

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

JUN - 3 2011

MICHAEL S. RICHIE
CLERK

PAUL MICKLE, BRENT BONNSTETTER,)
STEVE MEDLEY, and NORMA CASSIDY,)

Plaintiffs/Appellees,)

vs.)

Case No. 107,910

WELLMAN PRODUCTS, LLC,)

Defendant/Appellant.)

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE P. THOMAS THORNBRUGH, JUDGE

REVERSED AND REMANDED

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America.

OPINION BY ROBERT DICK BELL, CHIEF JUDGE:

¶1 Defendant/Appellant, Wellman Products, L.L.C. (Wellman), appeals the trial court's order certifying a class action. Plaintiffs/Appellees, Paul Mickle, Brent Bonnstetter, Steve Medley and Norma Cassidy (Employees) sought to represent a class of past and/or present, hourly employees of Wellman. Wellman appeals claiming the trial court erred in certifying the class as to the four causes of action stated in the petition because Employees failed to carry their burden under 12 O.S. Supp. 2009 §2023. After *de novo* review, we hold the predominance requirement for

class certification was not satisfied and reverse and remand.

¶2 Wellman manufactures clutch and transmission parts for heavy construction, mining and 18-wheel trucks. It operates three contiguous eight hour shifts at its Catoosa, Oklahoma facility and employs employees and temporary workers on a hourly basis. The temporary workers are paid by staffing agencies. Wellman's handbook states all employees are employed at-will and denies any employment contract. Wellman requires employees to clock in and out of its facility. Loud buzzers signify the beginning of a shift and the end of a prior shift. Wellman paid its hourly employees from the beginning to the end of their shift. Wellman's handbook requires that all overtime be approved by a "Lead" or supervisor. Employees may not begin work before their shift starts, but may clock in early.

¶3 Wellman uses a hand scanner to clock its employees' time in and out for attendance purposes and as an initial record for payroll purposes. The hand scanned times are subject to "ETime Punch Rounding." Under the rounding system, if an employee scans in prior to the start time of his or her shift, the employee's start time is rounded to the beginning of the shift. If an employee scans after the start of his or her shift time, the rounding defaults the employee's start time to the next quarter hour increment. At the end of the shift, if an employee scans out early, the employee's end time is rounded to the prior quarter hour increment. If an employee scans out late,

after the end of his or her shift, the employee's end time is rounded the prior quarter hour increment. The hand scanned times are not the sole method used by Wellman to determine payroll. Before an employee's time is submitted to payroll, each employee's default rounded ETime is reviewed and manually edited by a Lead to reflect the time an employee actually worked. The evidence submitted by Wellman demonstrated the Leads sometimes manually rounded punch time to the benefit of an employee. The ETime records are then submitted to payroll for editing and for use in creating weekly pay.

¶4 Employees' petition contended Wellman's pay practices related to the hand scanner and ETime rounding constituted a violation of the Oklahoma Labor Code, 40 O.S. 2001 §§165.1, 165.2 and 165.3, a breach of contract, a tortious breach of contract, a public policy tort¹ and fraud. Employees sought to have the court certify their claims as a class action. The crux of Employees' claim for class certification is that ETime always rounded in Wellman's favor and the times recorded by the hand scanner and the rounding system provided common proof of all hourly employees' uncompensated work during the time period between the hand scan and the shift buzzer (the "gap period").

¶5 After a two day evidentiary hearing, the trial court entered an order on

¹ The court dismissed Employees' public policy tort claim May 1, 2008.

December 9, 2009, finding the pay process for all employees was the same; therefore, the following employees should be certified as a class as to all four remaining causes of action:

All present and former hourly employees, whether employed directly by Wellman or through a temporary or employment agency, who have provided labor and/or services to Wellman Products LLC at its Catoosa, Oklahoma, manufacturing facility from the time it began operations in late 2004 through the date of the class certification hearing.

Wellman appeals the certification order by right pursuant to 12 O.S. 2001 §993(A)(6).

¶6 Because the class certification order was entered after November 1, 2009, we review the certification order *de novo*. 12 O.S. Supp. 2009 §2023(C),² *see also*

² As of November 1, 2009, §2023(C) provides, in part:

1. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order entered on or after November 1, 2009, that certifies a class action shall define the class and the class claims, issues or defenses, and shall appoint class counsel under subsection F of this section. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

2. The order described in paragraph 1 of this subsection shall be subject to a *de novo* standard of review by any appellate court reviewing the order. While the appeal of the order on class certification is pending, the trial court shall retain sufficient jurisdiction over the case to consider and implement a settlement of the action should one be reached between the parties and

(continued...)

Gentry v. Cotton Elec. Co-op., 2011 OK CIV APP 24, ___ P.3d ___. Under the *de novo* standard of review, we independently review the certification order without deference to the lower court's determination. *Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶6, 139 P.3d 873, 876.

¶7 Under Oklahoma law, certification of a class is appropriate only if the proposed class representatives demonstrate that the requested class satisfies each of the four requirements of §2023(A), namely: numerosity, commonality, typicality and adequacy of representation.³ *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, ¶6, 81 P.3d 618, 624. In addition, class representatives must meet one of the three §2023(B)

² (...continued)

discovery as to the class claims shall be stayed pending resolution of the appeal.

³ Section 2023 provides, in part:

A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.

requirements. Employees sought certification under §2023(B)(3) which provides:

B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:

* * *

3. The court finds that the questions of law or fact common to the members of the class predominate over any 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. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

d. the difficulties likely to be encountered in the management of a class action.

