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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EVERARDO CARRILLO; FERNANDO CHAVEZ; ERIC FLORES; JOSE MARTINEZ ARCEO; BALTAZAR ZAVALA; and JUAN CHAVEZ, for themselves and all others similarly situated and the general public,

Plaintiffs,

vs.

SCHNEIDER LOGISTICS, INC.; SCHNEIDER LOGISTICS TRANSLOADING AND DISTRIBUTION, INC.; PREMIER WAREHOUSING VENTURES, LLC; ROGERS-PREMIER UNLOADING SERVICES, LLC; IMPACT LOGISTICS, INC., WALMART STORES, INC., and DOES 1-15,

Defendants.

Case No.: CV 11-8557 CAS (DTBx)

WALMART STORES, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Assigned to the Honorable Christina A. Snyder, Courtroom 5

Date: April 8, 2013
Time: 10:00 a.m.
Judge: Hon. Christina A. Snyder
Place: Courtroom No. 5
312 North Spring Street
Los Angeles, CA 90012

Complaint filed: 10/17/2011
Further Sched. Conf: 3/11/13

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 8, 2013 at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 5 of the above-entitled Court, located at 312 North Spring Street, 2nd Floor, Los Angeles, California 90012-4701, Defendant Walmart Stores, Inc. will and hereby does move this Court for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ["FRCP"], dismissing the negligence claim from the Third Amended Complaint against Defendant Walmart, with prejudice.

This Motion is grounded on Plaintiffs' failure to properly plead a negligence claim under FRCP 12(b)(6).

This Motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the [Proposed] Order submitted herewith and the pleadings, files and records in this case and such further evidence and oral argument as may be presented by Defendant prior to or at the hearing on the Motion.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place telephonically beginning on or about January 16, 2013 and was followed up by an email dated February 7, 2013.

Dated: February 13, 2013

STEPTOE & JOHNSON LLP

By: /s/ Lawrence Allen Katz
LAWRENCE ALLEN KATZ
Attorney for Defendants
WALMART STORES, INC.

DEFENDANT WALMART STORES, INC.'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Plaintiffs' Third Amended Complaint ("TAC"), alleging wage and hour violations under the Fair Labor Standards Act ("FLSA"), the California Labor Code, and certain IWC Wage Orders, recently added Walmart Stores, Inc. ("Walmart") as a Defendant. The TAC includes a cause of action ("Fourteenth Claim for Relief") against Walmart for negligence, alleging failure to adequately monitor the efforts of its contractor, Schneider Logistics, Inc. ("Schneider"), to comply with wage and hour laws while managing Walmart's Mira Loma, California facilities. [TAC ¶¶ 233-37.] Because Plaintiffs' claim for negligence is preempted by the FLSA and fails to state a claim under FRCP 12(b)(6), it should be dismissed.

BACKGROUND

According to the TAC, Plaintiffs are warehouse workers who load and unload semi-trailer trucks at Walmart-leased facilities in Eastvale, California (also known as "Mira Loma"); the goods that move through these facilities are destined for Walmart stores and distribution centers. [TAC ¶¶ 1, 2.] Defendant Schneider began operating the Mira Loma facilities on behalf of Walmart in 2006. [TAC ¶ 3.] Defendant Impact Logistics, Inc. ("Impact") has been supplying employees to perform functions at the Mira Loma facilities since 2001. [TAC ¶ 3.] In 2009, Schneider also began contracting with Defendant Premier Warehousing Ventures, LLC ("Premier") to supply additional employees for these facilities. [TAC ¶ 3.] According to Plaintiffs, Premier and Impact failed to pay plaintiffs minimum wages and overtime and violated other provisions of the FLSA and the California Labor Code and Wage Orders. [TAC ¶¶ 38-39, 56-59, 134-218.] Plaintiffs further allege that Walmart is a joint employer, along with Schneider, Impact and Premier, and therefore equally responsible for the violations. [TAC ¶ 103.]

