

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRIAN OLSON and GEORGE RUIZ,

Plaintiffs,

v.

TESORO REFINING AND MARKETING  
COMPANY,

Defendant.

No. C06-1311RSL

ORDER GRANTING PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION

**I. INTRODUCTION**

This matter comes before the Court on "Plaintiffs' Motion for Class Certification" (Dkt. #13). Plaintiffs allege that defendant Tesoro Refining and Marketing Company ("Tesoro") violated Washington's Minimum Wage Act ("WMWA"), Revised Code of Washington Chapter 49.46 *et seq.*, by permitting unpaid work to be performed at the start and end of the workday at Tesoro's Anacortes, Washington refinery. As a result, plaintiffs seek to represent more than 250 Tesoro maintenance and operations workers who were paid for work at the Anacortes refinery between September 12, 2003 and the present. The Court held a hearing on the motion on September 11, 2007 and heard oral argument from counsel for plaintiffs and defendant.

For the reasons set forth below, the Court finds that class certification is warranted in this case.

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ORDER GRANTING PLAINTIFFS'  
MOTION FOR CLASS CERTIFICATION

1 **II. DISCUSSION**

2 **A. Factual Background.**

3 Tesoro operates a facility in Anacortes, Washington, where it employs approximately 350  
4 people and refines crude oil from around the world into transportation fuels. See Response at 1.  
5 Plaintiffs allege that Tesoro permitted performance of unpaid work by two classes of employees  
6 at the facility: operations workers and maintenance workers. Plaintiffs allege that Tesoro  
7 permitted these workers to perform unpaid pre-shift work routines, including donning personal  
8 protective gear,<sup>1</sup> gathering equipment and tools, and traveling to their work sites. See Motion at  
9 5-6. In addition, because maintenance workers perform a shift “change over” at the end of their  
10 workday, plaintiffs claim that Tesoro also permitted operations workers to perform unpaid post-  
11 shift work including doffing their personal protective gear, storing equipment, and traveling to  
12 the main gate. Motion at 7-8. Based on these allegations, plaintiffs seek certification of the  
13 following class:

14 All maintenance and operations workers employed by Tesoro Refining and  
15 Marketing Company at the Tesoro refinery in Anacortes, Washington, who were  
16 paid for work any time between September 12, 2003, to the date the class is  
certified, excluding managerial employees.

17 See Dkt. #1 at ¶2.2.

18 **B. Federal Rule of Civil Procedure 23(a) Requirements.**

19 A party seeking to certify a class must establish that the requirements of Fed. R. Civ. P.  
20 23 are met. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-14 (1997). A court must  
21 engage in a “rigorous analysis” to determine whether the requirements of Rule 23 are satisfied.  
22 Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982). Plaintiffs bear the burden  
23 of demonstrating that they have met each of the four requirements of Rule 23(a). Zinzer v.

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25 <sup>1</sup> The gear at issue includes: fire resistant coveralls (“FRCs”), fire resistant jackets or parkas,  
26 metal toe shoes, hard hats, safety glasses, and gloves. See Motion at 4; Response at 3.

1 Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). However, the evidentiary  
2 showing need not be extensive. Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975). All that  
3 is necessary is enough information for the court “to form a reasonable judgment on each  
4 requirement” because the court does not examine the merits of the case and must accept as true  
5 the substantive allegations of the representative plaintiffs’ claim. Id. at 901 and n.17.

6 The following prerequisites must be established under Rule 23(a):

7 (1) the class is so numerous that joinder of all members is impracticable, (2) there  
8 are questions of law or fact common to the class, (3) the claims or defenses of the  
9 representative parties are typical of the claims or defenses of the class, and (4) the  
10 representative parties will fairly and adequately protect the interests of the class.

11 Fed. R. Civ. P. 23(a). Each of the four prerequisites is considered, separately, below.

12 **1. Numerosity.**

13 Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is  
14 impracticable.” Although the number of putative class members by itself is not dispositive, as a  
15 general matter, courts have found numerosity is satisfied when class size exceeds 40 members.  
16 See Slaven v. BP Am., Inc., 190 F.R.D. 649, (C.D. Cal. 2000) (citing Ansari v. New York Univ.,  
17 179 F.R.D. 112, 114 (S.D.N.Y. 1998). In its response, Tesoro concedes that “the putative class  
18 is comprised of 260 members[.]” Response at 1 n.2. Given the size of the class, and the fact  
19 that in this case joinder of all the class members and their claims in one proceeding would be  
20 expensive and time consuming, in the interest of judicial economy, the numerosity factor is  
21 satisfied.

