Filed 8/28/14 Fayerweather v. Comcast CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GABRIEL FAYERWEATHER et al., Plaintiffs and Appellants, v. COMCAST CORPORATION, et al. Defendants and Respondents.	A137872 (Contra Costa County Super. Ct. No. MSC-08-01470)

Plaintiff Gabriel Fayerweather, a communications technician employed by defendant Comcast Corporation (Comcast), filed this wage and hour action on behalf of his fellow technicians.[1] The trial court initially certified a class with respect to his claim that Comcast has a policy of overworking its technicians, thereby denying them proper meal and rest breaks. When plaintiff's claim appeared to mutate in the course of the litigation, the trial court issued an order to show cause as a means to revisit the certification decision. In response, plaintiff abandoned his claim of understaffing and sought class certification with respect to several new theories, including data recorded by a communications system used by the technicians demonstrated widespread meal and rest break violations not reflected in the technicians' self-reported time records. The trial court decertified the class, finding, among other grounds, the communications system

[1] The complaint lists two defendants, one of which appears to be a corporate subsidiary of the other. Because the distinction between the defendants is immaterial for purposes of this appeal, we refer to them jointly as "Comcast."

was an insufficiently accurate measure of the technicians' activities to serve as common proof of the violations. We affirm.

I. BACKGROUND

Plaintiff filed this putative class action in May 2008, alleging various wage and hour violations by his employer, Comcast, on behalf of a class consisting of all "service technicians" and "communications technicians" (together, technicians) in California. As the first amended complaint explained, technicians' jobs require them to pick up and load a truck at a central office in the morning, drive among off-premises jobsites during the work day, and return the truck to the central office at the end of the day. The first amended complaint alleged Comcast violated various wage orders and statutes by (1) failing to compensate technicians for time worked at the beginning and end of the day, (2) failing to provide proper meal and rest breaks, and (3) failing to provide proper paychecks.

The trial court granted a motion for class certification in April 2010. The certified class included all technicians, defined by several specified Comcast job titles, employed by Comcast in California from May 2004 through April 2010. The class was certified with respect to a single legal theory, plaintiff's claim "Comcast has adopted a policy of understaffing (or over scheduling) that makes it unlikely that [technicians] can have their required breaks each day." Although the court considered the matter a "close case," it concluded there were sufficient common issues of fact and law to justify class treatment.

At a status conference in July 2011, the court expressed concern that plaintiff's theory of the case had changed from the claim of understaffing on which certification had been granted, but it deferred action until the next status conference in November. At that conference, plaintiff's counsel outlined new theories, that a communication device carried by technicians prevented them from having meal and rest breaks during which they were relieved of all work-related duties, as required by statute, and that technicians were not, in any event, actually receiving the breaks they reported to Comcast. Recognizing the departure from the theory on which class certification had been premised, the court determined class certification should be reconsidered. It issued an

oral order to show cause "why the class should not be de-certified," directed solely to the issues of common questions of law and fact and the superiority of class treatment with respect to the new theories. The court ordered the parties to submit papers following the Supreme Court's then-anticipated ruling in *Brinker Restaurant Corp. v. Superior Court*, which eventually issued in 2012 and was reported at 53 Cal.4th 1004 (*Brinker*).

According to the evidence before the trial court, Comcast technicians install and service devices providing telephone, Internet, and television services in the homes and businesses of Comcast customers. As one declarant put it, the technician position "is one that is not closely monitored." Normally only one technician is assigned to a particular job. They therefore spend most of their work time alone in the field, outside direct supervision, and decide on their own when to take a meal or rest break. Comcast maintains written policies allowing meal and rest breaks for technicians (as well as other nonexempt employees) that are consistent with California law.[2]

Within the time period covered by the certified class, technicians made a formal record of their daily activities in two ways. Prior to December 2008, technicians filled out handwritten time cards for each day. After that date, Comcast switched to an electronic timekeeping system, the "Employee Self Service" (ESS) system. Using ESS, each technician could log on to a Web site and enter a record of his or her work and break time.[3] Following supervisor approval, the technicians' time records are used as the basis for their compensation. Technicians are expected to record their time accurately.

