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CENTRAL DISTRICT OF CALIFORNIA
BY DA DEPUTY

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ENTERED
CLERK, U.S. DISTRICT COURT
DEC 13 2006
CENTRAL DISTRICT OF CALIFORNIA
BY BO DEPUTY

MICHAEL KENNETH PAUL EDWARDS, et al.,

Plaintiffs,

v.

CITY OF LONG BEACH, et al.,

Defendants.

CV 05-8990 ABC (PLAx)

ORDER RE: PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23 OR COLLECTIVE ACTION PURSUANT TO 29 U.S.C. §216(b)

Pending before the Court are Plaintiffs' Motion for Certification of Collective Action Pursuant to 29 U.S.C. §216(b) ("§216(b) Motion") and Plaintiffs' Motion for Class Certification Pursuant to Federal Rule of Civil Procedure 23 ("Rule 23 Motion"). The Court took both motions under submission on December 4, 2006. Having considered the materials submitted by the parties and the case file, and for the reasons set forth below, it is hereby ORDERED that Plaintiffs' §216(b) Motion is GRANTED, and Plaintiffs' Rule 23 Motion is DENIED.

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1 I. Factual and Procedural Background

2 Michael Kenneth Paul Edwards ("Plaintiff Edwards") is a former
3 employee of the City of Long Beach ("Defendant"). Plaintiff Edwards
4 worked for Defendant as a police officer with the Long Beach Police
5 Department ("Department") from 1993 until July 2005. Plaintiff
6 Edwards, on behalf of himself and the members of the two potential
7 classes (collectively, "Plaintiffs"), allege that Defendant employs
8 somewhere between 900 and 1000 officers who are represented by the
9 Long Beach Police Officers Association, and are subject to the
10 policies and procedures contained in a Memorandum of Understanding and
11 the Manual of the Long Beach Police Department. (Deposition of Deputy
12 Chief Timothy Jackman ("Jackman Depo."), 114:16-25 and 115:1-12; Rule
13 23 Motion, Exs. 4-6). Plaintiff Edwards alleges that during the time
14 he was employed by Defendant, he was unable to consistently take a 30
15 minute uninterrupted meal period when he worked in excess of 5 hours,
16 was unable to take rest breaks, and was not properly reimbursed his
17 costs to maintain and clean his safety equipment such as his firearm,
18 holster, belt and handcuffs. (Edwards Decl., ¶¶2, 6 and 8).

19 Specifically, Plaintiffs contend that Defendant, through its
20 management (which includes commanders, lieutenants and sergeants), has
21 a policy and practice of denying Plaintiffs 30 minute uninterrupted
22 meal periods. (Edwards Decl., ¶2, 3 and 4). Plaintiffs allege that
23 while the Department's written policy is to allow officers a 40 minute
24 meal period, there is no policy or procedure for recording and/or
25 reporting missed meal periods. (Edwards Decl., ¶5).

26 Additionally, Plaintiffs contend that the Department has no
27 written policy in its manuals or training materials, regarding rest
28 periods. (Jackman Depo., 72:23-73:15). Similarly, Plaintiffs allege

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1 that there is no policy or procedure for recording and/or reporting
2 missed meal breaks. (Jackman Depo., 75:13-80:18). Plaintiffs allege
3 that officers fill out weekly time records and overtime records to
4 record their daily work hours, overtime hours, and reasons for
5 overtime. (Edwards Decl., ¶5; Rule 23 Motion, Exs. 7-8). However,
6 the time weekly time records and overtime records do not contain a
7 section for meal or rest periods. Thus, Plaintiffs contend that the
8 Department uniformly does not provide meal and rest breaks for its
9 officers. (Edwards Decl., ¶6).

10 Finally, Plaintiffs contend that while the Department requires
11 its officers to have clean and functioning uniform and safety
12 equipment, it does not reimburse or credit the officers for money and
13 time spent maintaining these items. (Edwards Decl., ¶8).

