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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LES BRADLEY et al.,

Plaintiffs and Appellants,

v.

NETWORKERS INTERNATIONAL LLC,

Defendant and Respondent.

D052365

(Super. Ct. No. GIC862417)

APPEAL from an order of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

Three plaintiffs¹ filed a class action complaint against Networkers International, LLC (Networkers), alleging violations of state laws governing overtime pay, rest breaks, and meal breaks. Plaintiffs moved to certify the class, but the court denied the motion, concluding plaintiffs did not meet their burden to show common factual and legal

¹ The plaintiffs are Les Bradley, Edwin Jennings, and Versil Milton.

questions would predominate over individual issues. Plaintiffs appeal. We conclude the court's ruling was not an abuse of discretion, and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Networkers is a business that provides technical personnel services to the telecommunications industry. In about 2004, Networkers contracted with three telecommunications companies, EXi Parsons Telecom LLC (EXi), Ericsson Inc. (Ericsson), and Telecom Network Specialists, to supply skilled laborers to install and service cell sites in Southern California.² Each of these contracts provided the laborers would perform work under the direction of supervisors employed by the telecommunications company and set forth detailed requirements for worker qualifications and the work to be performed. Under these contracts, Networkers was responsible for recruiting and managing the employees, and warranted that the work would be performed in a satisfactory manner.

Networkers thereafter retained approximately 140 skilled workers, including the three named plaintiffs, to fulfill these contracts and provide repair and installation services at the cell sites. Most workers were hired to work on cell sites for a particular customer, e.g., some workers were hired and trained to work only on Ericsson/T-Mobile cell sites, and others were hired and trained to work only on EXi sites. Plaintiffs Bradley

² Cell sites are the tower facilities that receive and send radio transmissions to and from cellular phones. The Ericsson contract concerned primarily services for T-Mobile cell sites. For convenience, we shall refer to these sites as Ericsson/T-Mobile cell sites.

and Milton worked at Ericsson/T-Mobile cell sites and plaintiff Jennings worked at EXi cell sites.

Networkers required each worker to sign a standard contract, entitled "Independent Contractor Agreement," which stated the worker was an independent contractor rather than an employee. Based on its characterization of the workers as independent contractors, Networkers did not pay premium wages for overtime, compensate the workers for travel or waiting times, or establish a policy requiring meal or rest breaks.

In late 2005 or early 2006, plaintiffs Bradley and Jennings (along with numerous other workers) terminated their relationship with Networkers. Shortly after, Networkers replaced its "Independent Contractor Agreement" with an "Employment" agreement, and began paying overtime wages to these workers. Plaintiff Milton signed the new employment agreement, but left the company soon after.

Within several months, the three plaintiffs filed a class action lawsuit against Networkers, alleging Networkers violated wage and hour laws by failing to pay overtime and provide rest and meal breaks, failing to maintain required employment records, and requiring plaintiffs to underreport their hours. Plaintiffs claimed that although Networkers hired each worker using the standard "Independent Contractor Agreement," the actual relationship was in fact an employer-employee relationship and therefore Networkers was governed by state wage and hour laws. Plaintiffs sought to represent a

class of 140 technical support personnel who worked in California for Networkers at cell sites owned or operated by Networkers' customers.³

Based on these factual allegations, plaintiffs asserted seven causes of action: (1) failure to pay overtime compensation (Lab. Code,⁴ §§ 510, 1194); (2) failure to provide adequate meal periods (§§ 226.7, 512; Wage Order No. 4); (3) failure to provide rest time (Wage Order No. 4); (4) failure to furnish accurate wage statements (§§ 226, 226.3; Wage Order No. 4); (5) failure to keep accurate payroll records (§§ 1174, 1174.5; Wage Order No. 4); (6) waiting time penalties (§ 201 et seq.); and (7) unfair business practices (Bus. & Prof. Code, § 17200 et seq.).