Around 2007, Comcast began using a parallel system that allows the tracking of technicians' work, referred to as "TechNet." Using a cellular phone or a laptop, technicians are expected to enter information into the TechNet system about their activities throughout the day and can receive information about their daily jobs. Technicians log in to the TechNet system at the beginning of their shift and are presented

---

[2] In general terms, the policies allowed a 10-minute rest break every four hours, a single meal break after five hours, and a second meal break after 10 hours.

[3] For clarity, the technicians' time cards and the ESS entries will be jointly referred to as "time records."

with a list of their assigned jobs for the day. From then on, technicians interact with TechNet throughout the day, signaling the beginning and ending of jobs and transmitting messages to the dispatch office about the status of particular jobs. The technicians are also able to indicate they have begun and ended their lunch and rest break periods. TechNet can be used to generate a "daily timeline" tracking the activities of an individual technician throughout the day, based on his or her interaction with the system.

Plaintiff submitted a sample compilation of TechNet data demonstrating that, during the period December 22, 2010 through January 18, 2011, the average technician lunch hour reported to TechNet was 49 minutes, with 7 percent of technicians reporting no lunch at all. Only 32 percent of technicians reported taking a rest break during their work day, although those breaks lasted longer than the 10-minute legal minimum, at an average duration of 16 minutes.

Plaintiff contended the TechNet data demonstrated technicians regularly worked more than 10 hours without either taking a second meal break or executing a written waiver, as required by Comcast's policy. To support this contention, plaintiff relied on the expert declaration of accountant David Breshears. Breshears was provided with over eight years of time records and seven months of TechNet data from 2011. Using the time records, Breshears found over 526,000 occasions on which a technician worked between 10 and 12 hours in a day and failed to take a second 30-minute meal break. He also found over 31,000 occasions on which a technician worked more than 12 hours in a day without a second 30-minute meal break. Further, Breshears found more than 11,000 occasions on which a technician did not take a meal break until after the sixth hour of work and over 25,000 occasions on which a technician worked more than six hours and did not take a 30-minute meal break. Depending upon the circumstances, each of these could have constituted a violation of the wage and hour laws. Based on his analysis, Breshears concluded that 45 percent of technician work days featured "at least one potential meal break violation."

In addition, Breshears compared the duration of meal breaks recorded in the time records and by TechNet. He found 95 percent of meal breaks recorded in the time

records lasted either exactly 30 or exactly 60 minutes. In contrast, the TechNet data showed meal breaks of a wide variety of durations. Assuming the TechNet data was "a more accurate representation of employees' actual time," Breshears applied the TechNet data to "extrapolate the number of potential meal break violations" over the duration of the time records data, finding a substantially larger number of potential violations than the time records themselves revealed. When time records and TechNet data could be matched up for a particular employee and work day, Breshears compared the meal break duration reported by the technician in the time records with the duration recorded for the same technician by TechNet. He found the meal break times reported in the time records were, on average, nearly 10 minutes longer than the duration recorded by TechNet. Drawing on this type of comparison between TechNet data and the time records, Breshears estimated Comcast technicians had actually worked over 2 million more hours than were recorded in the time records in the years covered by the time records data.

Based on the foregoing, plaintiff sought certification of a class on three legal theories: (1) Comcast's policy of requiring technicians to remain connected to TechNet during breaks, combined with an "expectation and requirement" that they respond to TechNet messages sent during breaks, deprived the technicians of "off-duty" breaks;[4] (2) Comcast's failure to use the TechNet data in calculating its payroll "regularly depriv[ed] class members of all wages owed"; and (3) Comcast had a policy of refusing to pay "premium" wages when otherwise required by Labor Code section 226.7, subdivision (c), "even where its own records establish noncompliance with meal/rest break requirements pursuant to California law."

