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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROYA KOIKE and ADAM ODNERT, on No C 06-3215 VRW  
behalf of themselves and all  
others similarly situated, ORDER

Plaintiffs,

v

STARBUCKS CORPORATION,  
Defendant.

Roya Koike and Adam Odnert seek to represent a class of persons employed by Starbucks Corporation as assistant managers at California Starbucks retail outlets after April 4, 2002. Doc #25 at 3. Koike and Odnert allege that Starbucks failed to pay them and members of the class for "off the clock" work and hence violated California's minimum wage law, Cal Lab Code § 1197, and various other laws. Doc #25 at 2.

On October 18, 2007, Starbucks moved for summary judgment as to Odnert and opposed both plaintiffs' motion to certify a class. The court first takes up the motion directed to Odnert and then turns to the class certification issue.

I

For the reasons discussed below, the motion for summary

1 as a matter of law. FRCP 56(c). The court resolves any doubts in  
2 favor of the nonmoving party. "[S]ummary judgment will not lie if  
3 the dispute about a material fact is 'genuine,' that is, if the  
4 evidence is such that a reasonable jury could return a verdict for  
5 the nonmoving party." Anderson v Liberty Lobby, 477 US 242, 248  
6 (1986). "Only disputes over facts that might affect the outcome of  
7 the suit under the governing law will properly preclude the entry  
8 of summary judgment." Anderson, 477 US at 248. The burden of  
9 establishing the absence of a genuine issue of material fact lies  
10 with the moving party. Celotex Corp v Catrett, 477 US 317, 322-23  
11 (1986).

12 To defeat summary judgment, the nonmoving party may not  
13 simply rely on the pleadings, but must produce significant  
14 probative evidence, by affidavit or as otherwise provided in FRCP  
15 56, supporting the claim that a genuine issue of material fact  
16 exists. TV Elec Serv v Pacific Elec Contractors Ass'n, 809 F2d  
17 626, 630 (9th Cir 1987). Conclusory, speculative testimony in  
18 affidavits and moving papers is insufficient to raise genuine  
19 issues of fact and defeat summary judgment. Thornhill Publishing  
20 Co, Inc v GTE Corp, 594 F2d 730, 738 (9th Cir 1979). There is no  
21 genuine issue for trial unless there is sufficient evidence  
22 favoring the non-moving party; if the evidence is merely colorable  
23 or is not significantly probative, summary judgment may be granted.  
24 Anderson, 477 US at 249-50.

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26 C

27 Starbucks argues that it is entitled to summary judgment  
28 because Odnert cannot prove that Starbucks suffered or permitted

1 him to work off the clock. For Odnert to prevail on his off-the-  
2 clock claim, he must demonstrate that Starbucks had actual or  
3 constructive knowledge of his alleged off-the-clock work. Kenny v  
4 Supercuts, Inc, 2008 WL 2265194, \*3 (ND Cal 2008) (Breyer, J); White  
5 v Starbucks Corp, 497 F Supp 2d 1080, 1083 (ND Cal 2007) (Walker,  
6 J); Morillion v Royal Packing Co, 22 Cal 4th 575, 585 (2000);  
7 Brinker Restaurant Corp v Superior Court, 2007 WL 2965604, \*19 (Cal  
8 App 4th Dist 2007).

9 In his opposition to Starbucks's summary judgment motion,  
10 Odnert argues that Starbucks has misrepresented the proper legal  
11 standard the court should apply. Odnert argues that Morillion  
12 requires "[a]n employee [to] be compensated for all time spent  
13 subject to the control of the employer or when the employee is  
14 suffered or permitted to work \* \* \* [I]t does not matter under  
15 California law whether or not the employer knows that the employee  
16 has properly recorded all of his or her working time." Doc #104 at  
17 3:13-20. Odnert further asserts that "time clock records are not  
18 conclusive because the central inquiry is not whether time was  
19 recorded as worked, but whether the employee actually worked." Id  
20 at 4:5-7.

21 Odnert misunderstands Morillion. Morillion held that the  
22 inquiry in off-the-clock claims does not focus upon whether the  
23 plaintiff in fact worked the uncompensated hours he alleges he did,  
24 but whether the employer knew that the hours worked went unrecorded  
25 and therefore uncompensated. Morillion, 22 Cal 4th 584-585 ("[T]he  
26 words 'suffer' and 'permit' as used in the statute mean 'with the  
27 knowledge of the employer.'"). Hence, the court must focus its  
28 analysis upon the question of employer knowledge, not merely

1 whether Odnert worked off the clock. Applying the standard that  
2 Odnert presents would require the court to hold Starbucks strictly  
3 liable once it has determined that Odnert performed any work off  
4 the clock. That is not the standard the court applied in White,  
5 nor is it the legal standard under California law as explained in  
6 Morillion.