14 Plaintiffs' First Amended Complaint for Damages and Injunctive
15 Relief alleges causes of action for: (1) Violations of §7(a) of the
16 Fair Labor Standards Act, 29 U.S.C. §207(a) ("FLSA"); (2) Violation of
17 Labor Code §226.7; (3) Violation of Labor Code §512; and (4) Violation
18 of Labor Code §2802.

19 In the §216(b) Motion, Plaintiffs define the proposed §216(b)
20 class as follows:

21 [A]ll current and former police or peace officer
22 employees the rank of lieutenant and below of the
23 defendant represented by the Long Beach Police
24 Officers Association that worked at any time
between December 29, 2002 (three years preceding
the filing of the complaint), through the date of
judgment.

25 (§216(b) Motion, 2:10-14).

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1 With respect to the Rule 23 Motion, Plaintiffs define the
2 proposed Rule 23 class as follows:

3 [P]eace officers and police officers and others
4 with similar job duties, who worked and/or
5 continue to work for Defendant from December 29,
6 2002, up to and including the time that this
7 action is certified as a class action ("Class
8 Period") who:

9 (a) were unable to take and/or were denied a ten
10 minute rest period pursuant to [California] Labor
11 Code §§226.7 and 512;

12 (b) were unable to take and/or were denied a 30
13 minute uninterrupted meal period pursuant to
14 [California] Labor Code §§226.7 and 512;

15 (c) were not properly reimbursed for safety
16 equipment expenses pursuant to [California] Labor
17 Code §2802 and [8] California Code of Regulations
18 §11040, et seq.

19 (Rule 23 Motion, 4:17-28).

20 Plaintiffs filed both of the instant motions on July 24, 2006.
21 Defendant filed its oppositions to both motions on September 18, 2006,
22 and on December 4, 2006 Plaintiffs filed their replies.

23 II. ANALYSIS

24 A. Plaintiffs' §216(b) Motion is GRANTED.

25 The FLSA requires covered employers to compensate non-exempt
26 employees for time worked in excess of statutorily-defined maximum
27 hours. See 29 U.S.C. § 207(a). Section 16(b) of the FLSA provides
28 that an employee may bring a collective action on behalf of himself
and other "similarly situated" employees. 29 U.S.C. § 216(b). In a
§216(b) collective action, employees wishing to join the suit must
"opt-in" by filing a written consent with the court. Id. If an
employee does not file a written consent, then that employee is not
bound by the outcome of the collective action. Leuthold v.
Destination America, Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004). The

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1 court may authorize the named §216(b) plaintiffs to send notice to all
2 potential plaintiffs, and may set a deadline for those plaintiffs
3 "opt-in" to the suit. Id.; see also Pfohl v. Farmers Ins. Group,
4 2004 WL 554834 at *2 (C.D. Cal. 2004).

5 It is within the discretion of the district court to determine
6 whether a certification of a §216(b) collective action is appropriate.
7 Leuthold, 224 F.R.D. at 466. Although the FLSA does not require
8 certification for collective actions, certification in a § 216(b)
9 collective action is an effective case management tool, allowing the
10 court to control the notice procedure, the definition of the class,
11 the cut-off date for opting-in, and the orderly joinder of the
12 parties. See Hoffmann-La Roche Inc., v. Sperling, 493 U.S. 165, 170-
13 72 (1989). Here, the Court follows the majority approach and applies
14 a two-step approach for determining whether certification of a §216(b)
15 collective action is appropriate. See Leuthold, 224 F.R.D. at 466.

16 Under the two-step approach, the first step is for the court to
17 decide, "based primarily on the pleadings and any affidavits submitted
18 by the parties, whether the potential class should be given notice of
19 the action." Id. at 467; see also Pfohl, 2004 WL 554834 at *2. Given
20 the limited amount of evidence generally available to the court at
21 this stage in the proceedings, this determination is usually made
22 "under a fairly lenient standard and typically results in conditional
23 class certification. Id. It is the plaintiffs' burden to show that
24 "the proposed lead plaintiffs and the proposed collective action group
25 are 'similarly situated' for purposes of §216(b)." Leuthold, 224
26 F.R.D. at 466. "Plaintiff need not show that his position is or was
27 identical to the putative class members' positions; a class may be
28 certified under the FLSA if the named plaintiff can show that his