22 **2. Commonality.**

23 Under Rule 23(a)(2), there must be questions of law and/or fact common to the proposed  
24 class in order to justify certification. Courts have described the showing required to meet the  
25 commonality requirement as “minimal” and “not high.” Hanlon v. Chrysler Corp., 150 F.3d  
26 1011, 1020 (9th Cir. 1998); Mortimore v. FDIC, 197 F.R.D. 432, 436 (W.D. Wash. 2000). In  
assessing commonality, “[t]he existence of shared legal issues with divergent factual predicates

1 is sufficient, as is a common core of salient facts coupled with disparate legal remedies within  
2 the class.” Hanlon, 150 F.3d at 1019. Additionally, “[t]he commonality test is qualitative rather  
3 than quantitative – one significant issue common to the class may be sufficient to warrant  
4 certification.” Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1225 (9th Cir. 2007).

5 In their motion, plaintiffs list six representative legal issues they contend are common to  
6 the class, including the issue of “[w]hether walk time and clothes changing time are ‘hours  
7 worked’ under the WMWA.” Motion at 18. Tesoro asserts in response that this particular legal  
8 issue does not satisfy Rule 23(a)(2)’s commonality requirement because “whether any individual  
9 employee’s walk time or clothes changing time is ‘hours worked’ requires an individualized  
10 inquiry into the facts.” Response at 26. However, as plaintiffs correctly note in reply, and as  
11 the Ninth Circuit has underscored in recent cases, a question of law common to all members of  
12 the class is sufficient under Rule 23(a)(2)’s commonality requirement even if there are  
13 “divergent factual predicates.” See Reply at 4-5; Hanlon, 150 F.3d at 1019 (“The existence of  
14 shared legal issues with divergent factual predicates is sufficient[.]”). In this case, plaintiffs  
15 submitted evidence showing that Tesoro expressly advanced the legal position that “wage and  
16 hour law does not require the company to pay for time spent in walking, riding or traveling to or  
17 from the actual place where employees perform their principal place of work activities.” See  
18 Dkt. #14 (Shaver Decl.), Ex. 4 (Hanich Dep. Ex. 30). In its motion, plaintiffs contest this legal  
19 position and frame a legal argument asserting that the travel time in this case is compensable as  
20 “work” under the WMWA. See Motion at 12-15 (quoting Anderson v. DSHS, 115 Wn. App.  
21 452, 457 (2003)). On a motion for class certification the Court does not evaluate the merits,  
22 however, the Court finds here that whether or not clothes changing and travel time is  
23 compensable in this case is a common threshold question because it must be affirmatively  
24 decided in favor of any putative class member in order for an individual claim to succeed.  
25 Accordingly, the commonality requirement is met.

1           **3. Typicality.**

2           The typicality element<sup>2</sup> requires that “the claims or defenses of the representative parties  
3 are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Under the rule’s  
4 permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with  
5 those of absent class members; they need not be substantially identical.” Hanlon, 150 F.3d at  
6 1020. “Some degree of individuality is to be expected in all cases, but that specificity does not  
7 necessarily defeat typicality. Dukes, 474 F.3d at 1232. “The test of typicality is whether other  
8 members have the same or similar injury, whether the action is based on conduct which is not  
9 unique to the named plaintiffs, and whether other class members have been injured by the same  
10 conduct.” Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation  
11 omitted); see also Dukes, 474 F.3d at 1232 (quoting Hanon).

12           Here, the named plaintiffs’ alleged injuries for unpaid time spent walking, changing  
13 clothes and/or change-over time appears to be “reasonably co-extensive with those of the absent  
14 class members.” Hanlon, 150 F.3d at 1020. In support of their motion, plaintiffs submitted  
15 declarations from both Tesoro operations and maintenance workers stating that they were not  
16 paid for the same type of activities for which the named plaintiffs are seeking recovery. See  
17 Dkt. #17 (Brandelli Decl.) (maintenance) at ¶11; Dkt. #18 (Donley Decl.) (operations) at ¶11;  
18 Dkt. #19 (Scotte Decl.) (operations) at ¶11; Dkt. #20 (Kerr Decl.) (operations) at ¶12; Dkt. #21  
19 (Van Notric Decl.) (maintenance) at ¶10.