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9 Odnert testified that he was told that off-the-clock work  
10 is prohibited by federal law and against Starbucks policy. Doc  
11 #116, Exh A at A3:5-17. Odnert understood the policy, Doc #116,  
12 Exh A at A4:6-25, and the Starbucks store manager reiterated the  
13 written policy. Doc #116, Exh A at A7:7-9, A8:2-9 and A9:17-  
14 A10:11.

15 During his employment, Odnert recorded and was paid  
16 overtime. Doc #116, Exh A at A5:19-24. According to Odnert, he  
17 often worked off the clock, but, knowing that it was against  
18 Starbucks policy, he usually attempted to conceal his off-the-clock  
19 work from other Starbucks employees, "\* \* \* because I didn't want  
20 [others] to report to the boss that I was doing that. Q. Doing  
21 what? A. Working off the clock." Doc #16, Exh A at A19:7-11.  
22 When questioned about why he didn't record all of his time as  
23 worked, Odnert replied:

24 I didn't want to be paid overtime. I didn't want the  
25 time and a half. I wanted to be within the boundaries of  
26 my 40 hours and have it appear as though that were all  
27 happening within this recorded 40 hours.

28 That's what I was trying to do, because I  
thought that's what I needed to do in order to get my  
goal accomplished, and that was - does that answer your  
question?

1 Doc #116, Exh A at A20:25-A21:7.

2 Odnert was asked to explain his goal:

3 \* \* \* I would like to be able to do all of the things  
4 that an assistant manager needs to do, within 40 hours as  
scheduled, and do them to the best of my ability.

5 I wasn't there yet, and I wasn't satisfied with  
simply not having the job done, so I did it on my own  
6 time, because I wanted to be a store manager that badly.

7 Q. So you worked off the clock because you  
wanted to be a store manager at Starbucks very badly?

8 A. Uh-huh.

9 Q. Is that fair?

10 A. Is that fair?

11 Q. Is that a fair statement? I thought you  
said yes, but I want to make sure.

12 [Plaintiff's counsel]: What he means, is that a  
fair characterization of your testimony, is that -

13 Q. Yes.

14 A. Yes.

15 Doc #116, Exh A at A30:5-23.

16 Odnert asserts in his summary judgment reply brief that  
17 while he often failed to report time as worked, "he did not perform  
18 the work itself in secret." Doc #104 at 9:13-14. This statement  
19 directly contradicts Odnert's deposition testimony.

20 In his deposition, Odnert described the extent to which  
21 he sought to hide his off-the-clock work from other employees and  
22 the store manager. For instance, he diligently clocked in whenever  
23 the store manager was present: "Yeah there was just no way around  
24 it. Like you can't not clock in when she's there." Doc #66, Exh A  
25 at A52:20-22). Odnert also described closing the store and sending  
26 the baristas home before commencing his off-the-clock work: "They  
27 were supposed to wait for me, and I would leave, I would clock  
28 myself out, set the alarm, go to the door, let everybody out, lock  
the door, and we're done. \* \* \* And I went back in of my own  
volition because I had my own stuff to do." Doc #66, Exh A at  
A33:22-A34:6. It even appears that Odnert accepted formal

1 discipline for tardiness despite believing he may have arrived  
2 early to work off the clock:

3 Q. This is a corrective-action form that was  
4 issued to you on September 1, 2003, and was signed by you  
5 on September 4, 2003. \* \* \* So on these occasions  
6 detailed here, Mr Odnert, you were late reporting for  
7 work; is that right?

8 A. Yes.

9 Q. So at least on these days we know you  
10 didn't come a half and [sic] hour or an hour early and  
11 punch in and perform work off the clock, correct?

12 A. No. [The manager is] basing that on when I  
13 punched in. It doesn't mean I wasn't there.

14 Doc# 66, Exh A at A47:16-A49:9.

15 Despite his statements that he attempted to hide his off-  
16 the-clock work, to defeat summary judgment Odnert attempts to show  
17 a material dispute whether Starbucks suffered or permitted his off-  
18 the-clock work. At first glance, Odnert's strongest evidence that  
19 Starbucks was aware of his off-the-clock work is his conversation  
20 with his district manager and his work at coffee tastings and  
21 district events with Starbucks executives. Upon examination,  
22 however, this evidence does not create a genuine dispute of  
23 material fact whether Starbucks had knowledge of Odnert's off-the-  
24 clock work.

25 Odnert testified in his deposition that in one discussion  
26 with his district manager about problems he was having at work, he  
27 alluded to the fact that he had worked off the clock and was proud  
28 of it:

29 Q. With respect to your alleged off-the-clock  
30 work - just that issue - did you discuss that specific  
31 issue with your district manager -

32 A. Yes.

33 Q. - and if so, what did you discuss?

34 A. I was proud of it. \* \* \*

35 \* \* \*

36 Q. Well, what, if anything, did she say about  
37 off-the-clock work?

1 A. She said , "Every assistant manager thinks  
2 that they - that everything would just be fixed if they  
were in a different location .

3 "You need to manage your time, you need to  
4 perform, you need to have - you need to make your manager  
happy and support her in her goals for the store within  
your scheduled hours."

5 I told her point-blank that that was impossible  
6 for me to do given that I was so harshly reprimanded for  
having people there overtime whatsoever, over the  
7 allotted time for closing, much less actually beyond  
eight hours, which was very rare.

8 I mean, even if it wasn't overtime, time and a  
9 half, if it was just over what was allowed for closing,  
10 like 15 minutes was allowed to close and it takes a  
half-hour to just close the counter, let alone mop the  
11 floor or change the bathroom, you know, it's just - you  
know, it's just - it's incentive. Everybody needs to  
12 clock out when they're supposed to, and if it's not clean  
yet, they have to keep working.

13 Q. She told you to work off the clock?

14 A. She was well aware - she acknowledged that,  
15 "You need to get your work done within that period of  
time."

16 Q. Did she tell you to work off the clock, Mr.  
17 Odnert?

18 A. No.

19 Q. Did she tell you that off-the-clock work  
20 was prohibited by law and by Starbucks' policy?

21 A. She didn't use those words.

22 Q. Did she use words similar to that?

23 A. She just said, "You're not supposed to."

24 Doc #105, Exh 1 at 162:11-164:21. Thus, the only time when Odnert  
25 alleges specifically to have discussed off-the-clock work with  
26 anyone in the company was when he told a district manager about  
27 past off-the-clock work and she advised him that he should not do  
28 this.

29 Odnert argues that his district manager and other store  
30 managers knew he was working off the clock when he led coffee  
31 tastings and store events. Doc #104 at 7:25; 8:15; 8:25; 8:28-9:1.  
32 He testified that on one occasion the district manager said, "You  
33 need to get paid for this," and gave him a check following one of  
34 the coffee tastings. Doc #105, Exh 1 at 133:1-134:8. But Odnert

1 has offered no evidence that the district manager intended this  
2 check to compensate him for off-the-clock work rather than to serve  
3 as a bonus for going above and beyond the call of duty nor has he  
4 offered any evidence that the district manager knew he was working  
5 off the clock at that time. Odnert admits that the funds for the  
6 district manager's check came from petty cash instead of payroll.  
7 Doc #105, Exh 1 at 133:4-7.

8           The other evidence offered by Odnert is also insufficient  
9 to support a reasonable jury finding of knowledge by Starbucks.  
10 Odnert admits to having no recollection of actually discussing his  
11 off-the-clock work with his store manager:

12           Q. Did your store manager discuss with you  
13 your off-the-clock work, period, and it's a yes or a no  
14 answer?

15           A. I can't recall.

16           Q. You can't recall if she did or not?

17           A. I can't recall specific counseling from my  
18 manager regarding off-the-clock work.

19           Q. So without a specific discussion - so you  
20 don't recall any specific discussion with her about off-  
21 the-clock work.

22           A. No, I don't.

23 Doc #116, Exh A at A11:25-A12:10.

24           In lieu of evidence that his manager knew about his off-  
25 the-clock work, Odnert gives examples of how his manager could have  
26 acquired knowledge second-hand. Odnert testified that he believes  
27 a fellow employee or employees had complained to his manager that  
28 he worked off the clock on a dozen occasions. Doc #105, Exh 1 at  
96:1-99:24. In support of this speculation, however, Odnert only  
offers evidence that one barista - not a manager - knew that he  
would come in to work early and not punch in - and he speculates  
that when he arrived at work early and performed work afterward,

1 people who arrived after him would somehow know he had performed  
2 his prior work off the clock. Doc #105, Exh 1 at 91:1-93:16.

3 Even assuming that some baristas knew that he worked off  
4 the clock, Odnert could only speculate that anyone had told the  
5 manager:

6 Q. And how many of [the other employees]  
7 reported that you were working off the clock?

8 A. Reported that I was working off the clock?

9 Q. That's my question.

10 A. I have no idea.

11 Q. Well, did anybody, as far as you know?

12 A. Somebody must have, but it was never  
13 revealed to me who.

14 Q. Why do you say that?

15 A. Because when I would talk to the store  
16 manager, she reiterated that - she reiterated the written  
17 policy.

18 Doc #105, Exh 1 at 94:23-95:9. This line of questioning continues,  
19 but at no point can Odnert point to a specific person,  
20 conversation, or any other evidence other than speculation about  
21 what "must have" happened in order to inform the store manager  
22 about his off-the-clock work.

23 Other evidence offered by Odnert that the manager must  
24 have known he was working off the clock was equally speculative:

25 Q. Is there any way that [the store manager]  
26 knew you were working off the clock if you didn't have a  
27 specific discussion with her about off-the-clock work?

28 \* \* \*

A. Yeah, there's a way she knew I was working  
off the clock.

Q. And how is that?

A. By the work that was done outside of the  
time I was clocked in that was obviously not done by  
anybody else. My work has a signature on it. It's  
better than anybody else in that store. It's more  
complete. It has - it shines, it gleams, and it's mine.

Doc #116, Exh A at A12:25-A13:13.

Later in his deposition, Odnert concedes that there is no

1 way to show that his store manager knew when this work was being  
2 performed, or whether it was performed during uncompensated time.  
3 Doc #105, Exh 1 at 104:14-106:9. Odnert suggests that perhaps the  
4 store manager reviewed the store security tapes to ascertain when  
5 he had performed specific duties, but he has no evidence that the  
6 manager in fact reviewed any videotape. Doc #116, Exh A at A7:19-  
7 25.

8 In sum, the theories Odnert puts forth to support his  
9 claim that Starbucks actually or constructively knew about his off-  
10 the-clock work amount to little more than speculation and  
11 conjecture that Starbucks may have had knowledge. As in White,  
12 conjecture affords no grounds to impute knowledge. This is  
13 particularly inappropriate given that Odnert was paid for overtime  
14 nearly every pay period, and he went to great lengths to conceal  
15 the fact that he was working overtime at all. White, 497 F Supp 2d  
16 at 1085.

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18 E

19 The court turns briefly to the evidentiary objections  
20 made by Odnert regarding certain evidence offered by Starbucks in  
21 support of summary judgment. Doc #106. Because the court did not  
22 rely on any of the challenged evidence, the objection is DENIED AS  
23 MOOT.

24  
25 II

26 Odnert having no claim himself cannot, of course,  
27 represent a class, so the court now turns to the class  
28 certification motion, now deemed to have been brought by Koike.

1 For reasons discussed below, the motion for certification is  
2 DENIED.

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4 A

5 Koike filed her motion for class certification on  
6 November 5, 2007. Koike seeks to certify a class defined as:

7 All persons who worked for Starbucks as an Assistant  
8 Store Manager in California since September 30, 2002 who  
9 do not currently work for Starbucks, excluding those  
10 employees of Starbucks who filed a consent to be a party  
11 plaintiff in the case of Falcon v Starbucks Corporation,  
12 Case No H-05-0792 presently pending in the United States  
13 District Court, Southern District of Texas.

14 Doc #73 at 1. Koike estimates that the proposed class has over  
15 1,000 members. Doc #90 at 32.

16 In connection with the class certification motion, Koike  
17 relies heavily on the declaration of her counsel, Gregory N  
18 Karasik. Doc #77. That declaration contains ten exhibits, the  
19 first seven of which were "submitted conditionally under seal  
20 pursuant to protective order and Local Rule 79-5." These exhibits  
21 are lengthy excerpts of deposition testimony, the vast bulk of  
22 which appears to involve matter for which no reasonable claim of  
23 confidentiality would lie. The clerk has, therefore, by separate  
24 order been directed to file the entirety of the Karasik declaration  
25 in the public record, Doc #126, and the citations that follow will  
26 be to the public record.

27 B

28 According to the deposition testimony of Cindy Chrispell,  
Starbucks vice president of partner resources for the western  
division, as of April 9, 2007, Starbucks operated 1,637 stores in