[4] The trial court ruled against plaintiff on this first contention, finding no evidence Comcast had "adopted a 'policy' of requiring [technicians] to remain on-duty during their meal and rest breaks." Plaintiff does not acknowledge abandoning the theory in his opening brief, but neither does he address the rejected argument. We deem the theory to be abandoned as a result of plaintiff's failure to address it (*Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 578) and have not included the evidence relating to the theory in our discussion of the factual underpinnings of the decertification proceeding.

In arguing for decertification, Comcast took issue with Breshears's assumption the TechNet data was a more reliable indicator of technicians' work than the time records used to calculate the payroll. In a declaration, Scott Dutton, an employee of the company that had developed TechNet, explained the system had not been designed or marketed to serve as a time-keeping or payroll system. Instead, Dutton described it as "a communication tool" intended to allow Comcast supervisors and dispatchers to manage the operations of technicians in the field more efficiently by matching technicians to jobs. Throughout the day, technicians can use the system to indicate their current work status, such as "ONJOB," "ENROUTE," "MEETING," "LUNCH," and "BREAK." When making work assignments, managers and dispatchers can take each technician's indicated status into account. Dutton claimed TechNet has certain weaknesses as a timekeeping tool. Technicians may forget to indicate their status at any particular time, may choose not to indicate a particular status, or may even falsely report it. Technicians are unable to indicate their status when out of the electronic range of the system, and the system sometimes malfunctions by "kick[ing] out" technicians from a status. As a result of the foregoing uncertainties, Dutton opined that TechNet's records "are not reliable to establish the amount of time worked."

For this reason, Dutton believed, Breshears's analysis was unreliable. As an example, he examined the TechNet records of two technicians specifically discussed by Breshears in his declaration. The first technician reported taking an hour lunch between noon and 1:00 p.m. in his time records. TechNet data indicated he ended his last morning job at 11:17 a.m., took lunch from 1:01 p.m. to 1:41 p.m., and did not indicate he had resumed working until 2:37 p.m. From this, Breshears concluded the employee's actual lunch was 20 minutes shorter than indicated in his time records. Dutton pointed out the TechNet data could also be construed to indicate the employee had a duty-free period of over three hours around the noon hour. As a second example, Dutton examined another technician who, Breshears concluded, had worked nearly two hours longer than reported in his time records on a particular day. TechNet data showed the technician had initially logged on at 6:40 a.m., but this was followed by several short duration logon entries,

suggesting the technician was merely checking his jobs for the day, rather than actually having begun work. Although the technician did not log off until 8:14 p.m., he had entered "ENDOFDAY" at 6:09 p.m. The two-hour gap before log off suggested the technician forgot to log off and was timed out by the system, rather than working until after 8:00 p.m. In addition, the technician never indicated a "LUNCH" status on TechNet, but there was a long period of apparent inactivity in the middle of the day, since he noted the end of his morning job at 10:31 a.m. and did not indicate a resumption of work until 2:19 p.m. A logical inference is that the technician ate lunch without recording a break on TechNet.

Comcast also submitted declarations and excerpts from the depositions of a number of technicians and their supervisors. The evidence confirmed technicians were instructed to record their time accurately in the time records and were required to certify its accuracy upon submitting it. Some of the technicians stated that time records are more accurate than TechNet data in recording their work activities and confirmed they viewed TechNet as a means to communicate about their assigned work, rather than to record their activities. Many technicians discussed the technical problems to which TechNet was subject that affected the accuracy of its record-keeping, including slow response, crashes, difficulty in logging on and off and entering statuses, involuntary log outs, and difficulty connecting in remote areas. They admitted their own periodic failures to use the system accurately, largely due to lapses in attention, also diminished its reliability. Dispatchers and supervisors confirmed the sometimes haphazard use of the system. It was not uncommon, they said, for technicians to forget to log on or log out, enter a lunch or break status, and otherwise signal changes in their status in a timely manner. In addition, technicians, supervisors, and dispatchers all noted the system was subject to intentional manipulation by technicians, who are not directly supervised while on jobs. Many technicians also testified they were not required to enter breaks of any particular duration, knew Comcast policy prohibited off-the-clock work, and believed they were paid for all time worked.

