identified by Dailey either did not exist or, if they did exist, did not require Managers and Assistant Managers to engage primarily in non-exempt work. The company showed that day-to-day tasks of the Manager and Assistant varied greatly from store to store. The trial court denied the motion for class certification, finding individual facts and issues were more numerous and significant than the common issues.

### Class Certification Properly Denied

Dailey argued on appeal that the trial court incorrectly considered the merits of the parties' position and erred in denying class certification because, he averred, evidence showed the company had implemented policies that resulted in the widespread misclassification of Managers and Assistant Managers. The Court rejected Dailey's arguments. It said the trial court was permitted to "credit one party's evidence . . . in determining whether the requirements for class certification have been met." Such an examination, the Court stated, was not an "an improper evaluation of the merits of the case."

Turning to the merits, the Court determined that substantial evidence supported the trial court's determination that individual issues predominated. The Court found the company's evidence showed the duties of Managers and Assistant Managers varied extensively among employees and from store to store. Further, the strict labor budgets on which Dailey relied to demonstrate that Managers and Assistant Managers performed non-exempt work did not support his argument, the Court found. To the contrary, it determined that many of the proposed class members stated they were not bound by the labor budgets and could request adjustments as needed. The Court also noted that other store managers testified they could not create a list of their day-to-day duties because they varied from "day to day, season to season, and [were] based on the location of the auto center, sales volume, supervisor, staffing levels . . ." Accordingly, the Court saw no error in the trial court's finding that common questions did not

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predominate.

Dailey then argued the trial court should have considered his expert's random sampling methodology to manage the individual questions regarding the employees' job duties. The Court noted that, although random sampling has been accepted to prove damages, its use to prove liability was highly questionable in light of the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Even if a representative sampling were permissible in certain cases, it was not appropriate here, as Dailey sought to substitute a statistical sampling for the requisite commonality. The Court noted, "[I]f the commonality requirement could be satisfied merely on the basis of a sampling methodology proposal such as the one before us, it is hard to imagine that any proposed class action would not be certified."

The Court reached the same conclusion regarding Dailey's meal and rest break claims. It found no substantial evidence the company employed any policy or routine practice to deprive the proposed class members of meal and rest breaks. Therefore, class certification was properly denied.

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This case is welcome news for California employers defending against wage-hour class actions. However, the California Supreme Court will be addressing the use of representative testimony and statistical evidence in *Duran v U.S. Bank*, which is currently pending.

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