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1 position was or is similar to those of the absent class members.
2 However, unsupported assertions of widespread violations are not
3 sufficient to meet Plaintiff's burden." Freeman v. Wal-Mart Stores,
4 Inc., 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003) (internal citations
5 omitted); see also Bernard v. Household Intern., Inc., 231 F. Supp. 2d
6 433, 435 (E.D. Va. 2002) ("Mere allegations will not suffice; some
7 factual evidence is necessary.").¹

8 Here, applying the lenient standard used in the first step of the
9 analysis, the Court finds that conditional certification of a §216(b)
10 collective action is appropriate. Plaintiffs' complaint, affidavits
11 and supporting exhibits assert that Plaintiff Edwards routinely works
12 unpaid overtime in violation of the FLSA, and that Plaintiff Edwards's
13 experiences are shared by the members of the proposed §215(b)
14 collective action. In its opposition, Defendant focuses on
15 differences in job duties between Plaintiff Edwards and other
16 potential class members. Specifically, Defendant focuses on the
17 differences between the job duties of Plaintiff Edwards and A.G. Megas
18 (note that A.G. Megas is a potential member of the §216(b) collective
19

20
21 ¹ The second step occurs once discovery is complete and the
22 case is ready for trial. At that time, the party opposing
23 §216(b) collective action treatment may move to decertify the
24 class. Leuthold, 224 F.R.D. at 466 (citing Kane v. Gage
25 Merchandising Svcs., Inc., 138 F. Supp. 2d 212, 214 (D. Mass.
26 2001). Whether to decertify is a factual determination, made by
27 the court, based on the following factors: "(1) the disparate
28 factual and employment settings of the individual plaintiffs; (2)
the various defenses available to the defendants with respect to
the individual plaintiffs; and (3) fairness and procedural
considerations. Id. (citing Pfohl, 2004 WL 554834 at **2-3). If
after examining the factual record, the court determines that the
plaintiffs are not similarly situated, then the court may
decertify the collective action and dismiss the opt-in plaintiffs
without prejudice. Id. (citing Kane, 138 F. Supp. 2d at 214).

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1 action, not a named class representative). Defendant presents
2 detailed analysis of the differences in the two officers' positions
3 and duties, as well as a detailed discussion of the differences in
4 their potential claims. However, the Court finds that Defendant's
5 arguments are better suited for the more stringent second step of the
6 §216(b) collective action certification analysis - i.e., Defendant's
7 arguments are better suited for motion to decertify the §216(b)
8 collective action filed once notice has been given and the deadline to
9 opt-in has passed.

10 Thus, the Court finds that Plaintiffs have provided enough
11 support to meet the threshold showing that the potential members of
12 the §216(b) collective action are "similarly situated", and that the
13 collective action should be certified for purposes of notifying
14 potential class members of the pendency of the suit. Accordingly, the
15 Court GRANTS Plaintiffs' §216(b) Motion, and conditionally certifies
16 the proposed §216(b) collective action for purposes of notifying
17 proposed class members of the pendency of the suit.

18 **B. Plaintiffs' Rule 23 Motion is DENIED.**

19 All motions for class certification under Rule 23 must meet the
20 prerequisites of Rule 23(a).² Additionally, a plaintiff must fulfill
21 the requirements for at least one of the three types of class actions
22 enumerated in Rule 23(b). The burden of satisfying the Rule 23
23 requirements is on the party seeking certification. See Doninger v.
24

25 ² Rule 23(a) provides that a class action may be maintained
26 if (1) the class is so numerous that joinder of all members is
27 impracticable; (2) there are questions of law or fact common to
28 the class; (3) the claims or defenses of the representative
parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect
the interests of the class.

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1 Pacific Northwest Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977).
2 However, a plaintiff need not make a prima facie showing that he will
3 prevail on the merits for class certification to be granted. See
4 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("nothing in
5 either the language or the history of Rule 23 . . . gives a court any
6 authority to conduct a preliminary inquiry into the merits of a suit
7 in order to determine whether it may be maintained as a class
8 action"). The court is bound to take the substantive allegations in
9 the complaint as true. See Blackie v. Barrack, 524 F.2d 891, 901 n.
10 17 (9th Cir. 1975).