Plaintiffs then moved to certify the complaint as a class action. In support, they submitted a copy of Networkers' standard Independent Contractor Agreement, and produced evidence that it was signed by each putative class member. The agreement contained numerous provisions reflecting an independent contractor relationship, including that the worker was "responsible for determining when, where and how the Work is performed"; the worker was entitled to delegate the work or designate other

³ The complaint defined the class as follows: "All persons, whether designated by Networkers as an employee, or, contrary to fact and law, designated as a consultant or independent contractor, who are employed or have been employed by Networkers in California to work for Networkers' clients or Networkers' clients' telecommunications customers as non-exempt electronic technical support personnel, including technical services supporters, field technicians, cell site surveyor and others, to assist in the survey, deinstallation, installation, upgrading, maintenance, servicing and repair of such customers' facilities, cell sites and/or equipment"

⁴ All further statutory references are to the Labor Code, unless otherwise specified. References to Wage Orders are to the 2001 Industrial Welfare Commission Wage Orders.

individuals to perform the work; the worker could bid for the jobs; and the worker was required to maintain liability, errors and omissions, and workers compensation insurance.

Each named plaintiff also proffered his declaration asserting that Networkers did not adhere to these contractual provisions, and instead treated all of its workers as employees, and these employment policies were uniformly applied to all putative class members. The declarations provided detailed descriptions of the manner in which each plaintiff was hired by Networkers, the work assignment process, and the nature of the job and working conditions. We summarize these declarations below.

In his declaration, plaintiff Milton stated that Networkers hired him in December 2004 as a field technician after being recruited by Networkers employee Pete Wu. Milton signed the standard "Independent Contractors Agreement," but did not understand he was not an employee entitled to state law employee protections. Despite the express terms of the agreement, Milton was not required to have liability, errors and omissions, or workers' compensation insurance; he was not permitted to delegate the work; he was required to follow specific directions as to the scheduling and priority of the work; he was paid by the hour and did not bid for his employment; there was no negotiation regarding the hourly rate; and he was required to obtain a specific set of tools from Networkers and Networkers deducted money from his paycheck to pay for the tools. Additionally, Milton received introductory job training from Networkers.

With respect to his specific job assignments, Milton said he worked exclusively on cell sites owned by T-Mobile which contained equipment made by Ericsson. Milton was assigned approximately 45 to 50 cell sites and was responsible for maintenance, service,

and repair of each of these cell sites. Milton received his daily assignments through the receipt of a "trouble ticket" on his computer email or cell phone, which came from a Networkers switch technician or T-Mobile customer service. Milton said that before starting work each day, "Networkers required me to check my email on my computer at home for the trouble tickets I was to work on that day. I typically had as many as 25-30 trouble tickets. I was required to acknowledge receipt of all trouble tickets immediately."

Once Milton was at the job site, he "was not permitted to leave the site until the problem was fully resolved," which he said "meant that I could not simply stop for lunch or leave after an eight hour shift if the problem was not resolved—in fact doing so would lead to discipline if not immediate termination. If I happened to pass by a fast food restaurant between cell sites, and I was not rushing to a 'Critical' site, I would go through the drive-through and eat in my car while driving to the next cell site destination. . . . [¶] Similarly, because I was not allowed to leave a jobsite until the work was done, I regularly could not take any rest breaks while on site. I believed that I would be fired if I stopped working to take a rest break. Additionally, as Networkers set priority codes for the severity of cell site problems, I was required to arrive at the next cell site as soon as possible. As a result, I regularly did not have time to take a rest break between working on cell sites. [¶] . . . [¶] . . . Once the trouble ticket was resolved, I would email back to the switch techs or to T-Mobile to confirm that it was resolved. If the switch indicated the problem was ongoing, I had to stay and keep working until the problem was fixed. If I could not fix the problem, I would call a Networkers' supervisor or other tech to troubleshoot the problem over the telephone; if there was still a problem, a supervisor or

other tech would come to the site in person. . . . Additionally, if a site went back down, the crew would be called back immediately . . . and they would not be allowed to submit the time spent on the call back." Milton also said he was required to travel long distances, but generally was not permitted to record his full travel times, and 12-hour days were "common." Milton was required to be "'on-call'" at least one week each month. Although a Networkers' supervisor was not always at each cell site location, a Networkers' supervisor was always available by telephone. Milton submitted timesheets to Networkers and also entered his time on the customer's (Ericsson's) computer system.

