UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SHEILA LITTLE,

Plaintiff

v.

WYNN LAS VEGAS,

Defendant

Case No.: 2:23-cv-01150-APG-MDC

Order Denying Defendant's Motion to Dismiss

[ECF No. 14]

Plaintiff Sheila Little was employed as a slot attendant by defendant Wynn Las Vegas, where she regularly earned tips while serving customers. Little alleges that Wynn required slot attendants like her to tip out a portion of their pooled tips to their managers and kept some of slot attendants' tips for general business purposes. Little brings a claim under the Fair Labor Standards Act (FLSA), specifically 29 U.S.C. § 203(m)(2)(B),[1] and Nevada common law claims for conversion and unjust enrichment on behalf of herself and other similarly situated Wynn employees.

Wynn moves to dismiss the common law claims. It argues that Little relies on violations of the FLSA or Nevada statutes to establish the required elements for the common law claims, so they must be dismissed because they are either preempted by the FLSA or because Little does not have a private right of action to enforce Nevada Revised Statutes (NRS) § 680.160. I deny the motion because the FLSA does not preempt these common law claims and Little does not bring a claim under NRS § 680.160.

[1] The relevant FLSA provision declares that "[a]n employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips." 29 U.S.C. § 203(m) (2)(B); *see also* 29 C.F.R. §§ 531.52(b), 531.54(b).

I. BACKGROUND

Slot attendants provide service to Wynn's customers and create repeat business and goodwill for Wynn. ECF No. 4-1 at 14. Wynn paid Little and other similarly situated slot attendants an hourly wage. *Id.* at 3. Slot attendants also "regularly and customarily" received tips "independent of their hourly wages." *Id.* Little alleges that slot attendants earned tips as a "regular part" of serving customers. *Id*.

Little alleges that Wynn required slot attendants to "tip out" between five and fifteen percent of their pooled tips to their managers, called "slot leads," who are not customarily tipped. *Id.* at 6-7. Slot leads direct and supervise multiple slot attendants and have a say in the hiring or firing of slot attendants. *Id.* Little also alleges that Wynn "retained and utilized a portion of [slot attendants'] tips for general business purposes, and for [its] own financial benefit." *Id.* Little alleges that Wynn forced the slot attendants to agree to the tip-sharing policy by "taking advantage of their need for continued employment." *Id.* at 13.

I. DISCUSSION

In considering a motion to dismiss, I take all well-pleaded allegations of material fact as true and construe the allegations in a light most favorable to the non-moving party. *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017). However, I do not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1163 (9th Cir. 2017). Mere recitals of the elements of a cause of action, supported by conclusory statements, do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must also make sufficient factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A claim is facially plausible when the complaint alleges facts that allow the court to draw a reasonable inference

that the defendant is liable for the alleged misconduct. *Iqbal*, 556 U.S. at 678. When the claims have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

A. FLSA Preemption

Wynn argues that Little's common law claims are impliedly preempted by the FLSA because they "require the same proof as claims asserted under the FLSA" and therefore conflict with the FLSA's "comprehensive and exclusive remedial scheme." ECF No. 14 at 5. Wynn also argues that because FLSA collective actions are "opt-in," while class actions under Federal Rule of Civil Procedure 23 are "opt-out," the common law claims conflict with and pose an obstacle to accomplishing Congress's objectives under the FLSA. ECF No. 22 at 3-4. Little responds that the Ninth Circuit has held that the FLSA's saving clause allows states to enforce laws that provide more generous protections to employees. She contends that her common law claims should proceed because they allow for punitive damages, which the FLSA does not provide.

1. Preemption Framework

"State law that conflicts with federal law is without effect" and is preempted. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (simplified). Preemption analysis "starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Id.* (simplified). "There are three 'categories' of preemption: express, field, and conflict." *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 760 (9th Cir. 2010), *vacated on other grounds*, 565 U.S. 801 (2011).

Express preemption occurs when "Congress explicitly defines the extent to which its enactments preempt state law." *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000) (quotation omitted). Wynn acknowledges that the FLSA does not contain express

preemption language, so I will not address it further. ECF No. 14 at 4. Field preemption occurs when "state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy." *Williamson*, 208 F.3d at 1149 (quotation omitted). Conflict preemption occurs when "it is impossible to comply with both state and federal requirements, or [when] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*

The FLSA's purpose is to provide "specific minimum protections to individual workers" so that they "receive a fair day's pay for a fair day's work." *Id.* at 1150 (simplified). The "FLSA sets a floor rather than a ceiling on protective legislation . . . [and] does not preempt more generous protection" to employees. *Wang*, 623 F.3d at 759.

2. Field Preemption

The FLSA contains a saving clause that explicitly permits states and municipalities to enact more favorable wage, hour, and child labor laws. 29 U.S.C. § 218(a). Field preemption is thus inapplicable because "the FLSA's 'savings clause' is evidence that Congress did not intend to preempt the entire field" and "indicates that [the FLSA] does not provide an exclusive remedy." *Williamson*, 208 F.3d at 1151 (holding that a common law fraud claim was not field preempted based on this analysis). The FLSA therefore does not field preempt Little's common law claims.

