UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARCUS R. ABBE, et al.,

Plaintiffs,

vs.

CITY OF SAN DIEGO,

Defendant.

CASE NO. 05cv1629 DMS (JMA)
06cv0538 DMS (JMA)

ORDER GRANTING DEFENDANTS' MOTION FOR:

SUMMARY JUDGMENT ON BREACH OF CONTRACT CLAIM, and

PARTIAL SUMMARY JUDGMENT ON FAIR LABOR STANDARDS ACT CLAIM

[Doc. 327]

Pending before the Court are Defendant's motions for summary judgment on Plaintiffs' breach of contract claim, and partial summary judgment on Plaintiffs' Fair Labor Standards Act (FLSA) claim. The motions were argued on July 11, 2008. Gregory Petersen, Christopher Nissen, and Steve Colella appeared on behalf of Plaintiffs, and Colleen Smith, Kate Mayer, and Peter Benzian appeared on behalf of Defendant. Supplemental briefing was submitted by the parties following oral argument. Having carefully considered the matter and for the reasons set forth below, Defendant's motions are granted.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of the case are well known to the parties. Therefore, the Court sets forth only those facts that are relevant to the instant motion. Plaintiffs, numerous individual police officers employed by Defendant City of San Diego through the San Diego Police Department ("SDPD"), allege claims for compensation for overtime hours worked and breach of contract. The City and Plaintiffs, through their union, have negotiated several Memoranda of Understanding ("MOUs") over the years; these MOUs have been in effect from July 1, 2000 through June 30, 2002; July 1, 2003 through June 30, 2005; and July 1, 2007 to the present. Because the union and the City were unable to achieve a negotiated agreement for the periods from July 1, 2002 through June 30, 2003, and July 1, 2005 through June 30, 2007, Last, Best and Final Offers ("LBFOs") were implemented during such times. The same pay rates and allowances were applied during the periods of the last operative MOU unless modified by the LBFO. (Fifth AC ¶ 12). Plaintiffs allege Defendant breached the MOUs and LFBOs. (Fifth AC ¶ 33).

On July 20, 2007, Defendant brought a motion for summary judgment on the FLSA claims. The Court granted in part and denied in part Defendant's motion. (Doc. 265, November 9, 2007). Of particular importance to the present issues, is the Court's November 9, 2007 order, in which the Court found that Defendant was entitled to a partial exemption for overtime wages under 29 U.S.C. § 207(k) ("Section 7(k) Exemption"). As a result of the Section 7(k) Exemption, the FLSA does not require Defendant to pay Plaintiffs overtime until and unless they have worked more than 43 hours (rather than the usual 40 hours) per week. Accordingly, pursuant to the Section 7(k) Exemption, Defendant is entitled to a 3-hour per week offset of Plaintiffs' claimed wages. Defendant now argues it is entitled to judgment as a matter of law as to all Plaintiffs who claim overtime wages totaling less than 156 hours per year, which represents three hours per week multiplied by fifty-two weeks per year.

Shortly before the present motions were filed, a dispute developed between attorney Gregory Petersen, now associated with the Petersen Law Firm ("PLF"), and his former law firm, Jackson, DeMarco, Tidus, and Peckenpaugh ("JDTP"), concerning the representation of Plaintiffs in this matter. The attorney dispute was referred to Magistrate Judge Ruben B. Brooks for resolution. Judge Brooks

ordered all Plaintiffs to complete a substitution of attorney and indicate their choice of counsel. The vast majority of Plaintiffs did so. Judge Brooks further ordered that failure to file a substitution form would be treated as a default, and defaulting Plaintiffs would be deemed to be represented by JDTP. This Court adopted Judge Brooks' order. Accordingly, all issues regarding representation have now been resolved — either by substitution or default.

II.

LEGAL STANDARD

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure where there is an absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Cattrett,* 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party seeking summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. If the moving party fails to meet this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment by merely demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the nonmoving party must "go beyond the pleadings and by [his or] her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). When making its determination, the court must view all inferences drawn from the underlying facts in the light most

favorable to the party opposing the motion. *See Matsushita,* 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

III.

DISCUSSION

1. Breach of Contract

Defendant claims it is entitled to summary judgment because, among other things, Plaintiffs failed to exhaust grievance procedures set forth in their MOU. Plaintiffs concede they have not exhausted their contractually prescribed grievance procedures, but argue they are excused from compliance as the procedures are "inadequate," citing *Glendale City Employees' Ass'n v. Glendale*, 15 Cal. 3d 328 (1975).

Defendant correctly argues *Glendale* is distinguishable, noting the court in *Glendale* excused Plaintiffs from exhausting grievance procedures which (a) were established by a *city ordinance* (not contract) that the city employer *unilaterally* enacted, and (b) applied to all city employees, regardless of union affiliation. *Glendale,* 15 Cal. 3d at 342. Here, in contrast, the grievance procedures and exhaustion requirement are contained within a contract (MOU) negotiated between parties at arms-length during the collective bargaining process; employees, through their union, negotiated with the City and affirmatively agreed to first exhaust grievance procedures as a condition to litigation. (MOU, all versions, Article 24 §I.G.) *See Barker v. Southern Pac. Co.,* 214 F.2d 918, 919-920 (9th Cir. 1954) ("It is argued by appellant that notwithstanding the contractual provisions, an employee need not exhaust his administrative remedies unless required so to do under the applicable state law. It is questionable whether this doctrine is applicable where, by contract, the request for a hearing has been made a condition precedent to the bringing of a law suit.")