Additionally, Plaintiffs allege a cause of action against Walmart for negligent selection, retention, and supervision of Schneider as operator of the Mira Loma facilities. [TAC ¶¶ 111-17, 233-37.] Specifically, Plaintiffs claim that Walmart owed a duty to Plaintiffs "to exercise due care" in monitoring Schneider, and that Walmart "knew or should have known" that Schneider would violate state and federal wage and hour laws "given the history of employment law violations" at the Mira Loma facilities "dating back to at least 2001" and because "the terms of the Walmart-Schneider contract … created powerful incentives for Schneider and its labor services contractors to violate the labor and employment law rights of the plaintiff warehouse workers…." [TAC ¶¶ 234, 236.]

ARGUMENT

I. Plaintiff's Claim For Negligence Is Preempted By The FLSA

Plaintiffs' Fourteenth Claim for Relief (TAC ¶¶ 233-237), alleges that Walmart has been negligent in a duty supposedly owed to the Plaintiff class members to monitor Schneider's compliance with wage-hour laws. The Claim never mentions the FLSA, but the relief sought includes "lost wages," thus implicating that statute. Accordingly, the Claim is preempted.

In *Flores v. Albertson's, Inc.*, 2003 WL 24216269, at *5 (C.D. Cal. Dec. 9, 2003), this Court specifically found that allegations of "negligence per se, negligent training/supervision, and negligent hiring/retention" that were based on "permitting the wage and hour law violations . . . to continue" were specifically preempted by the FLSA. In *Flores*, workers who were employed by a janitorial service, brought wage and hour claims against the grocery stores that used the service. The court found that the workers' negligence claims "must fail," because they were "nothing more than additional legal theories to recover damages stemming from the alleged wage and hour claims." *Id. at *6.* The court concluded that, while several of Plaintiffs' claims for relief "may sound in

negligence, they are all based on violations of the state and federal wage and hour laws," for which the FLSA was the "exclusive remedy." *Id.* Likewise here, Plaintiffs' negligent hiring and supervision claim is based on, and wholly dependent upon, Defendants' alleged violation of "state and federal wage and hour laws," and is therefore preempted by the FLSA.

When Walmart raised a futility argument in opposition to Plaintiffs' Motion to Amend their Complaint in order to add the negligence claim against Walmart – with the Court ruling that the issue should be later submitted under FRCP 12(b)(6), as it is now -- Plaintiffs cited *Williamson v. General Dynamics*, 208 F.3d 1144 (9th Cir. 2000) [Reply Brief at 25]. Plaintiffs argued that *Williamson* undermined Walmart's reliance on *Flores* because the Ninth Circuit had supposedly rejected the district court's view that "the FLSA is the exclusive remedy for claims duplicated by or equivalent of rights covered by the FLSA." [*Id.*] Plaintiffs misunderstand *Williamson* – which was decided three years ***before*** Flores, and thus should not be read as a limitation on *Flores*. In *Williamson*, the issue before the court was whether a ***fraud claim – not, as here, a negligence claim --*** was pre-empted by the FLSA. *Id.* at 1152-53. The plaintiffs in that case had declined to join a class action suit for wage and hour violations after their employer promised them job security, despite the employer's secret plan to close its plant, costing plaintiffs their jobs. *Id.* at 1147. This promise was the basis of the plaintiffs' "career fraud" claim, which was ***unrelated to the wage and hour claims***. *Id.* at 1148. The court found that the "career fraud" claim was not covered by the FLSA and was not preempted by the anti-retaliation provision of the FLSA. *Id.* at 1152. As the court pointed out, the alleged fraud occurred ***after*** the wage and hour violations and would not have been actionable under the FLSA's anti-retaliation provisions. *Id.*

