

In a decision that will likely have repercussions affecting other planned or pending class actions asserting violations of California Labor Code provisions, US District Judge Jeffrey White has dismissed all state-law based claims from a proposed class action brought by drivers of SuperShuttle vans in the state. The case is *Kairy, et al. v. SuperShuttle International, Inc., et al.*, 2009 U.S. Dist. LEXIS 121867 (ND Cal., Dec. 22, 2009) (Case No. 3:08-cv-02993). The order strips the litigation of all claims other than those based upon the federal Fair Labor Standards Act.

The plaintiffs had contracted with SuperShuttle subsidiaries to operate SuperShuttle vans as franchises. The franchisees were treated as independent businesses, and were not paid by the SuperShuttle subsidiaries at all. Instead, they were paid by the passengers. The franchisees, in turn, paid various fees for access to the SuperShuttle reservation system, trademarks, etc. The case turned upon whether the franchisees were properly classified as independent contractor franchisees, or whether SuperShuttle defendants had exercised such "pervasive control" over their operations as to make them *de facto* employees.

The defendants' motion looked to Public Utilities Code §1759 and the analysis of that statute by the Supreme Court in *San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893 ("*Covalt*"). Public Utilities Code §1759 provides that no trial court of the state "shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties." Appellate courts may do so, but under strict procedural safeguards not applicable in *Kairy*. In *Covalt*, the Supreme Court established a three-part test for determining whether Public Utilities Code §1759 divested the courts of jurisdiction as to a particular lawsuit or claim. First, does the matter fall within the broad general scope of the "far-reaching duties, functions and powers" of the CPUC? (*Id.*, 13 Cal.4th at pp. 915, 923-925.) Second, has the CPUC acted in regard to the matter? (*Id.*, 13 Cal.4th at p. 926.) Third, would the relief being sought by the claimant either "reverse, correct, or annul" the CPUC's action, or would an award of damages "simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy"? (*Id.*, 13 Cal.4th at p. 918, fn. omitted, and at pp. 935-943.)

The operations of the airport shuttles are conducted pursuant to a certificate of public convenience and necessity issued by the California Public Utilities Commission (CPUC), which allows them to operate as passenger stage corporations (PSCs). The *Kairy* plaintiffs and all members of the proposed class are licensed transportation charter party (TCP) operators, separately regulated by the CPUC. The CPUC has issued regulations specifically permitting TCPs to operate as subcarriers for PSCs, and specifically requires them to operate under the "complete direction, supervision, and control" of the PSC. The same regulation (known as CPUC General Order 158-A, § 5.03) permits the TCPs to be classified as either employees of the PSC, or as independent operators.

The *Kairy* court found that the PUC's authority extended to permitting the imposition of a "complete control" requirement on the activities of subcarrier operators while permitting them to be classified as "independent" contractors. The court noted the PUC's "mission statement" providing that it "serves the public interest by protecting consumers and ensuring the provision of safe, reliable utility services and infrastructure at reasonable rates." See Cal. Pub. Util. Code § 768 (the PUC may promulgate rules governing the equipment, practices and facilities of public utilities "so as to promote and safeguard the health and safety of its employees, passengers, consumers and the public"). The court held that "the determination elucidated in the PUC's General Order regulating the specific types of business models that can be profitable and competitive at the lowest cost is consistent with the PUC's mission statement to ensure reasonable rates and the availability of services to the public." (*Kairy*, 2009 U.S. Dist. LEXIS 121, at *9)

The *Kairy* court easily found that the PUC had *in fact* acted in the area of classification, pointing to the *Prime Time* decision (*In re Prime Time Shuttle Int'l, Inc.*, 67 CPUC 2d 437 (Cal. P.U.C., Aug. 2, 1996)) and General Order 158-A. (*Kairy, supra*, at *10-11.)

Finally, the court found that "the PUC's regulations and decisions have determined that independent

nonemployee status is permitted, notwithstanding the requirement that the passenger stage corporation exercise 'complete supervision, direction and control' over the operations of the charter party licensee. [citing PUC General Order 158-A, § 5.03.] The Court finds that any determination regarding the proper classification of the plaintiff drivers would have the effect of adjudicating the classification of Plaintiffs as either employees or nonemployees under the California claims. This Court lacks jurisdiction to make such a determination. See Cal. Pub. Util. Code § 1759." (*Kairy, supra*, at *13-14.)

The court's order dismissed plaintiffs' California law-based claims for failure to pay minimum wage (Second Claim Of Relief); failure to pay overtime (Third Claim Of Relief); unreimbursed business expenses (Fourth Claim Of Relief); unlawful deductions from wages (Fifth Claim Of Relief); "coerced" purchases (Sixth Claim Of Relief); failure to provide meal periods (Seventh Claim Of Relief); failure to provide accurate wage statements (Eighth Claim Of Relief); failure to maintain payroll records (Ninth Claim Of Relief); and waiting time penalties (Tenth Claim Of Relief). Plaintiffs' claim based on California's Unfair Competition Law (Eleventh Claim of Relief) was also dismissed.

Plaintiffs' motion to certify the California-law claims as a class action was pending when the court issued the ruling granting the defendants' motion to dismiss for lack of subject matter jurisdiction. The hearing and remaining briefing schedule for that motion have now been vacated. Plaintiffs' lawsuit now will proceed solely as an "opt-in" collective action, based upon alleged violations of the overtime and minimum wage provisions of the federal Fair Labor Standards Act ("FLSA").