NOT FOR PUBLICATION

FILED

NOV 1 2022

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AISHA BOWEN, an individual, on behalf of herself of all others similarly situated; STACEY WILLIAMS, an individual on behalf of herself and all others similarly situated,

Plaintiffs-Appellees,

v.

TARGET CORPORATION, a Minnesota corporation,

Defendant-Appellant.

No. 21-56136

D.C. No.
2:16-cv-02587-JGB-MRW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted October 7, 2022
Pasadena, California

Before: TASHIMA and LEE, Circuit Judges, and BENNETT,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

Target Corporation employees brought this class action lawsuit challenging the company's method of calculating overtime pay for workers "who were paid a shift differential and/or holiday premium pay." Plaintiffs claim that Target violates California law in two ways: First, its method of calculating employees' regular rate of pay (RROP)—which uses total hours worked rather than only non-overtime hours—allegedly conflicts with the California Supreme Court's holding in *Alvarado v. Dart Container Corp.*, 411 P.3d 528 (Cal. 2018). Second, Target's payment of an overtime premium of one-half RROP supposedly runs afoul of California's requirement that it be calculated "at the rate of no less than one and one-half times the regular rate of pay for an employee." Cal. Lab. Code § 510.

The district court denied Target's Rule 12(c) motion for judgment on the pleadings, which we review de novo. *Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1068 (9th Cir. 2020). Our jurisdiction over this interlocutory appeal rests on 28 U.S.C. § 1292(b). Target asked the district court to certify two questions under §1292(b)—the *Alvarado* theory and the 1.5 overtime theory. The district court certified only the *Alvarado* theory, and Plaintiffs contend that our jurisdiction extends to that issue alone. It is well settled, however, that "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (emphasis in original). We therefore conclude that we have jurisdiction over

this entire appeal. We reverse the district court and hold that Target is entitled to judgment as a matter of law.

1. *Alvarado* theory: The district court erred in ruling that Target's method of calculating RROP using both overtime and non-overtime hours conflicts with the California Supreme Court's *Alvarado* decision. RROP is a "*weighted average* reflecting work done at varying times, under varying circumstances, and at varying rates," including "adjustments . . . reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation." *Alvarado*, 411 P.3d at 533, 544 (emphasis in original).

In *Alvarado*, the California Supreme Court considered how RROP should be calculated when an employee earns a flat-sum attendance bonus. *Id.* at 530. The court held that "when nonhourly compensation is factored into an employee's 'regular rate of pay,' only nonovertime hours should be considered." *Id.* at 540. That is, because an attendance bonus "is payable even if the employee works no overtime at all," it should be "treated as if it were fully earned by only the nonovertime hours in the pay period." *Id.* at 539. Plaintiffs argue that shift differentials and holiday premiums (collectively described as "shift premiums") should be treated similarly. We disagree.

Alvarado addresses a particular method of compensation: "[F]lat sum bonuses comparable to [an] attendance bonus." *Id.* at 539 n.6, 543. Such bonuses do not

increase with the number of hours worked. So if overtime hours were included in the RROP calculation method, it would mean that the denominator (reflecting the number of hours worked) would increase while the numerator (reflecting compensation, including flat sum bonuses) would not. That would then mean that the RROP would be "progressively decreasing" as an employee works more hours. *Id.* at 540, 542, 544–46. *Cf. generally Skyline Homes, Inc. v. Dep't of Indus. Rels.*, 211 Cal. Rptr. 792 (Ct. App. 1985) (discussing fixed weekly wages).

Alvarado's reasoning does not apply here. In contrast to flat-sum bonuses, shift premiums are not fixed; they are hourly payments and are proportional to hours worked. Accordingly, an hourly bonus paid for a shift differential or holiday premium directly correlates to the number of hours worked and will increase as an employee works additional overtime. Thus, we are not faced with a problem of an artificially declining RROP as an employee works more overtime hours. This is the same "important distinction" that *Alvarado* emphasized between fixed compensation, like a flat-sum attendance bonus, and other forms of pay. *Alvarado*, 411 P.3d at 543.

Put another way, because shift premiums "increase[ ] in rough proportion to the number of hours worked," *id.*, their payment is best understood as constituting base compensation for a workweek "[w]here two rates of pay are paid." Div. of Lab. Standards Enf't, Cal. Dep't of Indus. Rels., The DLSE Enforcement Policies and

Interpretations Manual § 49.2.5 (rev. Dec. 2019) [hereinafter "DLSE"]; *see also Alvarado*, 411 P.3d at 543. Alternatively, shift premiums might be viewed as bonuses "based on . . . some formula other than a flat amount." DLSE § 49.2.4. In either event, Target correctly included overtime hours in the RROP denominator. *See* DLSE §§ 49.2.4, 49.2.5; *Marin v. Costco Wholesale Corp.*, 87 Cal. Rptr. 3d 161, 170 (Ct. App. 2008), *reh'g denied*; *Alvarado*, 411 P.3d at 545.

2. 1.5 overtime theory: The district court also erred in ruling that Target violates California's requirement that employees' overtime hours be paid at a rate of "no less than one and one-half times the regular rate of pay." Cal. Lab. Code § 510.

While the parties offer dueling ways to calculate overtime pay, we conclude that Target's methodology meets California's requirement. Although the parties dispute whether employees were fully compensated for their overtime hours, Plaintiffs do not allege that Target failed to pay all other wages, including shift premiums. For example, during the two-week period of December 22, 2013, through January 4, 2014, Aisha Bowen was fully paid for 61.77 hours at her base hourly wage, plus 3.98 holiday hours subject to an additional $4.745 shift premium.

And because Target's employees have received total base compensation, it is irrelevant whether one views Target's one-half RROP premium as being added to straight-time wages (including shift premiums) or base hourly wages (excluding shift premiums). Under Target's method, an employee receives base hourly wages,

plus any accumulated shift-premium pay, plus an overtime premium of one-half RROP times overtime hours. Although these figures can be combined and sliced any number of ways, the only additional compensation a Target employee receives for their overtime hours is the one-half RROP premium itself. And by the associative property of addition, the precise time that this premium is added to the mix has no effect on an employee's paycheck. The only question thus is whether Target's method of adding a one-half RROP overtime premium is legally sufficient. We find that it is.

Paying a one-half RROP overtime premium is valid under California law so long as the employer compensates employees' overtime hours at a rate of one and one-half RROP. *See Marin*, 87 Cal. Rptr. 3d at 171; *Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 996 (9th Cir. 2017); *Chao v. Casting, Acting & Sec. Talent, Inc.*, No. CIV 00-03481, 2001 WL 1816648, at *8 (C.D. Cal. Nov. 27, 2001), *aff'd*, 79 F. App'x 327 (9th Cir. 2003). And because RROP is a weighted average (total base compensation divided by total hours), total base compensation is necessarily equal to total hours times RROP. *Cf. Gen. Atomics v. Superior Ct.*, 279 Cal. Rptr. 3d 373, 381–82 (Ct. App. 2021), *review denied*.

Finally, by adding a premium of one-half RROP to total compensation, Target's overtime calculation produces compensation equal to non-overtime hours at a rate of RROP plus overtime hours at a rate of one and one-half RROP. Put

differently, if total base compensation is equal to RROP times total hours (including overtime hours), then adding one-half RROP for each overtime hour compensates overtime hours at a rate of one and one-half RROP. *Id.* This is exactly what California law requires. Cal. Lab. Code § 510.

Ultimately, Plaintiffs' complaint is that Target should have adopted a payment methodology that maximizes their overtime pay. But California law does not require that outcome, and Target has complied with California's overtime requirement.

REVERSED.