

Costa, et al. v. Vitas Healthcare Corporation
of California
BC 313552

Tentative decision on motion for final approval of class settlement, attorney's fees, and representatives' enhancements: granted

Plaintiffs move for final approval of class settlement, an award of attorney's fees and for an incentive award to the class representatives. The court has read and considered the moving papers (no opposition or reply was filed), and renders the following tentative decision.

A. Statement of the Case

Plaintiffs commenced this lawsuit on April 8, 2004, alleging claims for failure to pay overtime, failure to provide meal breaks and rest periods, and violation of B&P section 17200. Plaintiffs are current and former nurses, home health aides, and social workers employed since April 8, 2000, who claim that they were not paid for overtime or provided meal and rest periods as mandated by state law.

B. Approval of Settlement

1. Applicable Law

To prevent fraud, collusion, or unfairness to the class, the trial court must determine whether a class action settlement is fair, adequate and reasonable. Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1800-01. In making this decision, the court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. Id. at 1801. The list of factors is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties. The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Id. Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.' "Id. The trial court has broad discretion in making this decision. Rebney v. Wells Fargo Bank (1990) 220 Cal.App.3d 1117, 1138.

The burden is on the proponents of the settlement to show that it is fair and reasonable. A presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. Wershba v. Apple Computer, Inc., (2001) 91 Cal.App.4th 224, 245. See Newberg & Conte, Newberg on Class Actions (3d ed. 1992) §11.41, 11-91.

2. The Proposed Settlement

Defendant Vitas Healthcare Corporation of California J("Vitas") is the operating entity of Vitas Innovative Hospice Care ("VICH"), which is based in Florida, and provides home hospice care in California. Defendant Vitas distributes patient-related job duties among teams comprised

of team members including nurses, home health aides, and social workers. These workers are paid hourly, and are scheduled to work an 8:00 a.m. to 5:00 p.m. shift.

Defendant's policy requires that team members who seek to report more than 14 minutes of overtime must obtain pre-approval before doing so. However, team members often are unable to obtain the required approval beforehand and are forced to work overtime without pre-approval. Team members are not paid for the time it takes them to drive from home to their first appointment in the mornings, or back home from their last appointment in the evening. During weekly team meetings, management discourages team members from reporting worked overtime. Team members can only perform certain administrative activities after their shifts, such as inputting data. Nevertheless, despite knowing that team members are performing these administrative tasks after their shifts, Defendant has a policy not to pay team members for this overtime unless the team members actually report it.

Team members are expected to meet certain "productivity standards," which is directly tied to pay raises, promotions and job security. Productivity is measured by the average number of patients an employee visits per week, the amount of time spent with each patient, and the type of activity that the employee engages in with each patient. In order to achieve the expected productivity scores, team members are under pressure to maximize the number of patients visited and to minimize reporting time spent on administrative tasks.

Defendant Vistas has set a specific code for team members to enter in to the "VRU system" (a timekeeping program) in order to keep track of meal periods taken, indicating when the break was taken. To access the VRU system, team members must place a telephone call from their home phones, and use the telephone's keypad to dial in the corresponding activity code for every activity performed and patient visited throughout the day. Plaintiffs allege that team members spend about 30 minutes per weekday on the VRU requirement, for which they are not compensated.

When members fail to report their breaks, Defendant interprets this fact to mean that the team member did not take a break. Defendant's records show that from April 8, 2000 through February 5, 2005, team members took only approximately 18% of their breaks. Prior to the filing of the lawsuit, Defendant did not track when employees took rest breaks.

The parties estimate that the entire settlement class is comprised of approximately 2,500 individuals. The parties' proposed settlement defines two sub-classes: the Overtime Sub-Class and the Meal Period Sub-Class. The Overtime Sub-Class consists of all persons who were employed by Defendant as Nurses, Social Workers, or Home Health Aides in California at any time from April 8, 2000 to the date of preliminary approval, and who worked more than eight hours in any given workday and/or over 40 hours in any given workweek without being paid compensation for all overtime hours worked. The Meal Period Sub-Class consists of all persons who were employed by Defendant as Nurses, Social Workers, or Home Health Aides in California at any time from April 8, 2000 to the date of preliminary approval, and who worked one or more five-hour increments of time and did not report a meal period in the VRU system for each such increment.