In December 2005, Networkers informed Milton that it would be reclassifying him from an "Independent Contractor" status to "W2 Employee" status, beginning in January 2006. After the reclassification, Networkers reduced Milton's hourly pay, and paid for overtime hours. The work remained exactly the same, and Networkers did not change its policies regarding rest breaks and restrictive reporting times (off-the-clock, on call, and travel time).

The declaration of plaintiff Bradley, who worked for Networkers as a field technician from December 2004 through December 2005, was essentially identical to Milton's declaration in most respects. As with Milton, Bradley was recruited to work for Networkers by employee Pete Wu; worked exclusively at T-Mobile cell sites servicing Ericsson equipment; signed the Independent Contractor Agreement; was paid hourly; was required to have a specific tool set; was provided with introductory training; was assigned work under the "trouble ticket" system; and sometimes travelled long distances to the sites. The primary difference in the declarations is that Bradley terminated his

relationship with Networkers before Networkers converted its independent contractor agreement into an employment agreement. Additionally Bradley, unlike Milton, stated he understood that Networkers did not consider him to be an employee, but Bradley believed this classification was legally erroneous.

The declaration of the third plaintiff (Jennings) contained substantially similar information as was in the other two declarations, except that he was assigned to work on EXi cell sites and had more direct customer supervision at the sites. As with Milton, Jennings said he signed the Networkers' standard Independent Contractor Agreement, but did not consider himself an independent contractor "as I had always been treated as an employee for the same or similar type of work" He did not bid on the employment contract or negotiate any of its terms, and Networkers required him and all of the other workers to purchase a complete set of tools and then deducted the cost from the workers' paychecks.

With respect to his specific EXi work, Jennings said he was trained by Networkers and EXi on basic tasks specific to the equipment being installed, maintained, and repaired. He then "worked on various sites decommissioning, installing, and re-commissioning equipment" Jennings said "[t]he travel time to the sites varied and could be as little as 15 minutes or as long as 2 [to] 3 hours. I would learn where the installation site was by email or phone call from a supervisor or whomever was the lead installer for that day. I did not determine where or when I would install a cell site. I would work side by side with other employees to complete the installation." Jennings was required to submit timesheets to Networkers through a computer timekeeping source, and

all of the time "had to be submitted to my supervisor for approval." He was not paid premium wages for overtime work, even though he "regularly worked over 40 hours a week and regularly worked more than 8 hours a day" He said that "[o]n days when the installation took a long time, we were not able to take any meal or rest breaks at all." Jennings also said he "felt pressured by my supervisor to shave my time on certain projects," and was "asked to enter less time for particularly time-consuming tasks. At the end of the day, we would ask the lead how many hours we should all put down for that day's work and whatever he said, we put down, even when that was less than the total amount of time we had actually spent working."

In explaining his daily work, Jennings said: "We were forbidden to leave the site once we started working on the equipment. . . . [¶] . . . Sometimes, a site that we installed that we had got up and running would go back down. When that happened, we were required to . . . return to the site immediately to get it up and running again. Typically, we were not allowed to put down the hours we spent on the call-back work on the site. [¶] . . . [¶] . . . Networkers employed supervisors, alongside EXi supervisors, to manage employees in the field working on cell sites. While supervisors may not be at each cell site location , a supervisor was always available by telephone should I need assistance with a cell site problem."

Plaintiffs also submitted the declarations of two putative class members, Ernie Garcia and Shane Pinkston, each of whom worked as Networkers field technicians in 2005, and primarily worked at T-Mobile/Ericsson cell sites. Their declarations were similar to the declarations of Bradley and Milton, reflecting the same form of

recruitment, work assignment process, working hours and conditions, and supervision levels. As with Bradley, these individuals terminated their relationship with Networkers before Networkers recharacterized its workers as employees. As with Milton, both stated they did not fully understand the distinction between an independent contractor and an employee.

Plaintiffs additionally submitted the declaration of their counsel, who said the three plaintiffs were chosen to represent the class because their claims were typical of the claims of all workers employed under the same Independent Contractor Agreement, each of whom performed similar technical work and were subject to identical management policies. In addition, plaintiff Milton "was chosen to represent those persons who Networkers reclassified in January 2006 from 'independent contractor' to 'employee' even though their job duties did not in any way change." Counsel said that 98 of the 140 putative class members worked exclusively under the Independent Contractor Agreement, and the remaining class members were in the same position as Milton, i.e., initially hired under the Independent Contractor Agreement and then signed a new agreement in January 2006 converting the worker's status to an employee position.

