Overtime, Take Two

Plaintiffs are suing companies that have settled once

By Matthew Hirsch
RECORDER STAFF WRITER

Ice Cube had "Barbershop 2." Ben Stiller had "Meet the Fockers." Now, some plaintiff-side California employment lawyers are trying to create a few hit sequels of their own.

In state and federal suits, class action attorneys have claimed before that big-name employers broke wage-and-hour laws by denying overtime pay to certain employees. Such claims have helped plaintiffs score lucrative settlements, like a $200 million deal Farmers Insurance reached with its claims adjusters in 2004.

Now some lawyers are suing repeat defendants, claiming that certain retail companies that have already settled overtime suits, like the Rite Aid pharmacy chain, have made few changes for some of the very employees who sued them the first time. Such second-wave suits have helped plaintiff lawyers breathe new life into an area of litigation that some say had been losing steam.

"Three or four years ago, I would have said the wage-and-hour well has pretty much dried up," said Scott Cole, an Oakland attorney who is handling at least five second-wave overtime suits. "I think just the opposite has happened."

In Cole's suit on behalf of Rite Aid store managers, U.S. District Judge Thelton Henderson last year certified a class of more than 1,000. In an earlier case, handled by other attorneys, those managers had been part of a $25 million overtime pay settlement a San Diego Superior Court judge approved in 2001.

If the second-wave cases go to trial, plaintiff lawyers hope to use the earlier suits to show that second-time defendants willfully violated California labor laws, a finding that would help get the courts to award punitive damages.

David Lowe, a partner at San Francisco's Rudy, Exelrod & Zieff, and his co-counsel have already tested that argument in a case against Big Lots, an Ohio-based discount store that sells brand-name toys, furniture and other consumer goods. He said a Los Angeles Superior Court judge struck the punitive damages claim in a pre-class certification hearing in May, but left open the possibility of reconsidering it later in the case.

Of an estimated 416 potential Big Lots class members, Lowe said, a "considerable number" were part of a $10 million settlement Big Lots employees reached with the company in 2004 in San

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Bernardino County Superior Court.

The first Big Lots suit, handled by the L.A.-based Quisenberry Law Firm, included managers and assistant managers. Lowe claims the assistant managers have since been given a lighter schedule and paid overtime, but that little has changed for store managers.

"To me, it shows a callous disregard for the law that they would make a business judgment to continue violating the law and take the risk that they would be sued in the future rather than classifying their employees correctly," Lowe said.

A spokeswoman for Jackson Lewis, the firm defending Big Lots, said attorneys there would not comment on the case.

But one employment defense lawyer not involved in that case said defendants might have a stronger hand to play in second-wave overtime suits.

Kirby Wilcox, a San Francisco partner at Paul, Hastings, Janofsky & Walker, said companies regularly engage in what he calls "target-hardening." after they settle a class action, to reduce the likelihood that they will be sued again. In overtime suits, he said, they might change the job duties assigned to employees or the amount of time employees spend on a particular task.

"If you sue again, that employer is going to be a whole lot less likely to settle. They are going to be in for a battle," Wilcox added.

Still, not all defense attorneys will be eager to return to court.

Aaron Lubeley, a Los Angeles partner at Seyfarth Shaw who represents employers, said under state labor laws, employees can create liability for companies by showing that most of their daily activities are non-managerial, routine tasks. That shifts the burden of proof to the employer to prove otherwise.

Because that burden is difficult to overcome, Lubeley said, many lawyers advise clients to reclassify and pay overtime to all employees whose managerial status is determined by the amount of time they spend on routine tasks.

"Here's what I say. Are you able to police how your employees spend their time? Do you have the means by which to do that? If the answer is no, then my recommendation is that you should reclassify to avoid the risk," said Lubeley, who worked on the first Rite Aid overtime suit when he was an attorney at Morgan, Lewis & Bockius.

Paul, Hastings partner Jeffrey Wohl is among the defense counsel in the second Rite Aid suit.

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