Following *Barker*, the Ninth Circuit in *Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1319 (9th Cir. 1990), held that union members may *not* challenge the "adequacy" of a negotiated grievance procedure unless the members first "present and prosecute their grievances through contractual procedures." The "[f]ailure to utilize the grievance procedures, or to invoke them in a timely manner,

bars grievants from pursuing remedies in court. At a minimum, therefore, members of the bargaining unit must first turn to the grievance procedures for a remedy." *Id.* at 1317.[1] Because it is uncontroverted Plaintiffs neither pursued nor exhausted their agreed upon grievance procedures, *see* First AC ¶ 45 (Plaintiffs "have not opted . . . to file an internal grievance"), they may not now "complain[] of the inadequacy of [the procedure]" and are "bar[red] . . . from pursuing remedies in court." *Carr,* 904 F.2d at 1317-19.[2] The City is therefore entitled to judgment as a matter of law.

The exceptions to the general rule requiring exhaustion of contract-based grievance procedures are few and narrowly drawn, and do not apply here. For example, the California Supreme Court noted that members may be relieved of their contractual obligation to exhaust grievance procedures "only when the organization violates its [own] rules for [internal] appellate review" or "upon a showing that it would be futile to invoke [such procedures.]" *Holderby*, 45 Cal.2d at 847. Plaintiffs do not allege the City violated its own rules for internal appellate review (as Plaintiffs never pursued the grievance procedures in the first instance). This leaves "futility," which may exist if the grievance process is "biased." *Carr*, 904 F.2d at 1318. Although Plaintiffs have for the first time implied bias on the part of the City in their supplemental briefing, arguing the City Counsel "and not an impartial body, would be the ultimate arbiter of Plaintiffs' claims," (Supp. Response at 5), they have presented no evidence in support of this bare allegation. In the absence of any such evidence, the City is entitled to judgment as matter of law.

Finally, Plaintiffs argue the MOU makes participation in the grievance procedure optional. This argument is contrary to the express terms of all applicable versions of the MOU. (*See* Thomas Decl.

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[1] Notably, *Carr* did not cite much less discuss *Glendale*. This is not surprising since *Glendale* simply does not address a member's obligation to exhaust *contractually* agreed upon grievance procedures.

[2] Plaintiffs assert they "complied with the initial step of the [grievance] procedure which require[s] nothing more than an informal complaint to a supervisor." (P's Supp. Response at 5). This assertion, however, is unsupported by evidence and – even if true – establishes only that Plaintiffs took the first, informal step of the grievance procedure, which does not satisfy the obligation of members to "present and prosecute" their contractual grievance procedures. Even the parties' MOU demands *complete* exhaustion: "P.O.A. agrees to pursue *all claims* of violation of this MOU through the grievance procedure. Resort to other remedies shall not be pursued until *all steps* of the grievance procedure have been exhausted." (Thomas Decl. Exh. 1, 4, and 6, MOU, Article 24, Section I.G.) (Emphasis added).

Exh. 1, 4, and 6, MOU, Article 24, Section I.G. (quoted *infra* n.2)). The parties clearly agreed to pursue "all claims" through the grievance procedure and not pursue other remedies until "all steps" of the grievance procedure have been "exhausted." For these reasons, summary judgment is granted. Plaintiffs' breach of contract claim is dismissed.[3]

2. Section 7(k) Exemption.

In its November 9, 2007 order, the Court concluded that the Section 7(k) Exemption applies, which allows Plaintiffs to recover overtime wages only after working 43 hours in a 7-day week. Since Plaintiffs assume entitlement to overtime wages after working 40 hours in a 7-day week, Defendant argues it is entitled to summary judgment with respect to 304 Plaintiffs whose own declarations indicate they have worked fewer than the 43 hour-per-week threshold, or, according to Defendant, less than 156 hours of overtime per year. Defendant arrived at the 156 hour limit by multiplying three hours per week by 52 weeks per year. (Mot. at 25). Defendant's calculation, however, will not necessarily yield the proper offset amount. Under Section 7(k), Plaintiffs are entitled to FLSA mandated overtime pay if they work more than three hours in any given week, even if their total overtime hours in a year do not exceed 156. Nevertheless, Plaintiffs' only evidence concerning the number of hours worked is contained in Plaintiffs' individual declarations, wherein no Plaintiff indicates any week-to-week discrepancy in the number of uncompensated overtime hours worked. As all evidence in the record indicates the uncompensated overtime hours were distributed evenly week-to-week, Defendant's calculation based on overtime hours per year is proper.

Defendant's calculation also does not include the number of missed meal periods. Defendant argues this is because such meal periods were *paid* pursuant to the MOU. Plaintiffs dispute this assertion. Attorneys from JDTP submitted a list of 682 Plaintiffs (Exhibit 82) who claimed to work more than 156 hours of overtime per year, apparently including meal periods; thus, as to these Plaintiffs, material issues of fact remain. As to the balance of Plaintiffs represented by JDTP, counsel correctly observed at oral argument that there is no evidence before the Court that these Plaintiffs worked more than 156 hours per year. (TR June 11, 2008 5:3-12). Summary judgment is therefore

[3] As the argument regarding failure to exhaust grievance procedures is dispositive of the breach of contract claim, the Court declines to reach the remainder of Defendant's arguments.

granted as to all Plaintiffs not identified on Plaintiffs' Exhibit 82 (Doc. 408, Attachments 1 & 2), who were represented by JDTP on July 11, 2008 (the date of oral argument).

IV.

CONCLUSION

For these reasons, Defendant's motions for summary judgment on the breach of contract claim and partial summary judgment on the FLSA claim are granted.

IT IS SO ORDERED.

DATED: August 19, 2008

HON. DANA M. SABRAW
United States District Judge