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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
NO. 2181CV00680

ANDREW JEFFERSON[1]

vs.

UTS OF MASS., INC. and others[2]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This action arises out of a mileage reimbursement arrangement between the plaintiff, Andrew Jefferson, on the one hand, and the defendant, UTS of Mass., Inc., on the other hand. Alleging, in essence, that UTS failed to properly reimburse him for all transportation expenses pursuant to 454 Code Mass. Regs. § 27.04, Jefferson has brought two counts of Violation of G.L. c. 149, §§ 148 and 150 against UTS and its two principals, William P. Crabtree and Steven T. Crabtree. Jefferson has now moved for class certification (Dkt. No. 22), and UTS has cross-moved for summary judgment on all counts (Dkt. No. 23). For the reasons that follow, UTS's motion for summary judgment is DENIED and Jefferson's motion for class certification is ALLOWED.

BACKGROUND

The following facts are taken from UTS's Statement of Material Facts (Dkt. No. 23.4), Jefferson's Responses to UTS's Statement of Material Facts (Dkt. No. 22.4), and reasonable inferences drawn therefrom.

UTS is a company that specializes in testing and inspection of construction materials, both in its laboratory on construction job sites. From September 10, 2018 to February 19, 2021, UTS employed Jefferson as a staff engineer. In that role, Jefferson visited job sites to conduct on-site soil inspection and

[1] On behalf of himself and all other employees similarly situated
[2] William P. Crabtree and Steven T. Crabtree

testing services. During his tenure with UTS, Jefferson traveled to jobsites to perform such testing, and UTS reimbursed Jefferson for his travel mileage at the rate of $0.35 per mile pursuant to its written policy for mileage reimbursement.

For Jefferson and other UTS staff engineers, UTS's reimbursable mileage was calculated as the distance between an assigned starting site, daily jobsites, and an assigned ending point. That is, the distance UTS used to calculate reimbursable mileage was the sum of: (1) the distance between the staff engineer's assigned starting point and their first job site of the day; (2) the distance between all other job sites to which they were assigned for the day; and (3) the distance between the last jobsite to which they were assigned for the day and their assigned ending point. Unique to Jefferson was that UTS agreed to use the Leominster Post Office, near Jefferson's home in Orange, Massachusetts, as Jefferson's starting and ending point for purposes of mileage reimbursement. Thus, when UTS and Jefferson calculated Jefferson's mileage reimbursement, they used the Leominster Post Office as Jefferson's starting and ending point. Generally, the starting and ending point assigned to other staff engineers was one of UTS's two offices, located in Stoneham and Easton.

To receive reimbursement for work-related travel, each UTS staff engineer, including Jefferson, submitted a timesheet each week detailing their work-related miles, tolls, miscellaneous transportation expenses, and hours worked.

All other material facts at issue are disputed.

Jefferson has brought this lawsuit seeking reimbursement for the difference between the $0.35 mileage reimbursement he received from UTS and his actual travel expenses, which Jefferson claims are accurately reflected by the mileage reimbursement rates the Internal Revenue Service ("IRS") published for the years 2019 through 2021. Those rates published by the IRS exceed the UTS mileage reimbursement rates for each relevant year. Jefferson also seeks class certification for the class including "all [UTS] employees during the period December 10, 2017 and March 21, 2022 who used their personal vehicles to perform work duties . . . ." Motion for Class Certification at 21.

DISCUSSION

I. SUMMARY JUDGMENT

Summary judgment is appropriate where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56. *Cassesso* v. *Comm'r of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991). *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991).

Here, Jefferson claims that the $0.35 per mile reimbursement UTS provided was insufficient to compensate him for all of his "transportation expenses". 454 Code Mass. Regs. § 27.04(4)(d) states that: "An employee required or directed to travel from one place to another after the beginning of or before the close of the work day shall be compensated for all travel time and shall be reimbursed for all transportation expenses." *Id.* Jefferson alleges that the $0.35 per mile UTS paid failed to "reimburse[] [him] for all transportation expenses." In so asserting, Jefferson does not cite to records of unreimbursed receipts for gasoline, auto insurance premiums, receipts for maintenance costs, or other such records. Jefferson argues that he and other UTS staff engineers did not maintain detailed records of their transportation expenses because UTS did not request or require such records to determine transportation expense reimbursement, so UTS staff engineers such as Jefferson had no reason to keep such records. Instead, Jefferson argues that the actual transportation expenses UTS staff engineers such as himself incurred are accurately reflected by the mileage reimbursement rates issued by the IRS, which exceeded UTS's mileage reimbursement rate at all relevant times. *See* IRS Standard Mileage Rates, https://www.irs.gov/tax-professionals/standard-mileage-rates (last visited October 1, 2022).