The proposed settlement will provide a common fund of \$15,000,000, and does not include any awarded attorney's fees, costs, class representatives' enhancements, and claims administration fees (all of which may not exceed \$4 million and will be paid by Vitas from

moneys separate and apart from the settlement fund). Half of the fund will be allocated to the Overtime Class, and the other half to the Meal Break class. All of the settlement will be paid out to class members who do not opt out of the settlement, so long as no more than 5% do so. In exchange, there will be a mutual release of all claims and a Civil Code section 1542 waiver.

a. Settlement Reached Through Arm's Length Bargaining

After conducting discovery, the parties engaged in settlement discussions with the assistance of Hon. John F. Trotter (Ret.) of JAMS, who oversaw three separate mediation sessions. He also communicated with counsel for the parties throughout the settlement process. This factor weighs in favor of a presumption of fairness.

b. Sufficient investigation and discovery

The parties engaged in substantial discovery before entering into the settlement. Prior the filing the lawsuit, Plaintiff's counsel conducted extensive investigations as to the validity and extent of the claims. This included witness interviews of both current and former employees, as well as an inquiry with the California Labor Commissioner as to the existence of any previous claims of this nature against Defendants.

During litigation, the parties engaged in extensive written discovery including eight sets of special interrogatories by Plaintiff; four sets of requests for admission; four sets of form interrogatories; and one sets of requests for production.

The parties also noticed and took numerous depositions. Each of the named Plaintiffs was deposed. Plaintiffs' counsel also deposed numerous employees of Defendant. Plaintiffs took the depositions of Defendant's PMKs as to the payment and policies related to overtime, meal breaks, rest breaks, and the VRU, voicemail systems, and computer and technological structure.

Plaintiffs also obtained telephone records relating to calls placed to Defendant's toll-free number used for its voicemail and VRU systems, in order to determine what time of day the class members placed their telephone calls to accomplish various tasks. Plaintiff reviewed a survey of Defendant's employees regarding employee satisfaction, to see if there were any common complaints throughout the organization that were pertinent to the claims alleged.

Plaintiffs retained the services of forensic accountants to analyze payroll information and other records for the purposes of calculating damages.

Clearly, the investigation was sufficient to enable both the parties and the court to evaluate the strength and weaknesses of the case. This factor weighs in favor of a presumption of fairness.

c. Experience of counsel

The declaration of Plaintiffs' counsel indicate that they are experienced in class action litigation similar to the instant matter. Accordingly, this factor militates in favor of a presumption of fairness.

d. Small percentage of objectors

The Claims Administrator mailed 2,780 class settlement notices to class members. A

total of 17 requests for exclusion were received (20 initially, with 3 withdrawn). Class counsel received one objection to the settlement. The court has received an objection to the settlement from Barbara Weitzberg (unknown whether it is the same received by counsel), who contends that Defendant did nothing wrong. The court has received another letter from Keith Knoche, an employee of Defendant as a Chaplain, who contends that he should be included in the class. (The court will provide these letters to counsel at hearing.)

This is a small number of objections and militates in favor of a presumption of fairness.

3. Conclusion

In evaluating a class action settlement, the court has broad powers to determine whether the proposed settlement is fair and reasonable under the circumstances of the case. Wershba v. Apple Computer, Inc., (2001) 91 Cal.App.4th 224, 234-235; Mallick v. Superior Court, (1979) 89 Cal.App.3d 434, 438.

As a result of the above factors, there is a presumption that the settlement is fair and reasonable.

The additional relevant criteria also support approval. Although Plaintiffs obviously believe that their claims are meritorious, there is no guarantee of success when claims are subject to adjudication in a jury trial. Although Defendant denies any wrongdoing, it desires to settle this action to avoid further expense and continue its business endeavors. Defendant continues to deny liability, and contends that Plaintiffs were paid for all hours worked, and took all meal and rest periods. Defendant would call as witnesses past and present employees who will testify that they did not work overtime and took all meal and rest breaks to which they were entitled.

The settlement has substantial value, when compared to the maximum potential value of Plaintiff's claims. Assuming Plaintiffs could establish that each and every class member worked 30 minutes of unpaid overtime every single day, the maximum amount they could have recovered would be around \$14.4 million; the proposed settlement represents better than 50% of Plaintiffs' maximum possible recovery; in all likelihood, not every single class member worked 30 minutes of unpaid overtime every single day. With respect to meal periods, the maximum Plaintiffs could have recovered (again assuming that every single class member could prove that he or she was denied a meal period every single day), the maximum value of the claim would be around \$10.5 million. Here, the recovery represents approximately 71% of the potential value of the claims. Some class members will receive a gross amount exceeding \$60,000 as a result of the settlement. This is a very favorable settlement.

The motion for final approval of the class settlement and entering final judgment for all members of the settlement class is granted.

C. Attorney's Fees and Costs

Plaintiffs' class counsel move jointly for an award of \$3,750,000 in attorney's fees, plus costs in the sum of \$62,574.28.

1. Calculation of the Attorney's Fees

Calculation of the amount of attorney's fees to be awarded starts with a calculation of the attorney's services in terms of the time he has expended on the case. See Serrano v. Priest,

(1977) 20 Cal. 3d 25, 34 ("Serrano III"). To perform this task, California state courts typically employ the lodestar approach in ascertaining the reasonableness of the fees requested in a class action. Some courts also have, in effect, adopted the federal practice of "cross-checking" the lodestar against the percentage value of class recovery. This approach does not violate the mandates of Serrano III because the award is still anchored in the time spent by counsel on the case. Lealao v. Beneficial California, Inc., (2000) 82 Cal.App.4th 19, 45.

No specific findings reflecting a court's calculations of attorney's fees is required. See Rebney v. Wells Fargo Bank, (1991) 232 Cal.App.3d 1344, 1349. "California case law permits fee awards in the absence of detailed time sheets. An experienced trial judge is in a position to assess the value of the professional services rendered in his or her court." Wershba v. Apple Computer, Inc., (2001) 91 Cal.App.4th 224, 255.

a. Lodestar method

The lodestar method requires the trial court first to determine a touchstone or lodestar figure based on a careful compilation of the time spent and reasonable hourly compensation for each attorney. That touchstone figure may then be augmented or diminished by taking various relevant factors into account, including (1) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee award, based on the uncertainty of prevailing on the merits and of establishing eligibility for the award. Ramos v. Countrywide Home Loans, Inc. (2000) 82 Cal.App.4th 615 (citing cases). This approach is meant to increase objectivity and predictability in fee awards. Such a multiplier or enhancement may be used where the court finds the lodestar figure does not provide sufficient compensation. Id.

Class counsel's lodestar figure is \$1,004,825 in fees, but counsel seeks a multiplier of 3.7. A multiplier in some amount is appropriate in this case, inasmuch as counsel has achieved a very favorable settlement for the class without the need for trial - one which will result in a payment to all class members who do not opt out. The litigation was time consuming for Plaintiffs' counsel, who is entitled to some reward for devoting substantial time and resources to this matter, to the exclusion of other business.

On the other hand, the requested multiplier of 3.7 is very high and would be inappropriate for most wage and overtime cases, which are not complex and have a relatively high probability of success. In this particular case, however, the attorney's fees will be paid by Defendant from a separate fund, and class members are not directly affected by the amount of the award.

b. Percentage Method

For purposes of checking the lodestar amount, the percentage recovery is 25% (\$3,750,000/\$15,000,000). The issue is whether this percentage is reasonable. Estate of Stauffer (1959) 53 Cal. 2d 124, 131.

There is case authority upholding attorney's fee awards of 35-50% of the settlement recovery. In re Warner Communications Secs. Litigation 618 F. Supp. 735, 749-50 (S.D.N.Y. 1985). Generally, however, the cases awarding attorney's fees in the 20%-50% range are distinguishable in that they were complex class actions. This case has never been deemed

complex.

Nonetheless, the court is satisfied as a cross-check that the requested fees are reasonable. The 25% recovery does not come from the settlement funds. The amount was agreed to by Defendant agreed to pay this amount from separate funds. The amount is large, but compares favorably to the fee agreement between Plaintiffs and counsel, which calls for a contingency fee of 1/3. This case would not have been brought or effectively pursued absent the diligent efforts of Plaintiffs' counsel.

The motion for an award of attorney's fees is granted. Plaintiffs are awarded the sum of \$3,750,000 in reasonable attorney's fees. Defendant will pay the fees from a separate fund from the settlement in accordance with the terms of the settlement agreement.

2. Costs

Plaintiffs seek costs in the sum of \$62,574.28. These costs will be paid by Defendant out of a separate fund. The request for costs is approved, which shall be paid by Defendant from a separate fund.

3. Award to Class Representatives

Plaintiffs also seek incentive awards for class representatives Ann Marie Cost (\$25,000), Deborah Gill (\$10,000), Anna Jimenez (\$10,000) and Gracetta Wilson (\$10,000).

It may be appropriate in a class action to provide a payment to the named plaintiffs for their services to the class. *See Van Vranken v. Atlantic Richfield Co.*, (N.D. Cal. 1995), 901 F.Supp.294, 299. The class representatives devoted significant amounts of their personal time to prosecuting this matter and assisting counsel. They submitted to depositions and assisted in responding to numerous requests for written discovery. They also assisted in preparing declarations and interviews. Ms. Costa also helped gather documents and sought counsel to prosecute this matter in the first place.

All of these efforts entitle the class representatives to awards in addition to their share of the settlement award. The motion for incentive awards to class representatives is granted. These awards shall be paid by Defendant from a separate fund.

D. Conclusion

The court has approved the settlement and entered judgment. The court has also awarded class counsel attorney's fees and costs, and awarded Plaintiffs an incentive award. The court anticipates that the claims will now be administered and counsel will file a final claims administration report setting forth information on the final payment of claims. The case is ordered taken off the civil active list.