Despite Plaintiffs' argument in their earlier Reply Brief, the *Williamson* court did ***not*** actually reject the trial court's statement that the "FLSA is the

exclusive remedy for claims duplicated by or equivalent of rights covered by the FLSA." *Id.* at 1152-55. To the contrary, the Ninth Circuit in fact held that "claims that are directly covered by the FLSA (such as overtime and retaliation disputes) must be brought under the FLSA." *Id.* at 1154. Three years later, in *Flores*, the California Appeals Court agreed. *See* 2003 WL 24216269, at *5 (***rejecting*** the overbroad suggestion that *Williamson* stood for the proposition that the FLSA ***never*** preempts other causes of action). Here, Plaintiffs' negligence claim, unlike the "career fraud" claim in *Flores*, is directly related to their FLSA wage and hour claims – it encompasses the same conduct and it seeks the same relief. Therefore, it is preempted.

Finally, Walmart anticipates that Plaintiffs will argue against preemption, as they have before, based on the following three cases: *Takacs v. A.G. Edwards and Sons, Inc.*, 444 F. Supp. 2d 1100 (S.D. Cal. 2006); *Bahramipour v. Citigroup Global Markets, Inc.*, No. C 04-4440 CW, 2006 WL 449132 (N.D. Cal. Feb. 22, 2006); and *Barnett v. Washington Mutual Bank, FA*, No. C 03-00753 CRB, 2004 WL 2011462 (N.D. Cal. Sept. 9, 2004). [*See* Reply Brief in Support of Plaintiffs' Motion for Leave to File Third Amended Complaint, at 25.] However, none of these cases is relevant, because, in each case, the question before the court was not whether a ***negligence*** claim was preempted by the FLSA (as Walmart now contends) but whether an ***unfair business practices*** claim, under the California Unfair Competition Law ("UCL"), Calif. Bus. & Prof. Code Sec. 17200, was preempted by the FLSA – an argument ***not*** being made by Walmart. *See Takacs*, 444 F. Supp. 2d at 1116; *Bahramipour*, 2006 WL 449132, at * 2; *Barnett*, 2004 WL 2011462, at *4. Each of these decisions recognized that the UCL provides ***additional*** protections for wage violations, and that the FLSA does not preempt California's own wage or overtime laws because the FLSA has a specific savings clause that allows states to enact more favorable wage, hour and labor legislation. *See also Williamson*, *supra* at 1150, citing 29 U.S.C. § 218(a). The savings

clause does not, however, protect Plaintiffs' negligence claim, because that claim does not extend the reach of the FLSA, but, instead, duplicates it.

II. Plaintiffs Have Not Stated A Negligence Claim Against Walmart.

Although FLSA preemption offers a clear basis to dismiss Plaintiffs' negligence claim against Walmart, the Court should also strike the Fourteenth Claim for Relief because it seeks to maintain a unique and baseless legal theory that Walmart's contract with Schneider was so demanding that violations of the wage-hour laws should have been anticipated and that Walmart was negligent for not being clairvoyant.

In negligent hiring/retention cases, the plaintiff must prove the employer "knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." *Phillips v. TLC Plumbing, Inc.*, 91 Cal. Rptr. 3d 864, 868 (Ct. App. 2009). "Liability for negligent supervision does not exist 'in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised." *Smith v. Puentes*, No. 1:08-cv-01792-LJO-SMC PC, 2009 WL 3300360, at *12 (E.D. Cal. Oct. 14, 2009); see also *Robinson v. HD Supply, Inc.*, No. 2:12-cv-00604-GEB-CKD, 2012 WL 5386293, at *8 (E.D. Cal. Nov. 1, 2012) (conclusory allegations that, because an employee is incompetent, employer is liable for negligent hiring or supervision, are not sufficient to withstand a motion to dismiss).

Plaintiffs allege that Walmart "knew or should have known" that Schneider would violate Plaintiffs' labor and employment rights because (a) Schneider's subcontractor, Impact, had been violating Plaintiffs' rights "dating back to at least 2001,"[1] (b) "the terms of the Walmart-Schneider contract … created powerful incentives for Schneider and its labor services contractors to violate"

[1] According to TAC ¶ 4, Impact began hiring workers for the Mira Loma facilities in 2001, and Premier began doing so in 2009.