In a 36-page written opinion, the trial court decertified the class. On the issue of "off-the-clock" work, the court rejected the foundation for plaintiff's argument, that the time records should be found less reliable than TechNet data. The court noted there was no direct evidence of a Comcast policy or practice of requiring technicians to falsify their time records by, for example, filling in meal breaks of exactly 30 or 60 minutes. The court held that, even if the TechNet data were reliable, the Breshears statistics did not prove "actual violations of the wage and hour laws," but only "potential" violations. Proving actual violations would require individualized proof. Further, the court held, there were "serious questions" about the accuracy of the TechNet data for the many reasons explained in the Comcast opposition. As a result, the court concluded, plaintiff's off-the-clock work claims were not susceptible of common proof.

On the issue of missed and second meal breaks, the court found plaintiff's theory inconsistent with an employer's legal obligation as explained in *Brinker*. Under that decision, the trial court held, an employer's duty is to provide an *opportunity* for a first meal break to employees working at least five hours and a second meal break after 10 hours. Plaintiff's evidence, which relied largely on the time records as analyzed by Breshears, did not demonstrate Comcast failed to provide technicians the opportunity for meal breaks. Further, as with off-the-clock work, his data could suggest only potential violations, requiring individual proof to demonstrate an actual violation. In the absence of an illegal company policy, the court held, there were insufficient common issues to justify class treatment.

II. DISCUSSION

A. *Legal Background*

As the parties and the court anticipated when the briefing schedule was set for the order to show cause, *Brinker* establishes the legal baseline for evaluating the trial court's ruling.

As *Brinker* explained the burden on a putative class representative: "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial

benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, 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." ' " (*Brinker, supra*, 53 Cal.4th at p. 1021.)

As here, the primary issue in *Brinker* was "whether individual questions or questions of common or general interest predominate. The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' " (*Brinker, supra*, 53 Cal.4th at pp. 1021–1022, fn. omitted.)

Resolution of the issues bearing on class certification is largely within the trial court's discretion. "On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' [Citations.] Predominance is a factual question; accordingly, the trial

court's finding that common issues predominate generally is reviewed for substantial evidence. [Citation.] We must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record . . . .' " (*Brinker, supra*, 53 Cal.4th at p. 1022.)

In addition to summarizing the law bearing on class certification, *Brinker* helpfully explained many of the principles of California wage and hour law pertinent here. An employer's duty to provide meal breaks is governed by Labor Code section 512, subdivision (a): "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes . . . . An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." As construed by *Brinker*, this requires employers to "afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control and are free to come and go as they please." (*Brinker, supra*, 53 Cal.4th at p. 1037.) "The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . . [¶] On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed." (*Id.* at p. 1040.) "What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Ibid.*)

B. *The Absence of Written Second Meal Break Waivers*

Under Comcast's personnel policies, an employee who works more than 10 hours in a day has the right to a second meal break. If an employee waives his or her right to the second meal, the waiver must be in writing and executed by both parties. Plaintiff contends, based primarily on Breshears's analysis of the time records, that technicians

regularly work 10 or more hours without taking a second meal break or executing a written waiver. He argues the trial court erred in declining to certify a class with respect to his claim that Comcast was liable for premium pay to any technician who was shown to have worked for between 10 and 12 hours without taking a second meal or executing a written waiver of the second meal and to any technician shown to have worked for more than 12 hours without taking a second meal, regardless of waiver.