20           In opposition, defendant contends that the typicality requirement is not satisfied because  
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24           <sup>2</sup> As the Ninth Circuit recently explained, “[a]lthough the commonality and typicality  
25 requirements of Rule 23(a) tend to merge, each factor serves a discrete purpose. Commonality examines  
26 the relationship of facts and legal issues common to class members, while typicality focuses on the  
relationship of facts and issues between the class and its representatives.” Dukes, 474 F.3d at 1232 n.10  
(internal quotation marks and citation omitted).

1 the named plaintiffs are retired<sup>3</sup> and they worked in a limited subset of all of the job functions  
2 included in the class. See Response at 27. The fact that named plaintiffs are retired does not  
3 implicate the typicality requirement in this case because the named plaintiffs allegedly suffered  
4 the same injury as those of the putative class: namely they were not paid for work they contend  
5 is compensable under the WMWA. The fact that named plaintiffs do not represent all of the job  
6 functions also does not defeat certification under Rule 23(a)(3). In Dukes, the Ninth Circuit  
7 recently held, in the different context of a sexual discrimination case filed under Title VII of the  
8 1964 Civil Rights Act, that under Rule 23(a)'s typicality requirement "the lack of a class  
9 representative for each management category does not undermine Plaintiffs' certification goal  
10 because all female employees faced the same discrimination." Dukes, 474 F.3d at 1232. It is  
11 the same here. Although the two named plaintiffs do not represent all the job functions in the  
12 operations and maintenance classifications, the named plaintiffs are claiming an injury that all of  
13 the putative class allegedly suffered. Therefore, the typicality requirement is satisfied here.

#### 14 **4. Adequate Representation.**

15 One of the main goals of Rule 23 is to "focus court attention on whether a proposed class  
16 has sufficient unity so that absent members can fairly be bound by decisions of class  
17 representatives." Amchem, 521 U.S. at 621. Rule 23(a)(4) allows class certification only if "the  
18 representative parties will fairly and adequately protect the interests of the class." "[T]he  
19 adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named  
20 parties and the class they seek to represent." Amchem, 521 U.S. at 625. To make this  
21 determination, the court must ascertain "(1) that the proposed representative Plaintiffs do not  
22 have a conflict of interest with the proposed class, and (2) that Plaintiffs are represented by  
23 qualified and competent counsel." Dukes, 474 F.3d at 1233.

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25 <sup>3</sup> As discussed infra in Section II.B.4, the contention that a retired worker cannot properly  
26 represent a class including current employees is properly directed at Rule 23(a)(4)'s "adequacy of  
representation" requirement.

1 Turning first to the representative plaintiffs, defendant contends that the named plaintiffs  
2 do not share the same interests as the proposed class because the named plaintiffs are retired and  
3 therefore “do not have the same interests that current employees have in retaining autonomy  
4 over when and where to do various activities and the flexibility that is currently in the workday.”  
5 See Response at 28. Although defendant submitted a declaration from a current Tesoro operator  
6 stating that “operators like the flexibility to control their work schedules,” as plaintiffs correctly  
7 note in their reply, there is no evidence that the claims in this lawsuit would compel Tesoro to  
8 remove flexibility from the work schedule. See Reply at 8; Arseneau Decl. at ¶4.

9 Defendant also opposes certification under Rule 23(a)(4) because it contends that “the  
10 majority of the hourly workers have decided not to become involved in the lawsuit.” Response  
11 at 28 (citing Anderson Decl. at ¶21). Other than the bare assertion by defendant’s counsel that  
12 the putative class does not want to “become involved in the lawsuit,” defendant has not shown  
13 that putative class members have divergent interests from the named plaintiffs. See Dkt. #46  
14 (Anderson Decl.) at ¶21 (“[I]t is my understanding that putative class members generally were  
15 unwilling to speak to or assist party representatives for either the named plaintiffs or  
16 defendant.”). It is reasonable that Tesoro employees would be reluctant to get involved with  
17 litigation against their current employer. In confronting defendant’s suggestion that putative  
18 class members are reluctant to get involved in this litigation, plaintiffs supplied declarations  
19 from current putative class members showing that while there may be reluctance to take a  
20 position against defendant, putative class members share the named plaintiffs’ interest in  
21 pursuing claims under the WMWA. See Dkt. #52 (Thomas Decl.) at ¶¶7, 9; see also Dkt. #53  
22 (Van Notric Decl.) at ¶9. There may be other reasons why putative class members do not wish  
23 to become actively involved in this litigation. But, on the record before the Court, it would be  
24 speculation to assume that this reluctance is the result of a conflict of interest with the named  
25 plaintiffs and ““this circuit does not favor [t]he denial of class certification on the basis of  
26 speculative conflicts.”” Newton-Nations v. Rogers, 221 F.R.D. 509, 511 (D. Ariz. 2004)

1 (quoting Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003). Accordingly, the Court finds  
2 that the named plaintiffs in this case have interests that are coextensive with those of the putative  
3 class.