Plaintiffs' rights, and (c) Walmart engaged in "close monitoring and control over the warehouse operations." [TAC ¶ 236.] These allegations are merely conclusions and arguments, not factual statements, and thus cannot sustain the negligence claim.

First, Plaintiffs have not alleged facts to show that Walmart had any actual knowledge of ***Impact's*** wage-hour violations "dating back to at least 2001," or Premier's similar violations after 2001 -- much less that Schneider was aware of them -- and that alone defeats their claim. There is no factual allegation in the TAC that would support the argument that Walmart "should have known" about Impact's violations beyond the allegation that they had been occurring since 2001. For example, there is no allegation that any employee or document brought such an issue to Walmart's attention. *See Robinson, supra* at *7 (holding that "an employer's duty [of care to employees] is breached only when the employer knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm….")

Second, the absence of a clear duty running from Walmart to Plaintiffs is fatal to their negligence claim, and that is a matter the Court can rule on without further ado, since the "existence and the scope of a duty of care in a given factual situation are issues of law for the court." *Walker v. Sonora Reg'l Med. Ctr.*, 135 Cal. Rptr. 3d 876, 883 (Ct. App. 2012). In determining whether a defendant has a duty to a third-party, the court looks at six factors: "[1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." *Quelimane Co. v. Stewart Title Guaranty Co.*, 960 P.2d 513, 532 (Cal. 1998).

In the present case, Plaintiffs have not alleged that Walmart's contract with Schneider was intended to affect them ***personally,*** or that harm to them as a result of that contract was at all ***foreseeable***. They are simply a class of people who were employed by Premier or Impact, which then contracted with Schneider. That is not enough to have created a duty of care running from Walmart to Plaintiffs. "The conduct alleged to have been negligent must have been intended to affect that particular plaintiff, rather than just a class of persons to whom the plaintiff happens to belong." *Desert Healthcare Dist. v. PacifiCare, FHP, Inc.*, 114 Cal. Rptr. 2d 623, 631 (Ct. App. 2001).

Plaintiffs have alleged that Walmart should have known that its demanding contract with Schneider would harm them, since Schneider was required to provide labor to Walmart's facilities, but that factor alone is insufficient to establish a duty, since "foreseeability of financial injury to third persons alone is not a basis for imposition of liability for negligent conduct." *Quelimane*, 960 P.2d. at 532. Plaintiffs have also failed to allege facts that would show the "closeness in connection" between Walmart's contract with Schneider and the Plaintiffs' alleged harm – which is especially true here because Plaintiffs were hired, not by Schneider, but by Schneider's own subcontractors, with no privity to Walmart. "Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." *Id*. Finally, Walmart incurred no "moral blame" -- warranting recognition of some public policy -- by merely negotiating a favorable services contract with Schneider.

Plaintiffs allege that the terms of Walmart's contract with Schneider created "powerful incentives" for Schneider not to comply with federal and state employment and labor laws, that Walmart "should have known "that Schneider would be driven to violate the law, and thus Walmart should be liable for Schneider's wrongdoing. Such a syllogism not only defies logic, it is based on an

unacceptable legal proposition – that a party who imposes demanding requirements on a contractor assumes liability when the contractor violates the law to satisfy the contract, even if the party was unaware of such misconduct. As alleged by Plaintiffs, Schneider is in the business of operating warehouses and providing warehouse services for Walmart and other customers. [TAC ¶¶ 19-20.] Walmart would have no reason to know – and none is alleged -- that an experienced warehouse operator like Schneider would violate wage and hour laws to satisfy contractual requirements.