In opposing plaintiffs' class certification motion, Networkers argued the class action was inappropriate because there were numerous individualized issues regarding: (1) the number of "trouble tickets" or job assignments performed by each class member; (2) the level of supervision of each class member; and (3) the different job responsibilities performed for different clients. In support, Networkers relied on plaintiffs' declarations and portions of plaintiffs' deposition transcripts.

In his deposition testimony, Bradley confirmed that he had understood he was "labeled" an independent contractor rather than an employee. Bradley also stated that generally there was no Networkers supervisor working at the cell sites, or monitoring his work, and the majority of the time, he was the only person working at the site. Bradley also agreed that he used his "professional expertise" to fix a problem in the field; the number of assignments that a person worked on each day depended on numerous factors, such as the work location and type of problem; and he would receive "trouble tickets" from Networkers' clients and not directly from Networkers. Milton similarly testified that the time needed to resolve a particular problem varied depending on the task; he was usually the only worker at a cell site fixing the reported problem; and the number of cell sites that he would visit varied each day. In his deposition testimony, Jennings testified that generally the only instructions he received from Networkers before he went to a jobsite was to "show up on time" and "do what they [tell] you to do," and that generally there was a "lead" EXi supervisor on the job telling him what to do, and the time it took to perform each job varied and depended on the nature of the job.

In reply, plaintiffs produced copies of Networkers' payroll data for each putative class member, reflecting the alleged overtime pay violations. Plaintiffs also submitted hundreds of pages of Networkers' discovery responses. In these responses, Networkers: (1) admitted it did not pay overtime to its technical service workers because they were independent contractors exempt from applicable overtime pay requirements; (2) admitted it did not have rest or meal break policies or maintain records of rest or meal breaks; and

(3) stated that because it did not supervise its service workers, it did not know whether the workers took rest or meal periods and the extent or frequency of such breaks.

After considering the parties' submissions and holding a hearing, the court denied plaintiffs' class certification motion. The court stated: "[P]laintiffs have not shown that common questions of fact or law will predominate over individual questions. For example, plaintiffs state, 'The disconnect between the reality of class members' work and the recitations of the [Independent Contractor] contract is so great that it borders on the absurd[.]' . . . However, there is insufficient evidence that the 'reality' that plaintiffs describe in [their] opening brief was experienced so commonly across the class that common questions of fact or law will predominate over individual questions. Moreover, it appears that the actual existence of damages and/or the manner of incurring damages would differ for individual members of the proposed class." The court declined to rule on each of Networkers' numerous evidentiary objections (spanning 137 pages), stating that "[e]ven if all of [Networkers'] objections were overruled, the Court's ruling would not change."

Plaintiffs appeal.

DISCUSSION

I. *General Legal Principles Governing Class Action Certification*

"Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress.'" (*Richmond v. Dart Industries, Inc.*

(1981) 29 Cal.3d 462, 469; *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1500.) This state's public policy supports the use of class actions to enforce California's minimum wage and overtime laws for the benefit of workers. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340 (*Sav-On*.) However, "because group action . . . has the potential to create injustice, trial courts are required to "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts."" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*); *Seastrom, supra*, 149 Cal.App.4th at p. 1500.)

"The party seeking certification . . . must establish the existence of an ascertainable class and a well-defined community of interest among the class members. [Citation.] The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Richmond v. Dart Industries, Inc., supra*, 29 Cal.3d at p. 470; see also Code Civ. Proc., § 382.) The proponent must show the "class action is superior to individual lawsuits or alternative procedures for resolving the controversy." (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1204; accord *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459.)

In evaluating whether the plaintiffs met their burden to show common questions of law or fact predominate, the trial court should "consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove

amenable to class treatment." (*Sav-On, supra*, 34 Cal.4th at p. 327.) Although the trial court does not rule on the merits of the lawsuit, the court should consider the elements of the claims and defenses to determine if the need for individualized proof of class members' claims predominates over common proof. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106; *Linder, supra*, 23 Cal.4th at pp. 439-440.) In conducting this analysis, a court may look to the allegations of the complaint, and the declarations of attorneys representing the plaintiff class. (*Sav-On, supra*, 34 Cal.4th at p. 327.)