4 The Court turns next to the issue of whether plaintiffs are represented by qualified and  
5 competent counsel. “To see if the attorney representing the class is qualified, the Court will  
6 look to the professional qualifications, skills, experience and resources of the lawyers.” Haley v.  
7 Medtronic, Inc., 169 F.R.D. 643, 650 (C.D. Cal. 1996). In this case, defendant has not  
8 challenged plaintiffs’ counsel’s qualifications, and the Court finds that plaintiffs’ counsel is  
9 qualified for purposes of Rule 23(a)(4) in this case, especially given their success in litigating  
10 the Alvarez v. IBP case to judgment. See Alvarez v. IBP, 339 F.3d 894 (9th Cir. 2003), aff’d,  
11 546 U.S. 21 (2005).

12 **C. Federal Rule of Civil Procedure 23(b) Requirements.**

13 In addition to Rule 23(a)’s prerequisites, plaintiffs also have the burden of demonstrating  
14 that at least one of the requirements under Rule 23(b) is met. See Zinzer, 253 F.3d at 1186. In  
15 this case, plaintiff argues that certification is appropriate under Fed. R. Civ. P. 23(b)(3), which  
16 requires that:

17 questions of law or fact common to the members of the class predominate over any  
18 questions affecting only individual members, and that a class action is superior to  
other available methods for the fair and efficient adjudication of the controversy.

19 Fed. R. Civ. P. 23(b)(3) (emphasis added); Motion at 21. The purpose of this rule is to identify  
20 those actions in which certification of a class “would achieve economies of time, effort and  
21 expense, and promote uniformity of decision as to persons similarly situated, without sacrificing  
22 procedural fairness or bringing about other undesirable results.” Fed. R. Civ. P. 23 Advisory  
23 Committee Notes (1966).

24 **1. Predominance of Common Issues.**

25 In their motion, plaintiffs assert that “the predominating common questions include  
26 whether the walk time, clothes changing and change over time are hours worked under the

1 WMWA, the use of representative and expert evidence,<sup>4</sup> and legal and factual issues pertinent to  
2 ‘willfulness’ double damages.” Motion at 22. The Court has already determined that the issue  
3 of whether walk time, clothes changing and change over time are hours worked under the  
4 WMWA satisfies the commonality requirement of Fed. R. Civ. P. 23(a)(2). However, while  
5 “[t]here is considerable overlap between Rule 23(a)(2) and (b)(3),” commonality alone will not  
6 satisfy the predominance inquiry. 2 Herbert B. Newberg & Alba Conte, Newberg on Class  
7 Actions, § 4:22 (4th ed. 2002) (hereinafter “Newberg on Class Actions”); see Hanlon, 150 F.3d  
8 at 1022. Instead, the predominance inquiry looks to the relationship between the common  
9 claims and individual issues. Hanlon, 150 F.3d at 1022. “When common questions present a  
10 significant aspect of the case and they can be resolved for all members of the class in a single  
11 adjudication, there is clear justification for handling the dispute on a representative rather than  
12 on an individual basis.” Id. (quoting 7A Charles Alan Wright, Arthur R. Miller, 7 Mary Kay  
13 Kane, Federal Practice & Procedure § 1778 (2d ed. 1986)).

14 Here, the Court finds that whether walk time, clothes changing and change over time are  
15 hours worked under the WMWA is an issue of central importance to the case common to all  
16 class members. This single common issue predominates because in any individual suit, a  
17 putative class member would have to prevail on this threshold issue to be successful. “[T]he  
18 predominance requirement is not a numerical test that identifies every issue in the suit as  
19 suitable for either common or individual treatment and determines whether common questions  
20 predominate by examining the resulting balance on the scale. A single common issue may be  
21 the overriding one in the litigation, despite the fact that the suit also entails numerous remaining  
22 individual questions.” Newberg on Class Actions, § 4:25. In opposition, defendant contends

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24 <sup>4</sup> The Court rejects plaintiffs’ argument that “the use of representative and expert evidence”  
25 supports Rule 23(b)(3)’s predominance requirement. If plaintiffs were not pursuing the claims on a class-  
26 wide basis, there would no need to use representative or expert evidence because individual plaintiffs  
could directly present evidence of their individual work activities they contend are compensable without  
having to resort to representative evidence through expert testimony.