

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DWYANE HART et al.,

Plaintiffs and Appellants,

v.

GRANT COUNTY EXCAVATION, INC.,
et al.,

Defendants and Respondents.

G046193

(Super. Ct. No. 30-2008-00080888)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gail Andrea Andler, Judge. Affirmed.

Freeman Firm, Thomas H. Keeling; Law Offices of Scott E. Schutzman, Scott E. Schutzman; Allen, Flatt, Ballidis & Leslie and Michael Corey Bock for Plaintiffs and Appellants.

Littler Mendelson, Fermin H. Llaguno and Michael A. Gregg for Defendants and Respondents.

* * *

Plaintiffs¹ appeal the trial court's denial of their motion for class certification in this wage-and-hour dispute. The court ruled, inter alia, that common questions of fact or law did not predominate. This stated reason for the court's denial was supported by substantial evidence. Accordingly, we affirm.

FACTS

Complaint and General Information

In July 2008, plaintiffs brought an action against their ex-employer, corporate defendant Grant County Excavation, Inc., doing business as Environmental Development Group (EDG), and individual defendants Jeffrey Sires and Stacey Sires,² who allegedly controlled EDG's Southern California operations and made all corporate decisions pertinent to the causes of action alleged in the complaint.³ In their complaint, plaintiffs pleaded nine causes of action based on a variety of wage-and-hour theories of liability (e.g., failure to pay wages, unlawful deductions, failure to provide rest/meal periods, failure to pay wages or provide employee records to terminated employees, failure to keep proper time card records, failure to compensate travel time and provide lodging).

The following background information is undisputed: "EDG is a landscape and construction company with locations in Arizona, New Mexico and California and provides services to commercial clients such as big-box retailers. EDG employs

¹ Dwyane Hart and Greg Prevost are individual plaintiffs purporting to bring this action on behalf of all others similarly situated.

² The record sometimes refers to "Stacy" Sires, but we use the spelling utilized in the declaration executed by "Stacey" Sires.

³ Jeffrey Sires is the vice president of EDG and Stacey Sires is the president of EDG.

individuals in an office environment and others working out in the field. EDG's field workers generally work in crews of three to five, including one foreman. The foremen are responsible for planning, organizing, directing and/or coordinating the work performed by laborers at a particular jobsite. The foremen also drive EDG vehicles to and from jobsites and are provided a company credit card to purchase materials and/or equipment. Crews may work at one jobsite in a single day or multiple jobsites depending on the nature of the work requested. Each crew performs a particular type of work at a jobsite such as landscaping, irrigation or rebuild. Rebuild encompasses destroying and rebuilding landscape or hardscape.”

The parties engaged in reciprocal discovery following the filing of the complaint and prior to the filing of a motion for class certification.

Motion for Class Certification

In April 2011, plaintiffs filed a motion for class certification, supported by numerous declarations. Plaintiffs' proposed class was limited to “all persons who are employed or who have been employed by Defendants in the State of California within 4 years of the filing of this Complaint, July 1, 2008, who had been employed by Defendants to provide exterior property maintenance, repairs and landscaping services in California and whose duties did not consist of over 50% administrative, executive, or professional duties” In discovery, EDG produced a document listing 692 potential class members with last known addresses and phone numbers.

The five categories of alleged wrongdoing against members of plaintiffs' proposed class included (1) persons “who were not paid all lawful wages due them for hours worked”; (2) persons “from whose wages Defendants improperly deducted expenses”; (3) persons “who were terminated or discharged within 4 years of the filing of this Complaint and who did not receive the wages or wage documentation to which they

were entitled”; (4) persons “who were not provided” with rest breaks and meal periods; and (5) persons whom defendants did not require to take rest breaks and meal periods.

Plaintiffs have abandoned the latter four allegations of wrongdoing on appeal. Thus, for purposes of this appeal, we focus our inquiry on whether the court correctly denied plaintiffs’ motion to certify a class of individuals employed by EDG from July 1, 2004 to July 1, 2008 “to provide exterior property maintenance, repairs and landscaping services . . . who were not paid all lawful wages due them for hours worked.” The essence of this claim is that EDG allegedly required employees who performed off-site duties to meet at EDG’s Irvine office in the morning, load/unload EDG trucks, and ride in EDG vehicles to and from worksites. EDG allegedly did not pay its employees for the time between their arrival at the Irvine office (when they clocked in) and their arrival at the first worksite of the day.⁴ (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 578-579, 586-588 [if employees are required to meet at central location and ride company bus to first worksite, travel time counts as “hours worked” under applicable law].) Moreover, EDG allegedly altered time sheets to reduce the number of hours paid. It is unclear whether the time sheet alteration allegation is limited to the context of travel time or if it extends to altering records of hours spent performing tasks at worksites.