The primary issue before the court at this stage is whether Jefferson may use the IRS mileage reimbursement rate to prove his damages in lieu of records of actual expenses. To begin, Jefferson must prove his claimed damages through more than mere speculation, but his damages need not be proven with mathematical precision. See *Herbert A. Sullivan, Inc.* v. *Utica Mut. Ins. Co.*, 439 Mass. 387, 413 (2003). Evidence that enables the factfinder to arrive at an approximate estimate of damages is sufficient. *Coady* v. *Wellfleet Marine Corp.*, 62 Mass. App. Ct. 237, 245 (2004), citing *Agoos Leather Cos.* v. *American & Foreign Ins. Co.*, 342 Mass. 603, 608 (1961). An element of uncertainty is permitted in calculating damages, and an award of damages can stand on less than substantial evidence. *Herbert A. Sullivan, Inc.*, 439 Mass. at 413. Massachusetts caselaw repeatedly bears out these principles, and there are many instances of lawful damages awards which inherently involve some acceptable level of approximation. See, e.g., *Rattigan* v. *Wile*, 445 Mass. 850, 862 (2006) (diminution in rental value); *Herbert A. Sullivan, Inc.*, 439 Mass. at 413-415 (2003) (lost profits); *Trinity Church in Boston* v. *John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 50-51 (1987) (reconstruction costs less depreciation).

Jefferson may reasonably calculate his damages through reference to the IRS mileage reimbursement rates for the relevant periods in lieu of records of his actual transportation expenses. The IRS standard reimbursement rate is a per-mile reimbursement rate that is designed to approximate the costs of operating a motor vehicle, including the costs of depreciation, maintenance and repairs, gasoline, tires, oil, insurance, registration, and the like. See *Randall* v. *Randall*, 2013-Ohio-707, ¶ 8 (Ct. App. 2013). A number of persuasive authorities have found the IRS mileage reimbursement rate to reasonably represent actual transportation expenses. See, e.g., *Escorbor* v. *Helping Hands Co.*, 2017 Mass. Super. LEXIS 162, at *4 (2017) (IRS reimbursement rate reasonable); see also *Waters* v. *Pizza*, 538 F. Supp. 3d 785, 793 (S.D. Ohio 2021) (IRS rate one reasonable estimate of per-mile transportation expenses); *Orth* v. *J & J & J Pizza, Inc.*, 2020 U.S. Dist. LEXIS 51562, at *9 (D. Mass. Mar. 25, 2020) ("Courts have regularly found that, consistent with the [Department of Labor's Wage and Hour Division's Field Operations Handbook], an employer must provide reimbursement at the IRS rate when they do not keep records of employees' actual vehicle expenses."); *Cornish* v. *Deli Mgmt., Inc.*, 2016 U.S. Dist. LEXIS

141209, at *9 (D. Md. Oct. 12, 2016) (allegation that the defendant failed to reimburse transportation expenses at or above the IRS rate sufficient to survive dismissal). Here, too, a factfinder may rely upon evidence concerning the relevant IRS reimbursement rates to determine Jefferson's damages.[3]

Here, Jefferson's alleged damages—the difference between the UTS mileage reimbursement rate and his actual transportation expenses—may be reasonably ascertained through reference to his work-related mileage, UTS's mileage reimbursement, and the IRS mileage reimbursement rates for the relevant periods. Such a damage computation methodology amounts to more than "mere speculation" and comports with settled Massachusetts law concerning the certainty required for damages computations. See *Herbert A. Sullivan, Inc.*, 439 Mass. at 413. UTS is not entitled to judgment as a matter of law, and UTS's motion for summary judgment is accordingly DENIED.