If the party seeking class certification fails to satisfy the four prerequisites of §2023(A) and one of the requirements of §2023(B), we must conclude the trial court erred in certifying the class. *Ysbrand* at ¶5, 81 P.3d at 623.

¶8 Employees' motion for class certification alleged employees "were each shortchanged earned but unpaid wages by Wellman requiring them to utilize a hand

scanner that had been programmed to underrecord their time worked.” Thus, here, the hand scanned times and the ETime punch rounding were the crux of Employees’ claim that common issues of fact and law predominate over each individual’s claim for uncompensated work during the gap period. The trial court agreed with this argument. In its order, the trial court explicitly found “the proof necessary to establish the class claims that Wellman Catoosa maintained a policy which prevented hourly workers from getting paid for all the time they worked is the same for each class member.”

¶9 On appeal, Wellman asserts the trial court’s certification of the employees and temporary employees as a class was erroneous because these hourly employees lacked commonality, typicality, numerosity, or predominance. Specifically, it challenges the trial court’s implicit determination that Employees share common issues of law and fact with the potential class members and such common issues predominate over individual issues. After *de novo* review of the record, we hold the trial court erred when it found Employees met the predominance requirement of §2023(B)(3).

¶10 In *Babineau v. Federal Express Corp.*, 576 F.3d 1183 (11th Cir.2009),⁴ a case factually similar to the instant case, the plaintiffs filed claims against Federal Express

⁴ Oklahoma courts may rely on federal authority in interpreting §2023. See *Mattoon v. City of Norman*, 1981 OK 92, ¶8, 633 P.2d 735, 737.

for breach of contract, unjust enrichment and violation of the Fair Labor Standards Act for failing to pay employees for the interval time (the “gap time”) between manual punch in and out times and the scheduled shift start and end times. The plaintiffs sought to certify a class of all FedEx employees who were required to punch in and out on a manual clock, but were paid from their scheduled start and end times. The class certification was denied by the district court and upheld by the Eleventh Circuit court.

¶11 The *Babineau* court reiterated certification under Rule 23(b)(3) is not appropriate when common questions of law or fact do not predominate over individualized issues in resolving the claim or claims of each class member. *Id.*, 576 F.3d at 1190. *Babineau* explained:

Here, the district court reasonably concluded that punch clock records do not provide common proof of any uncompensated work during gap periods-particularly in light of employee testimony regarding the various non-work-related activities that took place during the gap periods and the various personal reasons that employees listed for coming in early and staying late. Furthermore, assuming the existence of a contract, the district court acknowledged that FedEx may mount an individualized defense that an employee knew of FedEx's policy prohibiting off-the-clock work and chose to engage in it anyhow in breach of that contract.

Id. at 1192. *Babineau* concluded the predominance element for class certification was not met for each theory of the gap period claim because individualized inquiries would need to be made into each plaintiff's activities during the gap time.

¶12 We find the reasoning in *Babineau* to be persuasive. As in *Babineau*, we hold the common issue of an allegedly flawed time-keeping method is “swamped by individual factual inquiries into the activities of each employee during the gap periods.” *Id.*, 576 F.3d at 1191. Here, the record demonstrated certain proposed class members may not have performed work-related activities during the gap period. At the hearing, several employees testified they were fully aware of the rounding, thus they knew they would not be paid for the gap period. They further testified that during the gap periods, they may socialize with other employees, eat a meal in the break room, wash their hands, shower and change clothes, smoke cigarettes, or read the newspaper. These employees also testified that ten minutes before the buzzer sounded at the end of their shift, they would clean-up their work site in preparation for the next shift. The time record evidence shows routine individual adjustment of pay time both ways for a variety of reasons, pursuant to the gap period policy. There is no evidence of a consistent pattern of time record manipulation outside the scope of the gap policy to the detriment of Wellman employees.

¶13 The record likewise demonstrated that the testifying employees were aware of

the policy against unauthorized overtime work. Under the *Oklahoma Protection of Labor Act*, 40 O.S. 2001 §165.1 *et. seq.* (the Act), an employer does not have a duty to pay an employee for unauthorized work. *Reynolds v. Advance Alarms, Inc.*, 2009 OK 97, 232 P.3d 907. Specifically, the Act does “not compel an employer to pay an employee for work performed during a lunch break without the employer’s permission and in the absence of an established policy.” *Id.* at ¶18, 232 P.3d at 913. Thus, to the extent an employee claims he or she was uncompensated for work performed during the gap periods, such employee would have to produce individualized proof that such work was authorized by a lead.

¶14 Because Wellman did not exclusively rely on the hand scanned times and the ETime punch rounding method to determine payroll and each claim for unpaid overtime work must be examined to determine if such work was authorized, we hold individualized proof concerning each hourly employee’s activities during the gap period is indispensable to each employee’s claim for liability and damages purposes.

¶15 After *de novo* review, we conclude issues as to whether each employee was engaged in work or non-work activities during the gap period are too individualized to warrant class treatment for all hourly employees and therefore, Employees failed to establish the predominance requirement necessary to initially certify the proposed class. Because the predominance requirement was not met, the trial court erred in

certifying the class. Employees' failure to meet the predominance requirement is dispositive of this appeal. Consequently, it is unnecessary to address the remainder of Wellman's assignments of error. The order certifying a class action in this case is reversed, and this case is remanded for further proceedings consistent with this opinion.

¶16 REVERSED AND REMANDED.

HETHERINGTON, P.J., concurs, and HANSEN, J., dissents.