11 In their Rule 23 Motion, Plaintiffs argue that they satisfy the
12 requirements of Rule 23(a), as well as the requirements of Rule
13 23(b)(3). With respect to Rule 23(b)(3), Plaintiffs argue that the
14 requirements are satisfied because common questions of law or fact
15 predominate over any questions affecting only individual members, and
16 that a class action is superior to other available methods for the
17 fair and efficient adjudication of the controversy. Defendant
18 opposes, arguing that (1) the proposed class is smaller than alleged
19 by Plaintiffs, making joinder practicable; (2) the requirements of
20 commonality and typicality are not met due to differences in job
21 duties between class members; (3) a class action would not
22 substantially benefit the absent class members; and (4) viable
23 alternatives to class action litigation exist.

24 The Court agrees with Defendant's contention that Plaintiffs have
25 not satisfied the requirements of Rule 23(b)(3).³ Under Rule

26
27 ³ Given that the Court finds that Plaintiffs have not
28 satisfied the requirements of Fed. R. Civ. P. 23(b)(3), it is not
necessary to address each of the Fed. R. Civ. P. 23(a)
requirements.

1 23(b)(3), a plaintiff must show that "the questions of law or fact
2 common to the members of the class predominate over any questions
3 affecting only individual members, and . . . a class action is
4 superior to other available methods for the fair and efficient
5 adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Here,
6 the Court finds that certifying a Rule 23 class action is not the
7 superior means of adjudicating Plaintiffs' claims.

8 "Under Rule 23(b)(3), the court must evaluate whether a class
9 action is superior by examining four factors: (1) the interest of each
10 class member in individually controlling the prosecution or defense of
11 separate actions; (2) the extent and nature of any litigation
12 concerning the controversy already commenced by or against the class;
13 (3) the desirability of concentrating the litigation of the claims in
14 a particular forum; and (4) the difficulties likely to be encountered
15 in the management of a class action." Leuthold, 224 F.R.D. at 469.
16 Accordingly, the Court must compare the merits of proceeding as a
17 class action under Rule 23, against alternative methods of resolving
18 the dispute. See e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023
19 (9th Cir. 1998).

20 The Court here agrees with the reasoning of the Court in
21 Leuthold. In Leuthold, as in this case, the plaintiffs moved to
22 certify both a §216(b) collective action and a Rule 23 class action.
23 The Leuthold court determined that since the plaintiffs had the option
24 of bringing their pendent state law claims as part of the §216(b)
25 collective action, "[t]his alternative undercuts all of the Rule
26 23(b)(3) superiority factors." Leuthold, 224 F.R.D. at 469. In
27 reaching this conclusion, the Leuthold court discussed two main
28 rationales - both of which the Court finds applicable here.

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1 First, a §216(b) collective action "allows individuals to control
2 their participation in [the] litigation in a far more expeditious
3 fashion than does a Rule 23 class action." Id. In a §216(b)
4 collective action, the class members must affirmatively opt-in. In a
5 Rule 23 class action, on the other hand, class members must take the
6 affirmative action of opting-out in order to avoid being bound by the
7 judgment. If both a §216(b) collective action and a Rule 23 class
8 action were allowed to proceed, confusion would result from requiring
9 potential plaintiffs to both opt-in and opt-out of the claims in the
10 suit. See id.; see also McClain v. Leona's Pizzeria, Inc., 222 F.R.D.
11 574, 577 (N.D. Ill. 2004).⁴

12 Second, Plaintiffs' Rule 23 class is based solely on state law
13 claims, and thus raises jurisdictional concerns. But for the FLSA
14 claims, Plaintiffs would not have jurisdiction in this Court. See 28
15 U.S.C. §1367(a). Thus, if "only a few plaintiffs opt-in to the FLSA
16 class after the court were to certify a Rule 23 state law class, the
17 court might be faced with the somewhat peculiar situation of a large
18 number of plaintiffs in the state law class who have chosen not to
19 prosecute their federal claims." Leuthold, 224 F.R.D. at 470. This
20 raises issues concerning the propriety of the Court's exercise of
21 supplemental jurisdiction over the state law claims - i.e., that the
22