II. CLASS CERTIFICATION

Class certification does not turn on the merits. *Salvas* v. *Wal-Mart Stores, Inc.*, 452 Mass. 337, 361 (2008), quoting *Weld* v. *Glaxo Wellcome Inc.*, 434 Mass. 81, 84-85 (2001). The plaintiff's burden on a motion for class certification is well established. On a motion for class certification pursuant to rule 23, "[t]he plaintiffs bear the burden of providing information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23 . . .; they do not bear the burden of producing evidence sufficient to prove that the requirements have been met. *Kwaak* v. *Pfizer, Inc.*, 71 Mass. App. Ct. 293, 297 (2008). Rule 23 provides the correct standard for determining class certification of claims under Massachusetts wage laws. *Gammella* v. *P.F. Chang's China Bistro, Inc.*, 482 Mass. 1, 3 (2019) ("We conclude that rule 23 provides the correct standard for determining class certification in a claim under the wage laws.").

To achieve class certification, Rule 23(a) requires a plaintiff show that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to

[3] The court expresses no view concerning whether the IRS reimbursement rates are the appropriate measure of actual transportation costs within the meaning of 454 Code Mass. Regs. § 27.04. It is sufficient to state that Jefferson's reliance upon the IRS reimbursement rates is not improper such that UTS is entitled to judgment as a matter of law at this stage.

the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Mass. R. Civ. P. 23(a). Additionally, under Rule 23(b), the plaintiff must show (5) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (6) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Mass. R. Civ. P. 23(b). As discussed below, the requirements for class certification are met here.

1. Numerosity.

A class is numerous when joinder of all members is impracticable. Mass. R. Civ. P. 23(a)(1). The impracticability of joinder turns on whether joinder is impractical, unwise, or imprudent when considering efficiency, the limitation of judicial resources, and expenses to the plaintiff. See *Brophy* v. *School Comm. of Worcester*, 6 Mass. App. Ct. 731, 735 (1978).

Here, the proposed class numbers "over 200". See Motion for Class Certification at 11. Such a number undoubtedly satisfies the numerosity requirement of Rule 23(a). See, e.g., *Gammella*, 482 Mass. at 12 (numerosity requirement satisfied by "hundreds of unnamed employees"); *Escorbor* v. *Helping Hands Co.*, 2017 Mass. Super. LEXIS 162 at *8 (2017) (numerosity requirement satisfied by "hundreds"); *DeMego* v. *Nisonson*, 2017 Mass. Super. LEXIS 72 at *16 (2017) (numerosity satisfied by "more than forty members"); *Sagar* v. *Fiorenza*, 2014 Mass. Super. LEXIS 1 at *4 (2014) ("There is no dispute that the putative class, which includes "hundreds" of members, satisfies the numerosity requirement for class certification."); see also *DeRosa* v. *Massachusetts Bay Commuter Rail Co.*, 694 F. Supp. 2d 87, 98 (D. Mass. 2010) ("Classes of 40 or more have been found to be sufficiently numerous under Rule 23(a)(1).") (applying Fed. R. Civ. P. 23).

2. Common Questions of Law and Fact.

Commonality for class certification purposes requires a demonstration that a class-wide proceeding will generate common answers apt to drive resolution of the litigation. *Adem* v. *M11 Motors, LLC*, 2020 Mass. Super. LEXIS 190 at *12 (Dec. 9, 2020), citing *Wal-Mart Stores, Inc.* v. *Dukes*, 564

U.S. 338, 350 (2011). The claim must be "of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 338.

Here, Jefferson has met his burden of demonstrating that the claims at issue are capable of class-wide resolution. The only allegation at issue in this litigation is that UTS's mileage reimbursement rate of $0.35 failed to fully compensate UTS employees for all of their transportation expenses within the meaning of 454 Code Mass. Regs. § 27.04. It is difficult to see how this claim could not be capable of class-wide resolution. UTS's arguments to the contrary are unavailing. UTS first argues that the commonality requirement cannot be met here because the putative class members were situated differently, using different vehicles to perform work duties, using different starting and ending points for purposes of calculating work-related mileage, performing different levels of maintenance on their vehicles, and so on. The question common to the putative class members is whether UTS's mileage reimbursement rate of $0.35 failed to fully compensate them for all of their transportation expenses. Were UTS's employees required to prove their actual damages with mathematical precision, UTS's argument may have force, but such mathematical precision is not required here, see Section I, *supra*. At the class certification stage, the plaintiff need not meet the burden of proof what will be required at trial. See *Weld*, 434 Mass. at 85. At this stage, Jefferson's assertions are sufficient.

UTS's citations to cases involving the denial of motions for class certification are unpersuasive, as those cases are dissimilar to this one. See *Adem*, 2020 Mass. Super. LEXIS 190 at *14 (2020) (class certification and cross-motions for summary judgment denied where application of challenged company policy to named plaintiff was questionable); *Vitali* v. *Reit Mgmt. & Research, LLC*, 2016 Mass. Super. LEXIS 30 at *23-24 (2016) (class certification denied where common questions did not predominate); *Romulus* v. *CVS Pharmacy, Inc.*, 321 F.R.D. 464, 470 (D. Mass. 2017) (class certification denied where inconsistent evidence concerning implementation of allegedly unlawful employer policy and common questions did not predominate). Here, it appears undisputed that UTS's policy of reimbursing its employees at the rate of $0.35 per mile applied both to Jefferson and to UTS's field inspectors generally.

Further, UTS's production of declarations of members of the putative class alleging that they did not suffer harm do not defeat class certification. Firstly, for purposes of deciding this motion only, the court credits Jefferson's assertion that UTS objected to providing information about putative class members in response to Jefferson's discovery requests. Now, UTS relies upon information obtained from those previously unidentified putative class members to oppose class certification. Class certification "should not be thwarted where the defendant's opposition is based on information in the defendant's possession that the defendant itself asserted plaintiff did not need and then used strategically against the plaintiff." *Gammella*, 482 Mass. at 20. Secondly, four out of the five declarations UTS submitted in opposition to Jefferson's motion for class certification were from current UTS employees, and courts are generally reluctant to rely upon employer-obtained declarations to defeat class certification. See, e.g., *Carlson* v. *Home Depot USA Inc.*, 2021 U.S. Dist. LEXIS 194352 at *26 (W.D. Wash. Oct. 7, 2021) ("[T]he Court cannot overlook the declarants' unreliability and bias given that they are current employees who might fear retaliation if they cast their employer in a bad light."); *Vaughan* v. *Mortgage Source LLC*, 2010 U.S. Dist. LEXIS 36615 at *7 (E.D.N.Y. April 14, 2010) ("[C]ourts may assign the weight they think appropriate to affidavits from current employees because of the risk of bias and coercion.") (citation and internal quotation marks omitted); *Morden* v. *T-Mobile USA, Inc.*, 2006 U.S. Dist. LEXIS 68696 at *9 (W.D. Wash. Sep. 12, 2006) ("In support of its arguments, defendant relies in part on 99 declarations from current employees, all of whom are potential collective action members. However, the Court will discount those declarations because of the risk of bias and coercion inherent in that testimony."). Here, too, the court assigns minimal weight to the declarations UTS submitted in opposition to class certification on the grounds that they were all—except one[4]—submitted by current UTS employees.

Jefferson has satisfied his burden at this stage that a class-wide proceeding will generate answers common to all putative class members.

[4] The one declaration UTS submitted which was not from a current UTS employee was from a former UTS employee who retired in 2020. While its affiant asserts that he believes he was reimbursed for all transportation expenses, he does not state such as a fact, undoubtedly because he, like Jefferson, did not maintain records of his actual transportation expenses as they accrued.

3. Typicality.

Next, Jefferson's claims must be "typical of the claims . . . of the class." Mass. R. Civ. P. 23(a)(3). Typicality is established when there is "a sufficient relationship . . . between the injury to the named plaintiff and the conduct affecting the class," and the claims of the named plaintiff and those of the class "are based on the same legal theory." *Weld*, 434 Mass. at 87, citing 1 H. Newberg, Class Actions § 3.13, at 3-76 (3d ed. 1992). This alignment of claims and legal theories ensures that the named plaintiff, in "pursuing his or her own self-interest will advance the interests of the class members." *Id.* A plaintiff representative normally satisfies the typicality requirement with "an allegation that the defendant acted consistently toward the representative and the members of a putative class." *Id.*, citing *Fletcher* v. *Cape Cod Gas Co.*, 394 Mass. 595, 606 (1985).

Jefferson has satisfied the typicality requirement here. Jefferson has alleged that the same UTS policy providing for mileage reimbursement at the rate of $0.35 applied to all similarly situated UTS employees for the relevant period. Thus, Jefferson's legal theory that the $0.35 mileage reimbursement failed to fully compensate him for all transportation expenses, including maintenance costs, auto insurance premiums, and depreciation, applies equally to UTS's other employees compensated at its $0.35 mileage reimbursement rate. Jefferson's claims are typical of those of the putative class. See *Weld*, 434 Mass. at 87.