Trial courts "'are ideally situated to evaluate the efficiencies and practicalities of permitting group action'" and therefore are "'afforded great discretion'" in evaluating the relevant factors and in ruling on a class certification motion. (*Sav-On, supra*, 34 Cal.4th at p. 326.) A "'trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation] 'Any valid pertinent reason stated will be sufficient to uphold the order.''" (*Id.* at pp. 326-327.) In determining whether the record contains substantial evidence supporting the ruling, a reviewing court does not reweigh the evidence and must draw all reasonable inferences supporting the court's order. (*Id.* at p. 328.)

II. *Analysis*

A. *Overview*

The predicate legal issue underlying Networkers' liability is whether plaintiffs were independent contractors or employees. The trial court found the "'reality'" of the

work differed among the class members and therefore plaintiffs did not prove common questions would predominate on this legal issue. In reviewing the record, we find insufficient evidentiary support for this conclusion. Although there were certain differences in the class members' particular jobs, these differences are largely irrelevant to the legal issue of whether the worker was an employee or an independent contractor.

But this determination does not resolve the appellate issue before us. Even if some issues are capable of common proof, the court may properly deny class certification if other legal or factual issues would require individual proof or analysis, and these aspects of the case could not be effectively managed in a class action. (See *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 756.) As explained below, there was a reasonable ground for the trial court to conclude individual issues would predominate on the existence and amount of damages for each class member and that these individual issues would make a class action unmanageable.

In reaching these conclusions, we reject plaintiffs' argument that the trial court failed to adequately explain the basis for its ruling. Although it would have been helpful if the court had explained its reasoning in more detail, the court made clear the essential grounds for its order: (1) individual issues would predominate on the independent contractor/employee issues; and (2) "the actual existence of damages and/or the manner of incurring damages would differ for individual members of the proposed class." On the basis of the latter finding alone, the court's conclusion was supported.

B. *Independent Contractor Issue*

As recognized by both parties, a foundational legal question underlying Networkers' liability for the wage and hour violations is whether plaintiffs were independent contractors or employees. If plaintiffs were independent contractors, Networkers was not required to comply with rules governing overtime and meal and rest periods. On the other hand, if plaintiffs were employees, plaintiffs are likely to prevail on at least some of their claims because Networkers has admitted it did not comply with wage and hour laws applicable to employees.

As they did below, both parties agree that *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*) sets forth the appropriate factors for determining whether a worker is an employee or an independent contractor.⁵ Under this test, a court should evaluate all relevant factors, and the label that the parties attach to the relationship "is not dispositive and will be ignored if their actual conduct establishes a different relationship. (*Borello, supra*, 48 Cal.3d at p. 349.)" (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10-11 (*Estrada*)). The determination is one of fact and must be affirmed if supported by substantial evidence. (*Id.* at p. 11; *Borello, supra*, at p. 349.)

⁵ Those factors include: (1) the employer's right to control the means and manner of accomplishing the result; (2) whether the worker is engaged in a distinct occupation or business from the employer; (3) whether the type of occupation is usually "done under the direction of the principal or by a specialist without supervision"; (4) the skill required in the particular occupation; (5) the length of time for which the services are to be performed; (6) the method of payment whether by the time or by the job; (7) whether the parties believe they are creating an employee relationship; and (8) the right to discharge the worker at will. (*Borello, supra*, 48 Cal.3d at pp. 350-351.)

We agree with plaintiffs that the evidence relevant to the factual question of whether the class members were employees or independent contractors is common among all class members. Each of the class members signed a standard "Independent Contractor Agreement" that characterized the worker as an independent contractor; each class member was engaged in a similar occupation (skilled labor in installing or servicing cell sites); each class member was required to work full time and to be available on every working day and during assigned "on call" times; each class member was told how to prioritize each day's jobs; each class member received hourly pay, rather than pay by the job; each class member submitted timesheets to Networkers and Networkers' customers for approval; each class member was required to use a specific set of tools on the job and was required to obtain those tools from Networkers. Additionally, although Networkers' standard contract stated that the workers had the right to control the manner and means of the work, including that the workers were permitted to subcontract the work, Networkers had specific time and place job requirements that all workers were required to follow, and the workers could not deviate from these rules or delegate the work.

