

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

JORGE PALACIOS, on behalf of himself and all
other persons similarly situated,

Plaintiff,

v.

H & M HENNES & MAURITZ, LP,

Defendant.

CASE No. 18 CH 16030

CALENDAR 11

Judge Pamela McLean Meyerson

MAR 16 2023

Circuit Court – 2097

ORDER

This matter came on to be heard on Plaintiff's Renewed Motion for Class Certification. After considering the briefs and oral arguments, the Court grants the Motion.

BACKGROUND

Plaintiff Jorge Palacios and other employees of H & M HENNES & MAURITZ, LP ("H&M") had to scan their fingerprints into H&M's biometric time clock system to record the time they worked. This lawsuit—originally filed on December 27, 2018 by named plaintiff Kenyatta Slater and amended on August 9, 2019 to add Mr. Palacios as plaintiff—alleges that H&M violated the Illinois Biometric Information Privacy Act ("BIPA," 740 ILCS 14/1 *et seq.*), by collecting, possessing and transferring employees' biometric information without giving the required disclosures, getting the proper consents, and establishing and following a retention and destruction policy.

Discovery proceeded, with the case being stayed for much of its lifespan as various BIPA cases made their way through the appellate courts. With the stay now lifted, Plaintiff asks the Court to certify the class.

THE PROPOSED CLASS

Plaintiff seeks to certify the following class:

All hourly employees of Defendant who enrolled in or used Defendant's finger-scan timekeeping system while working for Defendant in Illinois between August 9, 2014 and October 15, 2019.

Plaintiff also asks the Court to appoint Jorge Palacios as class representative and to appoint Werman Salas P.C. as class counsel.

ANALYSIS

Certification of a class is governed by Section 2-801 of the Illinois Code of Civil Procedure, which provides:

An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

- (1) The class is so numerous that joinder of all members is impracticable.
- (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
- (3) The representative parties will fairly and adequately protect the interest of the class.
- (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

735 ILCS 5/2-801.

The proponent of the class has the burden of establishing these four prerequisites. Decisions regarding class certification are within the sound discretion of the trial court, as long as that discretion is exercised within the framework of Rule 2-801. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 125-26 (2005). In deciding whether to certify a proposed class, the trial court “accepts the allegations of the complaint as true and should err in favor of maintaining class certification, but should avoid deciding the underlying merits of the case or resolving unsettled legal questions.” *CE Design Ltd. v. C&T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶ 9 (internal citations omitted).

H&M does not question Plaintiff’s compliance with the first requirement, *numerosity*. Mainly, H&M contends that Plaintiff does not meet the third requirement, *adequacy of representation*. In a related argument, H&M contends that Plaintiff’s situation is factually and legally different from those of other class members, so Plaintiff has not met the second requirement, *commonality*. For these reasons, H&M argues that Plaintiff has not met the final requirement of *appropriateness*.

Adequacy of Representation

H&M cites several excerpts from Mr. Palacios’ deposition and contends he is “uninformed and disinterested in the facts, the litigation, and his role as the class representative.” (Def. Resp. at 8). H&M likens this case to *Byer Clinic & Chiropractic, Ltd. v. Kapraun*, 2016 IL App (1st) 143733, where the Court found a class representative to be inadequate because he:

- (i) believes he is pursuing the case individually and has no duties to the class;
- (ii) has no knowledge of the basic facts giving rise to the lawsuit;
- (iii) does not know how the Clinic became the named plaintiff;
- (iv) could not identify the name of the individual defendant or the claims asserted;
- (v) did not know when the lawsuit was filed or the status of the case or discovery;
- (vi) had virtually no involvement in the case including in discovery;
- and (vii) had no knowledge of the attorney fee arrangement.

Id. at ¶ 17.

This is not the situation with Mr. Palacios. The Court has reviewed his deposition and finds that, while he may not understand legal jargon or procedure, he understands the basic facts of his case and understands he is making a legal claim for violation of his biometric privacy rights on behalf of a class of other employees. He has been in regular communication with his counsel and participated in discovery. The Court finds that Plaintiff Jorge Palacios will fairly and adequately represent the interests of the class.

H&M has not challenged the appointment of Plaintiff's counsel as class counsel. The Court has observed counsel's advocacy in this case and others, and finds that Werman Salas P.C. will fairly and adequately protect the interests of the class.

Commonality

Plaintiff states that the following questions are common to the class:

- (1) Whether H&M's time clocks collected "biometric identifiers" or "biometric information" from the class;
- (2) Whether H&M provided written disclosures to the class and obtained their written consent before collecting their biometric data;
- (3) Whether H&M possessed the class's biometric data without establishing a data retention/destruction policy;
- (4) Whether H&M disclosed the class's biometric data to a vendor without obtaining the class's consent; and
- (5) Whether H&M's violations of BIPA are reckless or negligent.

See Pltf's Memo at 10, reply at 2.

H&M contends Mr. Palacios is at odds with the rest of the class because he alleged he suffered emotional distress, possibly giving rise to a defense that his claim is a workplace injury that is preempted by the Illinois Workers Compensation Act. Plaintiff points out that he has not pled a claim for emotional damages and is seeking only statutory damages under BIPA (plus an injunction and attorney fees). He stated at his deposition that "how I've been harmed is by my biometric information privacy rights," and stated in his interrogatory answers that he is pursuing the same claims for himself that he is pursuing for class members. Based on the pleadings and discovery, the Court finds that Mr. Palacios' emotional distress is unlikely to be a relevant issue.

Similarly, H&M attempted to distinguish Mr. Palacios' experience from that of other class members by pointing out that he hadn't read the H&M "support book" before he signed it. This is likely irrelevant as well. If H&M contends that the support book met BIPA's disclosure requirements, all employees who received it and signed the acknowledgment will be in the same boat—whether they actually read the support book or not.

The Court finds that the common questions noted above predominate over any questions affecting only individual members.

Appropriateness

Finally, a class action must be “an appropriate method for the fair and efficient adjudication of the controversy.” 735 ILCS 5/2-801(4). In this case, many individuals have allegedly incurred relatively small liquidated damages. Individually, their likely recovery is probably too small to justify a separate action. Collectively, a court may efficiently adjudicate their claims. This is what class actions were designed to achieve.

CONCLUSION

The Court finds that Plaintiff’s proposed class definition is not overbroad, and the Court certifies the following class:

All hourly employees of Defendant who enrolled in or used Defendant’s finger-scan timekeeping system while working for Defendant in Illinois between August 9, 2014 and October 15, 2019.

Further, the Court appoints Jorge Palacios as class representative and Werman Salas P.C as class counsel.

As discussed in open court today, Plaintiff will, on or before March 23, 2023, either (1) file a Third Amended Complaint that removes the allegations regarding emotional distress; or (2) submit to the Court an agreed order that strikes those allegations.

This matter is continued to April 14, 2023 at 10:15 a.m. for status by Zoom.

Judge Pamela McLean Meyerson

MAR 16 2023

Circuit Court – 2097

ENTER



Judge Pamela McLean Meyerson