4. Fair Protection of the Class's Interests.

Jefferson must show that he and his counsel "will fairly and adequately protect the interests of the class." Mass. R. Civ. P. 23(a)(4). Specifically, Jefferson must establish that there is no potential conflict between the named plaintiff and the class members and that his counsel is "qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews* v. *BechtelPower Corp.*, 780 F.2d 124, 130 (1st Cir. 1985) (applying Fed.R.Civ.P. 23).

Here, UTS does not challenge the ability of Jefferson or his counsel to "fairly and adequately protect the interest of the class." The court finds that Jefferson has no conflict with the rest of the class and that Jefferson's counsel are "qualified, experienced, and able to vigorously conduct the proposed

litigation." The requirement that Jefferson and his counsel fairly and adequately protect the interests of the class is accordingly satisfied here.

5. Predomination of Common Issues.

Jefferson must also show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . . ." Mass. R. Civ. P. 23(b). "The predominance test expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context." *Salvas*, 452 Mass. at 363, citing 2 A. Conte & H.B. Newberg, Class Actions § 4.23, at 154 (4th ed. 2002). The predominance requirement seeks to ensure, in part, that the economies of class action will be realized in the particular litigation. *Id.*, citing Newberg, supra at § 4.23, at 154. Common issues predominate when all of the class members' injuries are caused by a "single course of conduct" undertaken by the defendants. See *Weld*, 434 Mass. at 92. The "predominance requirement [is] satisfied by [a] 'sufficient constellation of common issues [that] bind class members together' and 'cannot be reduced to a mechanical, single-issue test.'" *Id.*, citing *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000).

Here, Jefferson has met his burden of demonstrating that common questions predominate over questions affecting individual members. As explained herein, the common question applicable to all class members is whether UTS's mileage reimbursement rate of $0.35 fully compensated UTS employees for all transportation expenses within the meaning of 454 Code Mass. Regs. § 27.04. UTS's mileage reimbursement policy applied broadly to all UTS field inspectors, such as Jefferson. Undoubtedly, the mileage incurred by each such field inspector will vary, but such variation will not convert the common question at issue into many different legal questions. Though individual inquiries may ultimately be required to determine damages, that fact does not vitiate a common question. See *Hickman* v. *Riverside Park Enters.*, 2018 Mass. Super. LEXIS 549 at *9-10 ("That individual inquiries may be ultimately necessary to determine the amount of damages each member of the class is entitled to receive is not a reason to deny class certification."); *Smilow* v. *Southwestern Bell Mobile Sys, Inc.*, 323 F.3d 32, 40 (1st

Cir 2003) ("Where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain."). The primary question at issue here, whether UTS's mileage reimbursement rate of $0.35 fully compensated its employees for all transportation expenses under 454 Code Mass. Regs. § 27.04, predominates over any individual questions.

6. Superiority of Class Action Format.

Finally, Jefferson must demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23(b). The superiority requirement serves to ensure the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents to court at all." *Anchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997) (citation omitted). In certain instances, a class action is superior to other methods of adjudication, not only because of the common legal and factual questions, but also for purposes of efficiency. *Weld*, 434 Mass. at 93. A class action provides judicial efficiency and access to the courts because "it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court." *Id.* Moreover, class actions are superior methods for adjudication to establish "uniformity of decisions as to persons similarly situated." *Amchem*, 521 U.S. at 615 (citation omitted).

Jefferson has satisfied the superiority requirement. Even assuming—without deciding—that the IRS mileage reimbursement rates Jefferson proposed are the proper measure of actual transportation expenses, it is unlikely that his anticipated damages—the difference between his actual mileage reimbursement under UTS's mileage reimbursement policy and what his mileage reimbursement would have been under the IRS reimbursement rates—could have warranted the expense of protracted litigation. Thus, Jefferson's proposed class would aggregate small claims—like his own—into a single action, providing class members with "access to the courts" where otherwise their "likely range of recovery would preclude" them from pursuing litigation. The class action format is thus the superior means of resolving this matter.

ORDER

In accordance with the foregoing, UTS's motion for summary judgment is DENIED and Jefferson's motion for class certification is ALLOWED.

Honorable Shannon Frison
Justice of the Superior Court

November 3, 2022