Significantly, Plaintiffs fail to allege that the terms of the contract ***required*** Schneider to violate wage and hour laws or that it would have been impossible for Schneider to perform the contract ***without*** violating such laws. Plaintiffs have also failed to allege a single term of the contract that created the supposed "powerful incentives" for Schneider to violate wage and hour laws. Plaintiffs do generally allege that the contract is a "cost-plus" contract and requires "increased productivity . . . while lowering the costs of . . . labor." [TAC ¶ 113.] But Plaintiffs fail to allege how those common contract terms require or incentivize a ***violation of wage and hour laws*** or to allege why Walmart was or should have been aware that those ordinary terms created such a risk. *See Puentes*, 2009 WL 3300360, at *12 (court rejected the "remarkable conclusion" that because employees were poorly paid to maximize profits, the employer must have negligently hired and supervised them). Plaintiffs' unique argument really would apply to any contract where the subcontractor agrees to provide labor to a third party – the subcontractor would always be more profitable if it violated wage and hour laws, but that does not automatically make the third party liable for negligent hiring or supervision.

Plaintiffs contend that, because of Walmart's "close monitoring and control over the warehouse operations," Walmart "knew or should have known" that its contract with Schneider was causing Schneider's own subcontractors to

violate wage and hour laws. That contention is nothing more than conclusion and argument, without supportive factual allegations, and is therefore inadequate to sustain a claim for negligence on Walmart's part.

III. Plaintiffs' Negligence Claim Is Preempted By The State Labor Code.

Plaintiffs' negligence claim also fails because Plaintiffs' causes of action for Defendants' alleged violations of the California Labor Code and IWC Wage Orders are limited to the statutory remedies set forth in the Code and Orders. Under the "new right-exclusive remedy" doctrine, "where a statute creates new rights and obligations not previously existing in the common law, the express statutory remedy is deemed to be the exclusive remedy available for statutory violations, unless it is inadequate." *Brewer v. Premier Golf Properties*, 86 Cal. Rptr. 3d 225, 232 (Ct. App. 2008), quoting *De Anza Santa Cruz Mobile Estates Homeowners Assn.* v. *De Anza Santa Cruz Mobile Estates*, 114 Cal. Rptr. 2d. 708 (Ct. App. 2001). In *Brewer*, the court found that violations of the Labor Code related to meal and rest breaks, pay stubs and minimum wage created new rights and obligations not previously existing in the common law. *Id*. at 232-33. The court further found that the remedies provided under the Labor Code were not inadequate and were therefore the ***exclusive*** remedies for such violations. *Id*. at 233.

Moreover, by filing specific claims under the California Labor Code, seeking statutory penalties, Plaintiffs have waived their right to seek additional, duplicative penalties (*e.g.*, punitive damages) under common-law tort theories, such as negligence. *See Turnbull & Turnbull v. ARA Trans., Inc.*, 219 Cal. App. 3d 811, 826-27 (Ct. App. 1990)[2]; *Troensegaard v. Silvercrest Indus., Inc.*, 175 Cal. App. 3d 218, 227 (Ct. App. 1985).

[2] Disapproved on other grounds, *Rojo v. Kliger*, 52 Cal. 3d 65 (1990).

Finally, Plaintiffs cannot seek tort damages using their negligence theory, because, under California law, their claims are based on ***contract***. "Labor Code provisions governing meal and rest breaks, minimum wages, and accurate pay stubs constitute statutory obligations imposed only when the parties have entered into an employment contract and are obligations *arising* from the employment contract." *Brewer, supra* at 235. "The breach of an obligation arising out of an employment contract, even when the obligation is implied in law, permits contractual damages but does not support tort recoveries." *Id*. Plaintiffs' claims arise out of their employment contract with Defendants. Therefore, they cannot obtain damages for negligence, which sounds in tort. *Id*.; *see also Adelman v. Associated Intern. Ins. Co*., 108 Cal. Rptr. 2d 788, 800 (Ct. App. 2001).

CONCLUSION

For all the foregoing reasons, Plaintiffs' Fourteenth Claim for Relief against Walmart (Negligence) should be dismissed with prejudice.

Dated: February 13, 2013

Respectfully submitted,

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