These common facts would be relevant in each class member's case against Networkers and would constitute the focus of the proof on the independent contractor/employee issue. (See *Estrada, supra*, 154 Cal.App.4th at pp. 13-14 [finding common issues in class action involving question whether workers were employees or independent contractors].) Networkers argued below that there would be a need for individualized proof because of differences among the workers pertaining to job titles, skill levels, pay grades, and the specific type of repair or installation work. However,

these distinctions are not material to the independent contractor issue in this case. The fact that some workers engaged in repair work and others engaged in installation work, or that workers had different pay grades or worked for different lengths of times on particular days, is not probative of whether the workers here were employees or independent contractors under the *Borello* test. (See *Borello, supra*, 48 Cal.3d at pp. 350-351.) Under the *Borello* analysis, the focus is not on the particular task performed by the employee, but the global nature of the relationship between the worker and the hirer, and whether the hirer or the worker had the right to control the work. (*Ibid.*) The undisputed evidence showed Networkers had consistent company-wide policies applicable to all employees regarding work scheduling, payments, and work requirements. Whether those policies created an employer-employee relationship, as opposed to an independent contractor relationship, is not before us. The critical fact is that the relevant evidence would be largely uniform throughout the class.⁶

Networkers also argued that individualized analysis would be necessary because the class members worked for different customers and some workers were more closely supervised at particular job sites than were other workers. However, plaintiffs' theory of the case was not that the class members were employees because they were supervised while working at the job sites. Because of the nature of the job—repair and installation at

⁶ In this regard, Networkers' reliance on decisions involving exempt employees is misplaced. (See *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440 and *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422.) In these cases, the specific nature of the class members' daily tasks was relevant because the issue whether a worker was entitled to overtime depended on the amount of time the worker spent on a particular task.

numerous remote sites throughout Southern California—plaintiffs acknowledged that most class members were not generally supervised by Networkers on technical portions of their jobs and had at least some discretion in the actual performance of the work. Plaintiffs claimed instead that Networkers gave its workers little or no discretion in areas such as responding to the assigned work, prioritizing the work, scheduling the jobs, the amount of payment per job, and selecting the tools with which to work. In considering these claims, the court would be required to address essentially the same legal and factual issues with respect to each class member.

We also find unhelpful Networkers' reliance on the fact that the plaintiffs may have had different subjective views of their business relationship with Networkers. The evidence showed that Bradley understood that the relationship was characterized as an independent contractor relationship, but did not believe this was legally correct. The other declarants asserted that they believed they were employees. The difference in this evidence is not legally significant. Networkers did not produce any evidence that the employees subjectively believed the realities of the job reflected solely an independent contractor relationship.

Viewing the evidence in the light most favorable to the court's ruling, the only reasonable conclusion is that the factual and legal questions would be essentially the same among the plaintiff class members on the independent contractor issue.

C. Specific Claims and Damages

As an alternate basis for its denial of plaintiffs' class certification motion, the trial court found there were substantial individual differences in proof pertaining to damages

for the proposed class members. As explained below, the court did not abuse its discretion in reaching this determination, and concluding that the differences would make the class action unmanageable.

1. *Alleged Overtime Wage Violations*

An employer is required to pay its employees 1.5 times the usual hourly wage for work in excess of eight hours per day or 40 hours per week, and two times the usual wage for work in excess of 12 hours. (§ 510; see also Wage Order No. 4, § 3(A).) Networkers admitted that it paid no overtime wages to any class members from December 2004 through December 2005. Thus, if plaintiffs prove they were employees, the fact that Networkers did not pay overtime wages is a common issue that can be proved classwide.

However, the *amount* of overtime pay damages to which each class member would be entitled requires individualized analysis because the number of hours worked each day was not uniform. Plaintiffs concede this fact, but argue that this issue could be effectively managed because it is a simple task to make the calculations based on the payroll records that have already been produced by Networkers. In theory, we agree with this assertion. The existence of time records showing the precise amount of hours worked by each employee could provide a reasonable basis for a court to award damages for failure to pay overtime wages. (See *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266 ["a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages"]; accord *Sav-*

On, supra, 34 Cal.4th at p. 333; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 746-751.)