We agree with the trial court that plaintiff's theory of automatic liability in the absence of a written waiver is contrary to the law. In evaluating Comcast's compliance, it is important to understand the nature of the technicians' workday. Unlike the work of the typical factory, agricultural, or retail worker, technicians' daily activities are not directly supervised, and their activities need not be coordinated with the activities of a large number of other employees. On the contrary, technicians' daily activities are largely self-policed. Technicians spend most of their days on the road, beyond the direct monitoring of their immediate supervisors. Although they must spend time driving and working at customers' homes and businesses, the nature of the work places few constraints on their ability to take appropriate rest and meal breaks. Under these circumstances, Comcast appears to have satisfied its legal obligation to "afford employees uninterrupted [break] periods in which they are relieved of any duty or employer control and are free to come and go as they please" (*Brinker, supra*, 53 Cal.4th at p. 1037) merely by creating an appropriate policy and instructing the technicians to follow the policy while on the road. There is no dispute Comcast policy states technicians should take a second meal break if they have worked 10 hours or more. Given the nature of the technicians' workday, implementation of this policy becomes their responsibility; Comcast "is not obligated to police" them. (*Brinker*, at p. 1040.)

Accordingly, Comcast is not liable for premium pay merely because Breshears's analysis indicates that a particular technician's time records show he or she worked for more than 10 hours without a second meal. Rather, Comcast is liable only if, in some manner, it prevented that technician from taking the second meal break without a waiver. (See *Brinker, supra*, 53 Cal.4th at p. 1040, fn. 19.) There is no evidence suggesting a

general policy or practice precluding second breaks, such as supervisors who regularly discouraged technicians from taking advantage of the second meal policy or the assignment of so much work that technicians had no time for the break. Thus, to determine whether any particular skipped meal resulted in a premium pay obligation—i.e., was involuntary and not waived—would require an individualized inquiry into the circumstances of each missed meal.[5] Given the need for an individual analysis of each claimed violation, the trial court did not abuse its discretion in concluding there was little or no advantage in class treatment.

Plaintiff argues Comcast's liability results merely from the absence of a written waiver, regardless of whether the technician voluntarily skipped a second meal, since Comcast policy requires a written waiver. The requirement of premium pay for a missed meal break, however, follows from a violation of the wage and hour laws, not from a violation of an employer policy. Labor Code section 512 does not require a waiver of the second meal to be in writing.

It is true Labor Code section 512 requires *some* waiver of the meal break, and, as plaintiff points out, the second meal break cannot be waived for a workday longer than 12 hours. Contrary to plaintiff's argument, however, this rule does not require that a waiver be obtained whenever an employee fails to take a second meal. Rather, a waiver is required whenever an employer declines to satisfy its obligation under section 512, which is defined in *Brinker* as requiring the provision of an *opportunity* for a second meal break. In other words, an employer must obtain a waiver if it requires an employee to work through the time that would otherwise be allotted for the second meal.[6] If the

---

[5] Citing Justice Werdegar's concurring opinion in *Brinker*, plaintiff contends a rebuttable presumption arises that no meal break was provided when none is recorded. Whatever the rule might be in more typical working situations, there is no basis for such a presumption in these circumstances, where the employee effectively determines his or her own break time. (*Brinker, supra*, 53 Cal.4th at p. 1040 ["What will suffice may vary from industry to industry"].)

[6] As *Brinker* explained the obligation: "When someone is suffered or permitted to work—i.e., employed—for five hours, an employer is put to a choice: it must (1) afford

employee voluntarily chooses to continue working through a provided meal break, no waiver is required. As discussed above, the nature of technicians' work suggests they are ordinarily given the opportunity to take a second meal break. Determining whether, in any particular case of a failed second meal break, a waiver was required because the break was actually denied will require individual analysis of every instance, defeating the advantages of class treatment.

C. *Failure to Pay for Denied Breaks*

Plaintiff contends the trial court erred in denying class treatment in connection with his claim that Comcast fails to maintain a policy to provide premium pay for denied breaks.

Under Labor Code section 226.7, subdivision (c), an employer who fails to provide an employee a legally required meal or rest break must pay the employee an additional hour of compensation. The obligation to provide this premium pay arises only when the employer has failed to provide a required meal break by denying an employee the necessary duty-free time. (*Brinker, supra*, 53 Cal.4th at p. 1040, fn. 19.) An employer who becomes aware an employee has performed work during a properly provided meal break must compensate the employee, but because an employee's voluntary decision to work during a break does not constitute a violation of the wage and hour laws, the employer need only pay ordinary compensation for the time worked. (*Ibid.*) Because the award of premium pay under section 226.7 is in the nature of damages, an employer's failure to provide premium pay to a worker denied a required break is not considered an independent violation of the law. Rather, the violation is the underlying failure to provide the required duty-free time. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256–1257 (*Kirby*).)

---

an off-duty meal period; (2) consent to a mutually agreed-upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on-duty meal period if circumstances permit." (*Brinker, supra,* 53 Cal.4th at p. 1039.) A waiver is therefore not required unless Comcast did not "afford" a technician a meal break.

In arguing for class treatment based on the absence of a formal premium pay policy, plaintiff relies on *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701 and *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, in which the courts discussed the absence of an employer policy in the process of certifying a class concerning the denial of meal and rest breaks. In both of these cases, however, the employer failed to maintain a policy governing the *breaks* themselves, not a policy governing the award of premium pay. As both courts found, the absence of an appropriate break policy led to widespread violations of the wage and hour laws through the denial of breaks, which were, of course, the underlying legal claims.[7] Because the failure to award premium pay is not itself a violation of the wage and hour laws (*Kirby, supra,* 53 Cal.4th at p. 1256), the absence of a policy governing the award of premium pay does not itself give rise to such violations. The failure to adopt such a policy therefore provides no basis to support class treatment for a claim of wage and hour violations. In any event, there was evidence Comcast maintained an informal policy of awarding premium pay in appropriate circumstances. For both these reasons, the trial court did not abuse its discretion in declining to certify a class based solely on the absence of a formal policy governing the award of premium pay.[8]

D. *Off-the-clock Work*

Plaintiff contends the trial court erred in declining to certify a class with respect to his claim of widespread off-the-clock work.

---

[7] The underlying claims were critical to both courts in certifying a class. Whether the absence of a break policy *alone* can support class treatment is unresolved. (See *Benton v. Telecom Network Specialists, Inc., supra*, 220 Cal.App.4th 701, 727 [declining to decide whether the absence of a policy, alone, can support a class claim].)

[8] To the extent plaintiff's claim is based on an alleged failure to award premium pay in appropriate circumstances, rather than the absence of a policy, there is no legal difference between this claim and his meal break claims. As noted, the obligation to award premium pay arises only when a violation of the meal or rest break rules occurs, and the failure to award premium pay is not considered an independent violation of the law. A claim for failure to provide premium pay is therefore wholly derivative of and dependent upon the demonstration of break violations.

There appears to be no dispute technicians were properly compensated for the time they actually reported in the time records. Plaintiff contends, however, that Comcast technicians are systematically underreporting their working time, since they do not claim, and are not paid for, all of time they are shown to be working by the TechNet system. Although plaintiff contended in the trial court that this purported underreporting was due, at least in part, to an informal Comcast policy requiring technicians to report round-number lunch break times of 30 or 60 minutes, he provided no direct proof of such a policy.[9] Nor did he provide proof of any widespread pressure on technicians by their supervisors to underreport their working hours. Rather, his claim is based entirely on inferences from the TechNet data.

Brinker is directly on point here. In that case, the employer had a formal policy allowing appropriate meal breaks. The plaintiff sought to certify a class demonstrating that, notwithstanding the policy, the employer "required employees to perform work while clocked out during their meal periods." (*Brinker, supra,* 53 Cal.4th at p. 1051.) In doing so, however, he failed to present "substantial evidence of a systematic company policy to pressure or require employees to work off-the-clock." (*Ibid.*) As the court explained in affirming the court of appeal's decision vacating class certification, "liability is contingent on proof [the employer] knew or should have known off-the-clock work was occurring. [Citations.] Nothing before the trial court demonstrated how this could be shown through common proof, in the absence of evidence of a uniform policy or practice. Instead, the trial court was presented with anecdotal evidence of a handful of

[9] In his opening brief, plaintiff asserts "Comcast requires that the Technicians' time records show a 60-minute meal period each work day" and provides several record citations in purported support of the assertion. His first citation is to a section of the ESS handbook in which Comcast instructs a hypothetical technician whose lunch break was interrupted by work after 45 minutes to record a 45-minute lunch break. This instruction is consistent with Comcast's written policy. The supposed proof thereby directly contradicts the assertion it was cited to support. The remaining citations are no more successful. The evidence consistently demonstrated that Comcast expected and encouraged technicians to take a 60-minute meal break, but it instructed them to record the meal break actually taken, even if it was less than 60 minutes.

individual instances in which employees worked off-the-clock, with or without knowledge or awareness by [their] supervisors. On a record such as this, where no substantial evidence points to a uniform, companywide policy, proof of off-the-clock liability would have had to continue in an employee-by-employee fashion, demonstrating who worked off-the-clock, how long they worked, and whether [the employer] knew or should have known of their work." (*Id.* at pp. 1051–1052.) Plaintiff's claim is no different.

Plaintiff attempts, in effect, to substitute the TechNet data for his lack of evidence of a uniform Comcast policy, arguing the data constitute common indirect proof of such a policy, or at least proof of Comcast's constructive awareness that technicians were underreporting their time. The argument is successful only if plaintiff provided an evidentiary basis in support of the premise for Breshears's analysis: that the TechNet data are a more accurate reflection of a technician's work day than the time records actually reported by the technician himself or herself. We find substantial evidence to support the trial court's conclusion that plaintiff failed to prove this premise.

Initially, we note plaintiff provided no basis for doubting the accuracy of the time records. As technicians are aware, their proper compensation depends upon the accurate reporting of their activities in the time records. Not only are they required to certify to the accuracy of the records, technicians have a financial motive to claim every compensable working hour. There was no indication Comcast discouraged technicians from such reporting. Plaintiff provided no explanation for the widespread underreporting of working hours that he claimed to be occurring.[10]

In contrast, there was convincing evidence to cast doubt on the trustworthiness of the TechNet data. TechNet was not designed as a method for keeping time but as a method for communication, and technicians did not treat the system as a means of

[10] Plaintiff's only evidence of inaccuracy was the regular occurrence of exact 60- and 30-minute meal periods, which he claimed to be suspicious. However, he provided no significant evidence of a Comcast policy to pressure technicians falsely to report round-figure break periods.

tracking their time. Individual technicians varied in the manner in which they used TechNet, could be careless in reporting their statuses, and could manipulate the system. The TechNet system was subject to malfunctions rendering its records inaccurate, and it ceased to work altogether when technicians traveled outside its communication range. The two individual records analyzed by Breshears and Dutton persuasively demonstrated the statuses reported by the technicians on TechNet bore no necessary resemblance to their actual work activities. In short, there was substantial evidence to support a conclusion that TechNet data was far less accurate in characterizing technician work activities than the time records.

Given the relative unreliability of the TechNet data, each departure of that data from the time records must be analyzed individually to determine whether, in fact, the technician's reported hours were inaccurate. Accordingly, the trial court did not abuse its discretion in concluding plaintiff failed to provide sufficient common proof of off-the-clock work to justify class treatment.

III. DISPOSITION

The judgment of the trial court is affirmed.

_____
Margulies, Acting P.J.

We concur:

_____
Dondero, J.

_____
Becton, J.*

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.