23 ⁴ Plaintiffs argue that Leuthold does not apply because in
24 Lauthold there was evidence of "substantial hostility against
25 [the] lawsuit among potential class members", and there is no
26 evidence of any such hostility here. Leuthold, 224 F.R.D. at
27 470. While the Court notes that this factual distinction appears
28 to be correct, the hostility of potential class members was but
one of the factors considered by the court in Leuthold. Even
though there is no evidence of similar hostility here, the Court
finds that the approach taken by the Leuthold court applies
equally here.

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1 state law claims would substantially predominate over the federal
2 claims. See 28 U.S.C. §1367(a). In other words, there would exist
3 "the rather incongruous situation of an FLSA 'class' including only a
4 tiny number of employees with a state-law class that
5 nonetheless includes all or nearly all of the [department's] current
6 or former employees. . . . [t]o do so would effectively allow a
7 federal tail to wag what is in substance a state dog." McClain, 222
8 F.R.D. at 577 (citing De Asencio v. Tyson Foods, Inc., 342 F.3d 301,
9 310 (3d Cir. 2003)); see also Hasken v. City of Louisville, 213 F.R.D.
10 280, 283-84 (W.D. Ky. 2003). "[W]hile Section 1367(a) allows parties
11 to join their state claims to federal claims where appropriate, it
12 does not contemplate a plaintiff using supplemental jurisdiction as a
13 rake to drag as many members as possible into what would otherwise be
14 a federal collective action." Id.

15 In addition to raising potential jurisdictional issues, allowing
16 both a §216(b) collective action and a Rule 23 class action to proceed
17 would frustrate the purpose of requiring plaintiffs to affirmatively
18 opt-in to §216(b) collective actions. "[T]he policy behind requiring
19 FLSA plaintiffs to opt-in to the class would largely 'be thwarted if a
20 plaintiff were permitted to back door the shoehorning in of unnamed
21 parties through the vehicle of calling upon similar state statutes
22 that lack such an opt-in requirement.'" Leuthold, 224 F.R.D. at 470
23 (citing Rodriguez v. The Texan, Inc., 2001 WL 1829490 at *2 (N.D. Ill.
24 2001) (allowing a plaintiff to certify an opt-out class in federal
25 court would undermine Congress's intent to limit claims of this type
26 to opt-in collective actions)).

27 As a result, the §216(b) collective action is a "more appropriate
28 vehicle to hear the state law claims of plaintiffs who are interested

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1 in pursuing such claims." Leuthold, 224 F.R.D. at 470. Accordingly,
2 the Court DENIES Plaintiffs' Rule 23 Motion. Plaintiffs who opt-in to
3 the §216(b) collective action may pursue any pendent state law claims
4 as part of the FLSA action.

5 **IV. CONCLUSION**

6 Based on the foregoing the Court hereby DENIES Plaintiffs' Rule
7 23 Motion, and GRANTS Plaintiffs' §216(b) Motion. The Court
8 conditionally certifies the proposed §216(b) collective action for
9 purposes of notifying proposed class members of the pendency of the
10 suit. Plaintiffs submitted a proposed notice as an exhibit to their
11 §216(b) Motion. However, the Court believes that in light of the
12 above ruling, it is appropriate for the parties to submit new proposed
13 notice(s) for the §216(b) class. The Court ORDERS the parties to meet
14 and confer and attempt to agree upon a joint proposed notice. If the
15 parties are unable to reach an agreement, the parties may each submit
16 a proposed notice. The proposed notice(s) must be submitted within
17 ten (10) days of the date of this Order. In the event that the
18 parties do not submit a joint proposed notice, the parties should file
19 any objections to the proposed notices within twenty (20) days of the
20 date of this Order.

21 **IT IS SO ORDERED.**

22
23 DATED: Dec. 12, 2006

24 Audrey B. Collins
25 **AUDREY B. COLLINS**
26 **UNITED STATES DISTRICT JUDGE**