But the damages issue was not so simple in this case. As recognized by the trial court during the class certification hearing, the overtime pay issue was inextricably linked with plaintiffs' claims that they were unlawfully pressured by their supervisors to underreport their hours, and their claims that they were not permitted to fully record travel and waiting times. The evidence shows that this underreporting did not occur on a consistent basis and was dependent on the particular job and the particular worker. Thus, to accurately determine the entitlement and amount of overtime pay, each of the class members would be required to testify, and Networkers would be entitled to present the testimony of the various individual supervisors, requiring numerous mini-trials on the factual issues regarding if and when the compelled underreporting occurred.

As they did at the hearing below, plaintiffs acknowledge the need for individualized analysis on this claim, but suggest the court could have severed the underreporting claims from the rest of the action. Although the trial court could have elected to do this, it was not required to take this approach. The court asked plaintiffs' counsel whether it was waiving these claims, but counsel (understandably) declined to do so. Under the circumstances, the court could reasonably find that it would not be an efficient use of resources for the parties to litigate all the overtime claims in a class action, and then to require individual trials on the issue of the underreporting of work time.

Plaintiffs argue the court could use statistical or sampling evidence to prove the damages on the underreporting issue. Although courts have upheld the use of such methods to evaluate damage claims (see *Sav-On, supra*, 34 Cal.4th at p. 333), the trial court had a reasonable basis to conclude the compelled underreporting claims could not be effectively proved by these methods and instead would require highly individualized factual determinations. Where the entitlement to damages varies greatly among class members so as to require extensive individualized proof, a trial court may properly conclude the action is not appropriate for class treatment. (*Wilens v. TD Waterhouse Group, Inc., supra*, 120 Cal.App.4th at p. 756; see *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 448-449.)

2. *Alleged Meal and Rest Break Violations*

We reach a similar conclusion with respect to the alleged meal and rest break violations. Generally, an employer must "provide" an employee a 30-minute meal break for a work period of more than five hours and a second 30-minute meal break for a work period of more than 10 hours per day, with certain waivers for six- or 12-hour shifts. (§ 512, subd. (a); Wage Order No. 4.) An employer also has a duty to provide 10-minute rest breaks for every four hours worked. (Wage Order No. 4.) "If an employer fails to provide an employee a meal period or rest period . . . , the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." (§ 226.7, subd. (b).)

Although the law is unsettled as to the precise scope of an employer's duty to provide these breaks,⁷ it is undisputed Networkers did not have a policy permitting or authorizing meal or rest breaks because it considered its workers to be independent contractors. Likewise, the undisputed evidence shows that defendants did not maintain records of when the employees took meal breaks.

We agree with plaintiffs that these uniform policies (or lack of policies) could be proved classwide. However, the proof on the remaining questions—the entitlement and amount of the claimed damages—would be highly individualized. To recover damages on a claim for a missed meal or rest break, the employee must have worked the required amount of time, and have actually missed the meal or rest break. If an employee took a rest break or a meal break, the employee cannot prevail on a claim that he or she is entitled to compensation for a "missed" break. (See *Brown v. Federal Express Corp.*, *supra*, 249 F.R.D. at pp. 586-587.) Although Networkers (by failing to maintain a break policy and required records) would arguably have the burden to show the employees took the required breaks (see *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727), the evidence pertaining to this issue remained highly dependent on the work performed by

⁷ Some courts have held that under California law employers must make meal breaks available to employees (*Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587), while other courts have suggested (in dicta) that California law requires employers to ensure that meal breaks are actually taken (see *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962). The issue is currently under review by the California Supreme Court. (See *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, review granted Oct. 22, 2008, S166350; *Brinkley v. Public Storage, Inc.* (2008) 167 Cal.App.4th 1278, 1287-1289, review granted Jan. 14, 2009, S168806.)

each individual on each particular date, particularly given the nature of the work in which each employee worked at numerous remote sites without any direct supervision.

