Docket: **16-3475 BLS 2**
Date: **February 12, 2018**
Parties: **LAURA BASSETT, JAMIE ZELINSKAS, ALYSSA WRIGHT, and ALEXIS CRAMER, individually and on behalf of all others similarly situated Plaintiffs vs. TRITON TECHNOLOGIES, INC., S. JAY NALLI, and ANDREW S. BANK, Defendants**
Judge: **/s/Janet L. Sanders**

MEMORANDUM OF DECISION AND ORDER
ON CROSS MOTIONS FOR SUMMARY JUDGMENT
AS TO COUNT III OF THE COMPLAINT

This class action raises the novel question of whether a call-in center where defendant's employees take orders for goods sold by others is a "store or shop" engaged in the "sale at retail of goods" such that the employees must be paid time and half for work on Sundays. See G.L.c. 136 §6(50). This Court concludes that it is not. As a consequence, the defendants are entitled to summary judgment in their favor on Count III of the Complaint, which alleges that the failure to pay for Sunday work violates the Massachusetts Wage Act, G.L.c. 149 §§148 and 150.

BACKGROUND

The following facts are not in dispute. The defendant Triton Technologies, Inc. (Triton) is a Massachusetts corporation that operates a call in center in Mansfield. It provides "teleservices" to various companies located throughout the country (Triton's "Clients") which produce goods ranging from exercise videos to garden tools. Triton is not involved in the manufacture, design, production or shipping of any of its Clients' goods. There is no evidence that it stores or at any time takes possession of its Clients' inventory or that any Client goods are available for purchase at any of its locations, including the Mansfield call center.

Typically, customers interested in a Client product reach Triton (or another call center elsewhere in the country) after calling a toll free number that appears on an advertisement for the goods that appears in a variety of media, including television and the internet. That advertising is paid for by the Client. Calls are routed to a Triton employee – called an "Inbound Sales Agent" – who works from a script developed by the Client. The Sales Agents sit at assigned workstations within the call center, which is not open to the public. The Sales Agent takes the caller's order and payment information, all of which is transmitted to the Client for processing. The Client ships the product directly to the customer. Triton does not receive money from the sales and does not collect sales tax on the goods sold. It does not pay any sale taxes.

The Mansfield call center operates 24 hours a day, 365 days per year. Triton's Sales Agents are scheduled to work based on call volume demand. The Sales Agents are paid an hourly base rate plus additional performance-based wages in the form of commissions and bonuses. Triton did not pay its Sales Agents for overtime pay – and in fact has conceded liability on Counts I and IV of the Complaint which allege that this failure violates G.L.c. 149 §148. It also does not pay time and a half for work performed on Sundays.[1]

DISCUSSION

Although Count III alleges a violation of the Wage Act, this Court's analysis begins with Section 6 of Chapter 136 of the Massachusetts General Laws, commonly referred to as the Sunday closing or "Blue Laws." That statute was enacted during the Colonial era when "playing, uncivil walking, drinking, travelling from town to town, going on shipboard, sporting, or in any other way misspending that precious time" was forbidden conduct. See Local 1445, United Food & Commercial Workers Union v. Police Chief of Natick, 29 Mass.App.Ct. 554, 555 (1990), quoting from the Report of the Governor's Special Committee to Consider the Laws Relative to Lord's Day Observance, 1962 Senate Doc. No. 404, 18, describing a 1672 statute. After

the Civil War, the Legislature began granting exceptions to that prohibition: operating ice cream parlors became lawful in 1902, engaging in amateur photography was permitted in 1908, unpaid gardening allowed in 1930; Sunday golf in 1931, and dancing at a Sunday wedding in 1955. By 1977, there were some 50 exemptions to the Sunday closing law, many of them relating to retail establishments.