Defendants opposed the motion for class certification. In doing so, defendants submitted their own declarations, as well as deposition testimony from individuals who submitted declarations in support of plaintiffs’ motion. According to defendants, the proffered deposition testimony contradicted relevant statements made in

⁴ It does not appear that plaintiffs specifically argued in their motion that they should have been (but were not) paid for travel time between the last worksite of the day and the Irvine office. But such a claim would be consistent with the legal theory advanced.

the witnesses' declarations and showed plaintiffs had failed to establish that common issues predominated. We set forth in detail relevant evidence submitted by the parties.

Evidentiary Statements by Defendants

To provide context for evidence from individual EDG employees, we begin by describing evidentiary statements by defendants. In response to a special interrogatory asking it to describe all EDG's policies after July 1, 2004 with regard to employee transportation to work sites, EDG responded in relevant part, "Throughout the work day, . . . EDG's Maintenance Foremen and Laborers travel to different job sites. From July 1, 2004, to around December 1, 2006, Foremen and Laborers were paid their regular hourly rate for travel time. [¶] Beginning in or around December 1, 2006, EDG began paying Laborers and Foremen minimum wage for travel time. The Foremen that drove EDG's vehicles continued to receive his/her regular hourly rate for travel time. [¶] Beginning on or about November 1, 2007, EDG implement[ed] a new travel policy. Pursuant to such policy, Laborers and Foremen (except for Foremen that operated EDG's vehicles) were not paid for travel time to the first job in the morning or from the last job site at the end of the work day. Employees were not required to travel in EDG's vehicle and could, instead, provide their own transportation. Except for travel time to the first job in the morning and from the last job site at the end of the work day, Laborers and Foremen were compensated for all travel time during the work day, regardless of whether they carpoled in EDG vehicles or drove their personal vehicles. [¶] On July 21, 2008, EDG implemented a new travel policy and began paying Laborers and Foremen for travel time to the first job site and from the last job site where the distance is greater than fifty miles from EDG's facility. In addition, Laborers and Foremen are also compensated for travel from job site to job site during the work day. The Foremen that drive EDG's

vehicles continue to receive his/her regular hourly pay for travel time including, travel time to the first job site and from the last job site irrespective of the distance.”⁵

Stacey Sires’s declaration in opposition to the motion for class certification summarized EDG’s evolving policies on travel time: “EDG’s California customers’ job sites are located in Southern and Northern California. Due to the locations of customers, crews travel to different job sites. From July 1, 2004, to around November 2007, EDG *paid field workers for the time spent traveling* to the first job site, between job sites and from the last job site. Beginning in or around December 1, 2006, *EDG began paying field employees minimum wage for the time spent traveling to the first job site and from the last job site*. Beginning in or around October 2009, field workers that wanted to travel to job sites in company vehicle met at a ride share location rather than EDG’s facility. EDG has always paid laborers and foremen for travel from job site to job site during the work day.” (Italics added.)

EDG’s interrogatory response and Stacey Sires’s declaration are silent with regard to whether riding in an EDG vehicle to the first work site of the day was mandatory prior to November 2007. The interrogatory response and declaration are also silent with regard to payment for time spent loading and unloading trucks at the Irvine office, both before and after November 2007. EDG’s discovery response and Stacey Sires’s declaration avoid any admissions of wrongdoing, but are ambiguous upon close examination. In particular, it is unclear whether EDG claims it paid at least minimum wage to laborers for every hour spent travelling to the first work site and back to Irvine from the last work site prior to December 2006.

⁵

This response was in the trial court record as part of the deposition transcript of Stacey Sires, but the court criticized plaintiffs’ failure to provide specific citations to the deposition transcripts and, as a result, it is unclear whether the court considered this interrogatory response.

Declaration of Regional Superintendent Waylon Mattison

Plaintiffs procured a declaration from Waylon Mattison, who worked for EDG from November 2006 to January 2008 as a regional superintendent for Southern California. Mattison supervised “all landscaping maintenance crews assigned to Southern California, and . . . had oversight of all the Wal-Mart stores [that] had . . . contracts with [EDG].”