3. Conflict Preemption on Substantive Grounds

The FLSA also does not preempt the common law claims based on conflict preemption. In *Wang*, plaintiffs claimed that their employer owed them overtime pay and alleged violations of the FLSA and California laws, including the California Unfair Competition Law (UCL), codified at Cal. Bus. & Prof. Code § 17200. *See* 623 F.3d at 749. The UCL "borrows violations

of other laws and treats these violations . . . as . . . independently actionable." *Id.* at 758 (quotation omitted). The UCL also allows for injunctive relief, unlike the FLSA. *See* Cal. Bus. & Prof. Code § 17203; 29 U.S.C. § 216 (penalties for violation of FLSA are limited to monetary compensation and civil penalties). The Ninth Circuit held that the FLSA did not preempt the UCL claim because where "state and federal requirements are the same, it is obviously possible to comply with both laws simultaneously." *Wang*, 623 F.3d at 760. It also held that allowing the UCL claim to proceed furthered the FLSA's "purpose of protecting employees." *Id.*

Wynn does not argue that it is impossible to comply with both state and federal requirements. It contends the opposite: that the common law claims are conflict preempted because they require the same proof as an FLSA claim. However, Wynn fails to explain why the common law claims are necessarily linked to a violation of the FLSA, and they do not appear to be linked.[2] Even if the common law claims require the same proof as the FLSA claim, the FLSA does not preempt state claims that are substantively duplicative of it. *See Wang*, 623 F.3d at 760. And allowing the common law claims to proceed would not conflict with the FLSA's central purpose of protecting employees or providing employees with "[a] fair day's pay for a fair day's work." *Williamson*, 208 F.3d at 1150 (quotation omitted). The additional remedies allowed by the common law claims may further the FLSA's purpose.

[2] The conversion and unjust enrichment claims do not appear to be based on a violation of the FLSA or any other statute. "Conversion is a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein." *Nev. State Educ. Ass'n v. Clark Cnty. Educ. Ass'n*, 482 P.3d 665, 674 (Nev. 2021) (quotation omitted). "Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Id.* at 675 (quotation omitted).

4. Conflict Preemption on Procedural Grounds

"Group claims for violations of FLSA are typically maintained as an opt-in 'collective action' to which each participant individually consents." *Wang*, 623 F.3d at 761; *see also* 29 U.S.C. § 216(b). In contrast, class actions brought under Federal Rule of Civil Procedure 23 exclude plaintiffs only if they specifically request to opt out of the action. *See* Fed. R. Civ. P. 23(c)(2)(B)(v). Wynn argues that allowing the common law claims to go forward would let Little evade the FLSA's opt-in requirements and are thereby obstacles to the accomplishment of the FLSA.

However, "the fact that Rule 23 class actions use an opt-out mechanism while FLSA collective actions use an opt-in mechanism does not create a conflict warranting dismissal of the state law claims." *Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525, 530 (9th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 513, (2014). Instead, I may certify two classes, an opt-in collective action class and an opt-out class under Rule 23, and allow them to "proceed in tandem . . . with the same discovery and the same notice to affected workers, but with the former covering the federal labor claims and the latter the state labor claims." *Rangel v. PLS Check Cashers of Cal., Inc.*, 899 F.3d 1106, 1111 n.4 (9th Cir. 2018). Proceeding on a dual-track "accommodat[es] the different mechanisms within a single case." *Id.*

5. Summary

Congress did not intend the FLSA to preempt the entire field, and Little's common law claims of conversion and unjust conversion do not conflict with the FLSA's purpose or procedure. Therefore, the FLSA does not preempt the common law claims.

B. NRS § 608.160

Wynn next argues that if the common law claims are not based on the FLSA, then they must be based on Nevada law, so "it follows that Plaintiff is alleging a violation of NRS 608.160." ECF No. 14 at 6. It also argues that NRS § 608.160, which prohibits employers from taking any part of the tips bestowed upon its employees, does not allow for a private right of action and can be enforced only by the Nevada Labor Commissioner. Little responds that she does not bring a claim under NRS § 608.160, and her common law claims of conversion and unjust enrichment "are entirely different legal causes of action." ECF No. 21 at 9.

Wynn's argument fails because Little does not bring a claim under NRS § 608.160. Moreover, Wynn does not explain why the common law claims are necessarily tied to NRS § 608.160 or must be limited by the restrictions applicable to NRS § 608.160. Neither a conversion claim nor an unjust enrichment claim requires showing that the defendant also violated a statute. *See supra*, n.1.

III. CONCLUSION

I THEREFORE ORDER that defendant Wynn Las Vegas's motion to dismiss **(ECF No. 14) is DENIED**.

DATED this 9th day of March, 2024.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE