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Court recommends class action status for employee lawsuit against King Soopers

Michael Karlik, Colorado Politics

Nov 18, 2020



King Soopers at Uintah Gardens in Colorado Springs.

Gazette photo

A federal court on Tuesday recommended preliminary approval for a class action lawsuit against King Soopers by assistant store managers alleging their compensation violated federal labor law.

"Plaintiffs have set forth substantial allegations," wrote U.S. Magistrate Judge N. Reid Neureiter, that assistant managers are "similarly situated as the victims of King Soopers' common policy, practice, or plan of misclassifying them as exempt and not paying them overtime compensation."

The parties will have 14 days from the Nov. 17 order to file objections before U.S. District Judge Raymond P. Moore will decide whether to adopt the recommendation.

In July, William Powell filed the federal complaint against The Kroger Company on behalf of all assistant store managers in Colorado, New Mexico, Utah and Wyoming, where Kroger operates approximately 150 King Soopers stores, including a handful of City Market locations.

Powell alleged that assistant store managers are exempt from overtime pay, despite doing largely the same work as nonexempt hourly employees — including moving freight, stocking shelves and working as cashiers. Two other assistant managers who worked at several stores joined the lawsuit to demonstrate that policies were similar across locations. They estimated they spent upward of 90% of their time doing non-managerial activities.

Conway Legal, LLC, based in Philadelphia, brought this lawsuit as well as a virtually identical one against Lakewood-based Natural Grocers. Earlier this month, a federal magistrate judge gave preliminary class action certification to that lawsuit. In both instances, plaintiffs alleged a violation of the Fair Labor Standards Act by being required to work in excess of 40 hours.

"Defendants are aware or should have been aware that federal law required it to pay Plaintiff and the members of the ASM Collective overtime premiums for hours worked in excess of 40 in a workweek," argued Powell, who worked as an assistant store manager in multiple Colorado stores from June 2016 to December 2019.

Carol Funk, who was formerly a department manager at a Douglas County King Soopers, agreed with the plaintiffs' characterization of the assistant manager job.

"They do work long hours and perform many of the same tasks and duties as hourly employees," she said. "But unfortunately when you're salaried that's what happens in my past experience."

King Soopers pointed to inconsistencies between the plaintiffs' accounts of their duties, indicating that some were left in charge of the store, interviewed employees, trained others or had direct reports — but others did not.

"These critical disparities in actual job duties and the job duties of each other and the ASMs they seek to represent make collective treatment of their claims impossible," the company wrote in opposing class action status.

"None of King Soopers' arguments are persuasive," wrote Neureiter in his recommendation, adding that the burden on the plaintiffs was lower at this stage. The magistrate judge explained the court had "broad discretion" about the notice to be sent to assistant store managers who could potentially join the litigation as plaintiffs. King Soopers objected to a request to send notice via text message and to post materials in stores.

Neureiter turned aside both concerns, recommending that "notice should be posted in King Soopers employee breakrooms or other, non-public locations, as this will reach a wider audience than mailing, especially given the COVID-19 pandemic's disproportionate effects on grocery store workers."

Attorneys for The Kroger Company did not immediately respond to a request seeking comment.

The case is *Powell v. The Kroger Company et al.*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 20-cv-01863-RM-MBN

"WILLIAM POWELL, individually and on behalf of all others similarly situated,
Plaintiff,
v.
THE KROGER COMPANY and
KROGER COMPANIES, LLC and KING SOOPERS, INC. d/b/a KING SOOPERS/CITY
MARKET,
Defendants.

**REPORT AND RECOMMENDATION ON
PLAINTIFF'S MOTION AND MEMORANDUM OF LAW FOR
CONDITIONAL CERTIFICATION AND CLASS-WIDE NOTICE
(Dkt. #16)**

N. REED NEUREITER
United States Magistrate Judge

This Fair Labor Standards Act ("FLSA") case is before the Court pursuant to an Order dated October 27, 2020, Judge Raymond P. Moore selecting Plaintiff William Powell and CIO in Plaintiffs' Memorandum of Points and Arguments, Policy 1 ("Plaintiff's") Demands Motion and Memorandum of Law for Conditional Certification and Class Authorization Notice. Dkt. #16. The Kroger Company and Kroger Companies, LLC d/b/a King Soopers, Inc. d/b/a King Soopers/City Market ("King Soopers" or "Defendant") filed a Response, Dkt. #20. Plaintiff filed a Reply, Dkt. #22. On October 27, 2020, the Court heard argument from the Parties. See Dkt. #27. The Court has taken judicial notice of the Court's file, considered the applicable Federal Rules of Civil Procedure and case law, and RECOMMENDS that the motion be GRANTED.

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US Magistrate recommendation for King Soopers

Updated Nov 18, 2020

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