So what do the Blue Laws have to do with the Massachusetts Wage Act? Three of the exemptions in the Blue Laws that relate to retail establishments also contain a provision that require the employer to pay its employees a premium for Sunday work. The plaintiffs argue that this case falls within one of those three—specifically, Clause 50 of G.L.c. 136 §6. That clause exempts from the Sunday closing law any "store or shop" for the "sale at retail of goods therein" but also require a business with more than seven employees to compensate those employees at a rate of time and a half for an work on Sunday. It is undisputed that Triton has more than seven employees and has not paid that extra amount to its Sales Agents who work on Sunday. It argues, however, that it has no obligation to do so because it is not a "store" or "shop" for the "sale at retail of goods therein." This Court agrees.

Applying basic principles of statutory construction, this Court interprets this language according to its plain and ordinary meaning. Black's Law Dictionary defines a "store" as a "place where goods are deposited for purchase or sale." The Mansfield calls center clearly does not fit this definition, since it does not handle any Client products. In Commonwealth v. Moriarty, 311 Mass. 116, 119, 124 (1942), the Supreme Judicial Court, relying on earlier precedent interpreting criminal statutes, construed the term "shop" as used in the Blue Laws to be any "place kept and used for the sale of goods." It held that this included a tavern that sold alcohol because the dominant purpose of a tavern is the selling of a kind of merchandise – alcoholic beverages – at retail. Relying on Moriarty, plaintiffs argue that the call center is a place "used for the sale of goods" at retail, and that it does not matter that the goods sold are not developed, warehoused, or shipped from there. Plaintiffs also contend that a more expansive application of the language so as to embrace retailers that do not operate from brick and mortar locations is in keeping with the "remedial purpose" of G.L.c. 136 §6.[2] This Court is not persuaded.

Clause 50 by its terms applies to stores used for the "sale at retail of goods therein," that last word implying that the goods are indeed within the physical space from which their sale to retail customers occurs. Based on the undisputed facts, this Court also fails to see how a call center with employees that are performing essentially ministerial tasks for the actual seller (Triton's Clients) could be called a "store" or a "shop" as those words are commonly understood. The call center itself consists of rows of workstations and is accessible only to the employees who work there. As to the work that is done, those employees read from scripts developed by Triton's Clients, who develop and market the goods. Although Triton takes payment information, it does not actually process those payments or receive any funds from the sales. It does not participate in the transfer of the goods, since Triton's Clients handle the shipping. Significantly, Triton does not collect or pay any sales tax.

Plaintiffs argue that times have changed since Clause 50 was enacted and with more retail sales occurring virtually, this Court should read Clause 50 more expansively. But see fn. 2. Had the legislature intended for that clause to reach call centers like the one at issue here, however, it would have said so. Indeed, the legislature as recently as December 15, 2005 amended Clause 50 to allow retail stores covered by that provision to open before noon on Sundays, but otherwise did not change the definition of the stores to which the clause applied. Moreover, the legislature chose not to require premium pay for the great majority of the exemptions that it carved out from the Sunday closing law, so that absent an explicit requirement of such pay, this Court should not read one in.

For all the foregoing reasons and for other reasons articulated in the defendants' memoranda in support of their own motion and in opposition to plaintiffs' motion, the Plaintiffs' Motion for Summary Judgment as to Count III of the Complaint is DENIED and the defendants' Motion as to Count III is ALLOWED. It is ORDERED that Count III be DISMISSED, with prejudice.

/s/Janet L. Sanders
Justice of the Superior Court

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[1] Count II of the Complaint concerns the alleged failure to pay bonuses, which is not a target of the instant motions and which remains in the case. Counts V through VIII of the Complaint have been voluntarily dismissed by the plaintiff.

[2] This argument invoking the purpose of the Blue Laws is a peculiar one. As defendants points out in their Reply brief, plaintiffs "harken back to the olden days of yore and paint an idyllic picture of relaxing Sundays when nobody had to work." At the same time, plaintiffs ask that this Court expansively interpret Clause 50 in recognition of contemporary conditions.