COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
Civil No. 22-450-BLS1

DARRIN DUTY[1]
Plaintiff

vs.

THIELSCH ENGINEERING, INC. d/b/a RISE ENGINEERING, & another[2]
Defendants

MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND CLASS CERTIFICATION

Darrin Duty, a former employee of Thielsch Engineering, Inc. d/b/a RISE Engineering ("RISE"), brings this class action to recover unpaid overtime, which he contends RISE unlawfully failed to pay to him and to any other similarly situated Residential Energy Specialist ("Specialist") that RISE employed. The case is before me on RISE's motion for summary judgment. RISE argues that plaintiff (and the others similarly situated Specialist) are exempt from overtime under the "outside salesman" exception in G.L. c. 151, § 1A. The case is also before me on plaintiff's motion for class certification. For the following reasons, material disputes of facts compel me to deny the motion for summary judgment, but I certify the class.

BACKGROUND

The summary judgment record reflects the following:

Plaintiff was hired at RISE as a Residential Energy Technician in 2011 and promoted to a Specialist in 2012. Plaintiff served as a Specialist for more than nine years, until July 13, 2021.

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[1] On behalf of himself and all other employees similarly situated.

[2] Brian Kearney.

As a Specialist, plaintiff was responsible for going out to customers' homes and completing energy audits at customers' homes. Although a home energy audit was part of every initial visit a Specialist made to a customer's home, only if appropriate would a Specialist try to sell the homeowner further engineering services to save them further costs on their energy bill.[3] Plaintiff received a salary, plus sales-based incentive compensation, and was reviewed, in part, based on his success in sales. Specialists did not have to go into RISE's field office to perform their job duties.

DISCUSSION

I. Summary Judgment

There are genuine issues of material disputes of fact precluding summary judgment, see Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991), regarding the question of whether Duty is an "outside salesman" within the meaning of G.L. c. 151, § 1A.

It bears discussing the overtime statute briefly. Section 1A states, in relevant part:

> [N]o employer in the commonwealth shall employ any of his employees in an occupation, as defined in section two, for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of forty hours at a rate not less than one and one half times the regular rate at which he is employed.

G.L. c. 151, § 1A, para. 1 (emphasis added). Section 1A expressly excludes from the overtime provision "any employee who is employed . . . (4) as an outside salesman," G.L. c. 151, § 1A, para. 2 (emphasis added), but does not define the phrase "outside salesman." There is little caselaw in Massachusetts construing the phrase.

[3] The job description for Specialists includes conducting "energy audits" and "in-home energy tests," "install[ing] instant-savings measures," and "prepar[ing] on-site assessment reports," as well as "[s]ecur[ing] homeowner approval of proposed work and coordinat[ing] available benefits, costs and savings."

Notably, however, G.L. c. 151, § 2, defines the term "occupation" and that definition is expressly incorporated into § 1A. See G.L. c. 151, § 1A, para. 1. Section 2 defines "occupation," in relevant part, as "any [ ] class of work in which persons are gainfully employed, but shall not include . . . outside sales work regularly performed by outside salesmen who regularly sell a product or products away from their employer's place of business and who do not make daily reports or visits to the office or plant of their employer."

It is an open question whether the phrase "outside salesman" in G.L. c. 151, § 1A, para. 2, only applies to "outside salesmen [1] who regularly sell a product or products away from their employer's place of business and [2] who do not make daily reports or visits to the office or plant of their employer," as limited in § 2, or if the phrase "outside salesman" is broader. Judge Salinger has concluded that the limits on the definition of "outside salesmen" in § 2 do not apply in the context of the overtime statute. Jinks v. Credico (USA), LLC, 2020 WL 1989278 at ** 9-10 (Mass. Super. Mar. 31, 2020).[4] While there are arguments against Judge Salinger's construction,[5] I need not resolve the issue on this motion.

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[4] This aspect of Judge Salinger's ruling was not presented on appeal. See Jinks v. Credico (USA) LLC, 488 Mass. 691, 695 n.8 (2021).

[5] Under the first sentence of § 1A, para. 1, the predicate for the obligation to pay overtime for more than 40 hours of work in a week is that the "employer" employs the "employee[ ] in an occupation, as defined in section two." The express inclusion of the definition of "occupation" from § 2 arguably imports into § 1A the limits of the definition of "occupation" contained in para. 2, including for outside salesmen that the person "regularly sell[s] a product or products away from their employer's place of business" and does "not make daily reports or visits to the office or plant of their employer." In other words, if an outside salesman does not regularly sell a product "away from their employer's place of business" or makes "daily reports or visits to" the employer's office, then the outside salesman is not engaged in an "occupation" that triggers an obligation to pay overtime under § 1A. But cf. Jinks, 2020 WL 1989278 at * 9 (§ 1A, para. 2, exception (4) does not "incorporate by reference the materially different language found in the § 2 outside sales exception"). In addition, the repetition of phrases and professions excluded from the definition of "occupation" and excluded from the reach of § 1A are overlapping in other regards. Compare, e.g., G.L. c. 151, § 1A, para. 2 (overtime statute "shall