According to Mattison, “[t]he company would provide trucks for the employees providing landscaping and maintenance services to travel to work sites From the time they left the yard to the time they reached the site, I was aware that these individuals were to receive travel time under California law. This was supposed to [be] the official policy of the company. The travel time pay was supposed to be based on the GPS of the truck. However, it should have been based on the time that they clocked in and the time that they were actual[ly] traveling. There should have been no distinction between travel time and time spent at the work site. Foremen were supposed to be responsible for ensuring workers clocked in and out correctly.”

“The entire travel time situation was a large problem for [EDG]. In general, the workers that I observed clocking in and out during the time that I worked for EDG never received the travel time that they were entitled [to]. Hours were always cut down. [EDG] would use the GPS system as a means to justify correcting, altering, and changing the hours actually noted by the employees on their time sheets. In my experience, the laborers were truthful about the hours that they spent traveling, however, [EDG] unfairly would reduce their hours. [¶] My best estimate would be that an individual who was actual[ly] working and traveling on company trucks for forty hours would see his hours reduced to thirty-one to thirty-two hours. The GPS system was a failure that under-compensated employees, as it merely recorded when a truck was moving, not when employees arrived at work. Additionally, workers when they arrived at the [EDG] headquarters would have to set the trucks up for the day, including

unloading the truck, placing trash . . . into a large bin, placing equipment into the truck, or removing equipment from the truck. Workers would work for hours before travel began, and then would often wait in the truck before and after travel commenced, and would be uncompensated for this time.”

“For jobsites located throughout Southern California, workers would typically be on duty for twelve to thirteen hours, but would largely see their pay reduced to eight hours a day. Employees who complained about the reduction in hours and asked for full payment of their hours were ignored, or were met with frustrating delays and eventually gave up or had their claims denied. The crews at the beginning received overtime pay more frequently than later in my employment. As time went by, overtime became less and less frequent. [¶] In general, over the course of my employment, approximately ninety-five percent or more of the time individuals would not receive the full pay they were entitled to for landscaping and maintenance services, ranging from two to six hours. The payroll section . . . which included ‘Michelle’ and ‘Cindy,’ would routinely alter time sheets by crossing out the hours indicated by the workers and placing reduced hours on the time sheets. The hours claimed by the workers, in my experience, were generally correct and far more accurate than the hours used by [EDG].”

Individually Named Plaintiff Dwyane Hart

Hart worked for EDG from August 1, 2007 until April 2008, although from November 2007 he was designated as a foreman. Hart’s stint as a laborer included tasks such as “rubbish removal, foliage and plant installation, pruning, watering, irrigation, property repairs, [and] pesticide/herbicide application.” Hart worked on three different crews for three different foremen during his three months as a laborer. Hart’s duties as foreman were similar to what he did as a laborer, with the added responsibilities of supervising his co-workers, managing the worksite, and filling out time sheets for himself

and the laborers. Hart's work for EDG took him to locations throughout Southern California, including distant worksites in Vista, San Bernardino, and Calexico.

In his declaration, Hart stated that his job required him to report to a location in Irvine at approximately 5:00 a.m. and his job description included cleaning EDG trucks and unloading/storing equipment at the Irvine location, but he was "not compensated for this time." In his deposition, Hart testified that prior to November 2007, "we got paid for loading and unloading the trucks." After November 2007, shop assistants loaded trucks so laborers and foremen would not have to be paid for doing so.

Hart declared that EDG employees "were required to travel in [EDG] vehicles. I was specifically informed at various times that I could not use my own vehicle." Hart attached a copy of his November 2007 employment agreement for his foreman position to his declaration, which indicated that employees could use their own vehicles or the complimentary EDG vehicle to travel to and from jobsites. In either case, according to the contract, "Employee further acknowledges that he or she will not receive compensation for travel time to the first job site in the morning or from the last job site in the evening, whether in a vehicle owned or leased by EDG or on his or her own." Hart attested in his declaration that the contract was "completely false" because foremen and laborers were "required to use the company vehicle" In his deposition, Hart conceded that he had never asked for permission as a laborer to drive his own vehicle to job sites. Moreover, Hart acknowledged at least some instances in which employees would drive their own cars to worksites (e.g., parolees who needed to meet with parole officers during the day, medical appointments). Hart also admitted no one ever told him when he was a laborer that he could not take his own car to jobsites. When he was a foreman, "[t]hey didn't say you couldn't, but if I'm [a] foreman and I drive to a job location, who's going to drive my truck."

Hart appended a foreman orientation document he received from EDG, which indicates with regard to filling out time sheets that "travel hours are hours spent

driving or riding in the vehicle and must be at least 1 hour to report. Only foremen and pre-approved drivers will be paid for full drive time. Passengers will be paid half of the travel hours reported.” In his deposition, Hart testified that he recorded all driving time on the time sheets (including time to drive to the first worksite, time driving between worksites, and time driving back to Irvine from the last worksite of the day). As far as Hart knows, the foremen he worked for as a laborer filled in travel time on time sheets the same way Hart did. The record provides no clear indication as to when and how the “half-time” travel pay policy actually worked. Plaintiffs do not argue they were only paid for half of their travel hours (at some point during the four years at issue) and defendants do not address when, if ever, it paid for only half of travel hours reported (and for travel hours only if there was at least one hour to report).

According to Hart’s declaration, EDG reduced travel hours recorded based on GPS records. Hart appended two time sheets in which it appears that the number of hours written in by Hart were reduced by a subsequent reviewer of the timesheet. Hart claims his “hours worked were often reduced, travel hours were changed, and no satisfactory explanation was ever given. . . . Typically my hours were reduced by twenty to thirty percent.”

Individually Named Plaintiff Greg Prevost

Prevost worked for EDG from January 1, 2006 to May 2007. Like Hart, Prevost began working as a laborer but was subsequently promoted to foreman. Prevost worked on three different crews during a five-month period as a laborer. Prevost’s job duties were similar to those of Hart. Indeed, much of Prevost’s declaration, Hart’s declaration, and the other declarations submitted in support of the motion for class certification use identical language, as shown by an appendix submitted by defendants in their opposition papers.

Despite claiming in his declaration that employees were required to travel in EDG vehicles, Prevost testified at his deposition that with regard to at least one jobsite he was given permission to drive his own vehicle. Prevost also recalls another employee who was allowed to drive his own vehicle to worksites.

Like Hart, Prevost claimed in his declaration that “foremen and laborers were truthful about the hours that they spent traveling and working.” But Prevost admitted at his deposition that he heard some workers recorded hours they did not work.

Ex-employee Declarations Submitted by Plaintiffs

Plaintiffs submitted three additional declarations of ex-employees to go along with those of Mattison, Hart, and Prevost. These declarations generally support the description of EDG policies advanced by plaintiffs (e.g., employees were required to arrive in Irvine and clock in, but were not paid for their time until they arrived at the first worksite; time spent loading and unloading was not paid for by EDG; alterations were made to time sheets, including the use of GPS records to reduce stated travel/work time). The declarations for the most part utilize language identical to that in the Hart and Prevost declarations. The court granted defendants’ motion to strike one of the employee declarations.

One of the ex-employees, Abraham Montes, stated in his deposition that when he first started working for EDG (about 2006 according to his declaration), he was paid from the time he arrived at the Irvine facility until the time he returned to Irvine at the end of the day. At some point the policy changed. Montes remembered he signed a paper and was told employees could drive their own vehicle to a worksite. Montes noted that because he never owned a car, the policy allowing him to provide his own transportation never pertained to him. Montes also testified that time spent loading and unloading trucks was sometimes recorded on his time sheets.

Employee Declarations Submitted by Defendants

Defendants procured 17 declarations from current employees and submitted those declarations in opposition to the motion for class certification (it appears the court may have discounted some of these declarations because valid signature pages were not filed in a timely fashion). We describe relevant portions of two validly submitted declarations for illustrative purposes.

Sean Nailen, a laborer for EDG since August 2007, declared that he was paid for all travel time prior to November 2007 (even travel time to the first jobsite and from the last jobsite). Nailen understood that in November 2007, EDG stopped paying for travel time to the first worksite and from the last work site at the end of the day. Nailen has worked for several different crews during his tenure at EDG, but stated his supervisor accurately recorded his work hours and no one (to his knowledge) altered his time records. Nailen successfully resolved any paycheck problems he has had with EDG by using a discrepancy form to dispute errors.

A laborer named David Shirley, hired in March 2007, has worked for 15 different foremen. Before November 2007, Shirley was paid minimum wage for travel time to the first worksite. After November 2007, Shirley understood EDG did not pay for travel time to the first worksite and back to Irvine from the last worksite unless travel time was more than one hour. Shirley claimed that GPS records had been used to reallocate his time between travel and work, “but it has usually not affected my pay.”

Court’s Ruling

The court denied plaintiffs’ motion. The court explained its ruling in a minute order. “The declarations by the named plaintiffs and witnesses in support of the motion were boilerplate and conclusory. In addition, the declaration of Mattison is insufficient to establish a policy or common practice. No exhibits were attached, and there was no attempt to lay foundation for any other evidence. Moving party has failed to

meet its burden to show by a preponderance of the evidence that the claims should be subject to resolution on a class-wide basis.”

“Regarding the purported class for failure to pay wages, it appears that this purported class requires the consideration of different types of claims There was no showing by moving party that all employees were subject to all of the identified practices. In fact, it appears that many, if not a vast majority of the employees, were not. This appears to require an individualized determination in order to understand which employee was subjected to which practice. In some instances, such as the claimed alteration of time cards, as well as failure to reimburse, there is insufficient evidence to establish commonality, typicality, or numerosity. It also appears that different foremen treated meal and rest breaks differently, raising issues not only of commonality, typicality, and numerosity, but also ascertainability. Finally, there are questions as to whether the class representatives would be proper. Aside from the several instances where the declarations conflict with deposition testimony, it is simply not clear from the moving papers which plaintiff is a proper representative for which claimed class. There are other problems, such as Hart’s deposition testimony that he was issued a company credit card for business related expenses and that he never used his own money for work related expenses. This appears to make him unsuitable to represent a class with claims related to expenses. Prevost admits in his deposition that laborers did not have to stay with the truck. This appears to make him unsuitable to make a claim on behalf of laborers who claim they were denied meal breaks because they had to stay with the truck.”

“In conclusion, the motion by plaintiffs for class certification is denied. The declarations cited by plaintiff in the moving papers were either insufficient or to some degree contradicted by the deposition testimony of the declarant. The motion sets forth [a] laundry list of alleged labor code violations, but little if any attention was paid to establishing ascertainability, commonality, typicality, and numerosity. The

conclusory . . . Mattison declaration was not sufficient to turn the individual allegations by Hart, Prevost, Montes and Bock into common policies or conduct by the employer. The attached deposition testimony of four additional witnesses was not sufficient to show a common policy for each of the classes for a class allegedly as big as approximately 700 persons, with various job titles and varying duties.”

DISCUSSION

Standard of Review

Code of Civil Procedure section 382 authorizes class actions “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court” “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.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) “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.” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

“The question of class certification is essentially procedural and does not involve the legal or factual merits of the action. [Citation.] The ultimate question in ruling on a class certification motion is whether the issues which may be adjudicated as a class, when compared with the issues which must be adjudicated individually, are sufficiently numerous or substantial to make a class action advantageous to both the litigants and the judicial process.” (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 938-939 (*Knapp*).)

“Trial courts have discretion in granting or denying motions for class certification because they are well situated to evaluate the efficiencies and practicalities of permitting a class action. [Citation.] Despite this grant of discretion, appellate review of orders denying class certification differs from ordinary appellate review. Under ordinary appellate review, we do not address the trial court’s reasoning and consider only whether the result was correct. [Citation.] But when denying class certification, the trial court must state its reasons, and we must review those reasons for correctness. [Citation.] We may only consider the reasons stated by the trial court and must ignore any unexpressed reason that might support the ruling.” (*Knapp, supra*, 195 Cal.App.4th at p. 939.)

“We will affirm an order denying class certification if any of the trial court’s stated reasons was valid and sufficient to justify the order, and it is supported by substantial evidence. [Citations.] We will reverse an order denying class certification if the trial court used improper criteria or made erroneous legal assumptions, even if substantial evidence supported the order. [Citation.] A trial court’s decision that rests on an error of law is an abuse of discretion.” (*Knapp, supra*, 195 Cal.App.4th at p. 939.)

Trial Court’s Commonality Analysis

By abandoning most of its class claims on appeal (e.g., rest and meal breaks, unlawful deductions from paycheck, failure to pay all amounts owed upon employee termination), plaintiffs in effect concede the correctness of the majority of the court’s order. With regard to denying class certification of the claim that EDG failed to pay wages for mandatory travel and loading time, the court cited the lack of evidence demonstrating the employees in the proposed class were subject to common policies or practices. According to the court, this case would “require an individualized determination in order to understand which employee was subjected to which practice.” The court’s stated reason for denying the motion (i.e., common questions do not

predominate) was valid and sufficient to deny plaintiffs' motion for class certification. (See *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732-734.)

Plaintiffs contend that by reading between the lines, it "appears" the court erred by actually adjudicating the merits of the dispute rather than the procedural question of class certification. (See *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1345-1346 [rejecting similar claim and noting overlap between merits questions and class certification questions].) Our review of the court's order discloses no hidden meaning. The court's order did not reach the merits of the dispute. Instead, the court was not convinced by a preponderance of the evidence that common issues of liability predominated. The court's ruling provides no indication of how the merits of the case would be resolved with regard to any particular EDG employee.