Based on the submitted declarations, deposition testimony and payroll records, there was substantial variations as to the hours worked by each employee and the breaks taken by each employee on each particular date. For example, Jennings stated that the "travel time to the sites varied and could be as little as 15 minutes or as long as [two to three] hours," and although he stated that he was "forbidden to leave the site" once he began working on the equipment, he did not state that he was always precluded from meal and/or rest breaks while at a site. An employer is not necessarily required to permit an employee to leave the premises to take a rest or meal break. Further, although each of the other declarants stated that they frequently could not take meal or rest breaks if a job took a long time, there was no basis to find how often this occurred with respect to each worker. The declarants stated that they typically had about 25 to 30 assignments each day, and that "[o]nce at the site to perform the repairs," they were "not permitted to leave the site until the problem was fully resolved" However, these declarants acknowledged that the jobs did not always take a long time, they were frequently alone at the sites, and would often stop at a fast food restaurant between jobs on any particular day. Although several declarants said they would eat in their cars on the way to their next job, the trial court could reasonably conclude that this evidence would be subject to various interpretations based on the specific employee and situation.

Based on the submitted evidence, there was a reasonable factual basis for the court to conclude that not all workers had missed meal and rest breaks, and that the issue of

which employees had missed breaks and how many breaks were missed and whether those missed breaks were the result of Networkers' lack of a break policy was highly dependent on the testimony of each plaintiff, essentially requiring a mini-trial on each plaintiff's case to determine the amount of damages to which each plaintiff would be entitled. On this record, the court did not err in concluding that a class action would not be advantageous for the class members or for the judicial system. (See *Brown v. Federal Express Corp.*, *supra*, 249 F.R.D. at p. 587 ["the resources that would be expended on determining the reason for the missed breaks would exceed those saved by classwide determination of the number of breaks missed"].)

Plaintiffs argue that the evidence showing they could not take the required breaks was common to all class members because it was based primarily on Networkers' "upstream" contracts, i.e., Networkers' contracts with the telecommunications companies. They say that provisions in each of these contracts established that the workers were required to respond immediately to certain critical issues at the cell sites, which effectively prohibited the class members from leaving the cell site until the assignment was completed.

Even assuming the upstream contracts support these assertions, there was a reasonable basis for the trial court to reject plaintiffs' argument. The provisions of the upstream customer contracts do not show whether all class members were assigned to jobs that took more than four or five hours, and how often they were assigned to these type of jobs. According to plaintiffs' evidence, plaintiffs were routinely assigned to 25 or 30 "trouble tickets" per day. This evidence is inconsistent with a conclusion that each

class member was routinely compelled to remain at a site for more than four or five hours. Further, the evidence did not show that the fact that a class member could not leave a cell site until the repair was completed necessarily meant the workers could not take a meal or rest break while at the site.⁸

3. *Remaining Claims*

In addition to their causes of action for failure to pay overtime wages and violations of meal and rest break laws, plaintiffs also brought claims for: (1) failure to furnish accurate wage statements; (2) failure to keep accurate payroll records; (3) waiting time penalties; and (4) unfair business practices. Because each of these claims was based on plaintiffs' overtime and/or meal-and-rest break claims, the court did not err in similarly denying class certification of these claims.

D. *Conclusion*

Although the independent contractor issue appears amenable to class treatment, the court did not abuse its discretion in refusing to certify the class based on its conclusion that the common issues would not predominate on the damage issues and that a class action would not be an effective or efficient means of resolving class members' claims. In reviewing a class certification ruling, we must presume every fact in favor of the order and uphold the order unless the court's conclusion was "irrational." (*Sav-On, supra*, 34 Cal.4th at p. 329.) Applying this standard, we cannot say it was irrational for

⁸ In this respect, this case is unlike *Bufile v. Dollar Financial Group, Inc.*, *supra*, 162 Cal.App.4th at pages 1205-1206, in which the court found the employer's policies specifically prohibited the employees from taking the required breaks, and there was no evidence the employees violated this policy and did in fact take the breaks.

the court to conclude that a class action was not appropriate because individual factual questions on claims of missed meal and rest breaks and overtime pay (and related underreporting issues) would predominate over common questions. It is not our role to disturb the court's ruling even if the record can also support a contrary conclusion based on other reasonable inferences. (*Id.* at p. 331.)

DISPOSITION

Order affirmed. Appellants to bear respondent's costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.