In this instance, the question is not whether Specialists regularly report to or visit RISE's office, but whether Specialists are, in fact, outside sales personnel; that is, whether their primary duty is making sales or obtaining orders or contracts for services. See Youssefi v. Direct Energy Business, LLC, 2020 WL 2193677 at ** 1-2 (Mass. Super. Feb. 28, 2020) (applying Fair Labor Standards Act's definition of "outside salesman"). In contrast to Jinks, where it was "undisputed that Plaintiffs worked . . . as outside sales people," 2020 WL 1989278 at * 9, here there are material disputes of fact about whether Specialists are primarily sales personnel or if they primarily perform other functions. The disputes are sufficient to preclude entry of summary judgment. See, e.g., Marzuq v. Cadete Enterprises, Inc., 807 F.3d 431, 439-447 (1st Cir. 2015).

II. Class Certification

A class action is appropriate "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to 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." Mass. R. Civ. P. 23(a). If the requirements of Rule 23(a) are met, the class may be certified if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23(b). Weld v. Glaxo Wellcome, Inc., 434 Mass. 81, 86 (2001). See also Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 362-372 (2008).

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not be applicable to any employee who is employed . . . "as a . . . professional person . . . earning more than eighty dollars per week," or "as a laborer engaged in agriculture and farming on a farm"); and G.L. c. 151, § 2 ("occupation" does "not include professional service, agricultural and farm work").

Class treatment of employee work classifications is particularly well-suited for class certification, where all workers in a particular group are treated by the employer in the same way, as is the case here. Indeed, Massachusetts law expressly authorizes overtime claims and Wage Act claims to be brought as class claims on behalf of all employees similarly situated. Specifically, G.L. c. 151, § 1B, provides:

> [I]f a person is paid by an employer less than such overtime rate of compensation, the person may institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for the full amount of the overtime rate of compensation less any amount actually paid to him by the employer.

In construing similar language in the Wage Act, G.L. c. 149, § 150, the Supreme Judicial Court held that such language "provides for a substantive right to bring a class proceeding." Machado v. System4 LLC, 465 Mass. 508, 514 (2013).

Here, plaintiff has shouldered his burden to demonstrate that this case meets the requirements for class certification of all individuals who worked as a Specialist for RISE in Massachusetts since June 1, 2018, and who were not paid overtime for work over 40 hours. As to numerosity, there are more than 60 known individuals who would populate the class. Given the numbers, joinder of all members would be impractical, particularly in light of the reticence of employees to join a suit against their employer and the statutory right to proceed with such litigation on a class-wide basis. See, e.g., Gammella v. P.F. Chang's China Bistro, Inc., 482 Mass. 1, 10-11 (2019) ("rule 23 has the necessary structure and adaptability to advance the 'very legitimate policy rationales underlying the Legislature's decision to provide for class proceedings under the Wage Act," in particular the need to deter violations of the law and allow certain

plaintiffs to come forward on behalf of others in the class who may fear retaliation") (emphasis added), quoting Machado, 465 Mass. at 515.

As to commonality and predominance, the common question of liability predominates in this case – whether RISE's practice of exempting Specialists from overtime is lawful, i.e. whether RISE Specialists are "outside salesm[e]n" under G.L. c. 151, § 1A, para. 2. This question does not turn on the individual behavior of individual Specialists, but on the job description, job functions, and general day-to-day duties of the Specialists as a group. That there will be different calculations of overtime for each Specialist based on duration of service, hours worked, and consideration of work during the lunch hour, etc., is simply a matter of mathematics. The common legal question of classification justifies class treatment, and a class action is a superior method of adjudicating these claims. The parties seem to agree, as to typicality, the considerations of commonality control. Plaintiff was a Specialist over an extended period. His claimed injury is typical in kind to those of other Specialists.

As to the adequacy of representation, defendant does not challenge the adequacy of plaintiff's counsel, but argues that plaintiff is a flawed person to represent the class because he was terminated for cause after it was discovered that he had solicited RISE customers to contract electrical work with his father, and he was found to have done electrical work for RISE customers when he was not working for RISE. These arguments are not particularly persuasive. Even if plaintiff has some testimonial baggage, his termination from RISE does not create a conflict of interest between plaintiff and the plaintiff class. To the contrary, his interest is wholly aligned with the interests of the proposed class. Plaintiff's counsel is skilled. He will doubtlessly call witnesses besides plaintiff to testify to the work of a Specialist for RISE as it bears on the question of liability. In short, I find that class certification is appropriate in this case.

ORDER

Defendants' Motion for Summary Judgment (Docket #15) is **DENIED**.

Plaintiff's Motion for Class Certification (Docket #19) is **ALLOWED**. I certify the following plaintiff class:

> All individuals who worked as a Residential Energy Specialist for Thielsch Engineering, Inc. d/b/a RISE Engineering in Massachusetts since June 1, 2018, and who were not paid an overtime premium for hours worked over 40 in any work week.

Dated: May 2, 2024

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Peter B. Krupp
Justice of the Superior Court