We are left with the question of whether there is substantial evidence supporting the court's conclusion that commonality was not established by a preponderance of the evidence. "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 Restaurant Corp. v. Superior Court, supra*, 53 Cal.4th at pp. 1021-1022, fn. omitted.)

There are certainly common questions at issue in this case. The parties dispute whether there was an EDG policy requiring employees to meet in Irvine in the morning and ride in company vehicles to the first worksite of the day. The parties also dispute whether EDG's laborers were paid adequately for their loading time, travel time to the first worksite, and travel time back to Irvine from the last worksite. Furthermore, the parties dispute whether EDG followed a policy of altering workers' time sheets in order to reduce worker pay. Finally, regardless of the outcome of these factual disputes, the parties no doubt would contest the legal consequences thereof. Had it been presented with the proposed class as narrowed and clarified by plaintiffs on appeal, the court might well have decided that these common factual and legal issues overshadowed any individual issues that would need to be addressed. For example, the existence of some instances in which employees were allowed to travel on their own to worksites does not necessarily mean there are no common issues amenable to class treatment. Nor do admissions by particular workers that they have no knowledge of being shorted pay suggest a class action is inherently improper. The workers may well be mistaken in their understanding of the facts.

However, "the proper standard of review is not whether substantial evidence might have supported an order granting the motion for class certification, but whether substantial evidence supported the trial court's conclusion that common questions of law or fact did not predominate over individual issues." (*Knapp, supra*, 195 Cal.App.4th at pp. 940-941.) The record supports the court's conclusion that common issues do not predominate. In its role as factfinder, the court was distinctly unimpressed with the vague declarations submitted by plaintiffs in support of the motion. As suggested by defense counsel at the hearing on the motion, plaintiffs' showing can reasonably be characterized as "anecdotal evidence of a number of individuals who believe that they didn't get paid correctly."

Defendants' evidence (i.e., declarations and deposition testimony) supported an inference that not all EDG employees from 2004 to 2008 were forced to report to the Irvine office for loading and travel without pay. Nor did all employees take issue with the number of hours for which they were paid. If resolving the factual and legal liability issues in this case would require an examination of the policies and practices of each foreman over the course of four years, as well as each individual's experience with each foreman for which they worked, it can reasonably be concluded there is insufficient commonality to support class treatment. It would be preferable, under this view of the case, for individual aggrieved workers (or small groups joined together as parties) to seek relief against EDG for alleged wage-and-hour violations.

We also note defendants attempted to certify a class that included laborers and foremen who worked for EDG over the course of four years. Evidence from both sides in this dispute suggests EDG, on more than one occasion during the four years at issue, changed its nominal policies and practices with regard to travel policy and travel pay. It is certainly not clear from the record that EDG employees who worked in 2004 or 2005 have anything in common with EDG employees who worked in late 2007 and early 2008. Nor is it clear that foremen (like Hart and Prevost in part) have much in common with laborers, as some evidence suggests foremen were paid for travel time because they were required to drive the EDG vehicles.

In sum, substantial evidence supports the court's commonality finding, which was the primary ground relied on by the court for rejecting a class based on a claim for failure to pay wages. We need not address the remainder of the court's order, which refers to theories of liability abandoned by plaintiffs on appeal (e.g., meal and rest breaks, deductions from paychecks). As noted by plaintiffs in the briefs, the court's concerns with regard to ascertainability, typicality, and adequacy of representation related more to these other legal theories.

Leave to Amend

Finally, plaintiffs assert the court erred by failing to exercise its discretion to allow plaintiff to amend its request for class certification. Plaintiffs do not point to any request they made to the court for leave to file an amended motion to certify a class. Nor do plaintiffs point to any legal authority for the proposition that a court abuses its discretion when it does not, sua sponte, seek to rescue a class action from its perceived deficiencies by granting leave to amend the motion for class certification or by rewriting the class definition to address the court's commonality concerns. Plaintiffs cite a single case pertaining to trial courts having the power to redefine a class to preserve a class action when the proposed class is not ascertainable. (*Hicks v. Kaufmann & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) But *Hicks* does not provide authority for reversing the court's ruling in the instant case, as there is substantial evidence supporting the court's judgment call that commonality had not been established by a preponderance of the evidence.

DISPOSITION

The court's order denying class certification is affirmed. Defendants shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.