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CLASS CERTIFICATION AND THE ARKANSAS MINIMUM WAGE ACT

By Katherine Stephens

Two recent cases involving alleged violations of the Arkansas Minimum Wage Act (“AMWA”) may indicate a changing outlook on class certification in Arkansas that could prove useful for defendants in class action cases in the future.

Rule 23 of the Arkansas Rules of Civil Procedure governs class actions. Rule 23 allows one or more members of a class of similarly situated persons to sue on behalf of the class if the trial court determines that six requirements have been met: (1) numerosity, (2) commonality, (3) typicality; (4) adequacy (5) predominance and (6) superiority. See Ark. R. Civ. P. 23(a)–(b); *Diamante, LLC v. Dye*, 2013 Ark. 501, at 2, 430 S.W.3d 710, 714. Historically, the circuit court has been given broad discretion in deciding certification issues. Additionally, the question of whether to certify a class should not involve any analysis of the merits of the claim.

In the recent case of *Arkansas Dep’t of Veteran Affairs v. Mallett et al.* decided on November 19, the Arkansas Supreme Court reversed a class certification order, stating that, even assuming that the question met the commonality requirement, it did not predominate over the individual issues of liability and damages involved. Several non-

nursing employees had alleged that ADVA violated the Arkansas Minimum Wage Act (AMWA) by failing to pay employees for overtime worked because it automatically deducted time for meal breaks even though it regularly required employees to work through such breaks. The trial court granted class certification, finding the common question to be “[w]hether Defendant’s systematic and automated practice of deducting meal breaks is a violation of the AMWA”. In a 4-3 decision, the Supreme Court reversed, determining that “the mere existence of a policy of making automatic deductions for scheduled meal breaks does not, in and of itself, violate AMWA,” and thus ADVA could only be found to have violated AMWA’s overtime compensation requirement if (1) the employee actually worked unpaid meal breaks and (2) the employee worked over 40 hours as a result.

As the dissent in *Mallett* pointed out, the majority’s holding seems to be in sharp contrast with another recent class certification case decided by the Arkansas Supreme Court in June. In *Ark. Dep’t of Veterans Affairs v. Okeke*, 2015 Ark. 272 (June 18, 2015), the court had affirmed the certification of a class of nursing employees suing ADVA for the same meal break overtime compensation issue. In that case, the majority stated that whether such a policy was lawful per se went to the merits of the claim and thus would not be part of the analysis. The reasonableness of the automatic deduction and time reclaiming policies was a common question that predominated over any issues of damages based on meal breaks worked and 40-hour thresholds, which could be

easily bifurcated later. In response, the *Mallett* majority distinguished *Okeke* by noting that, unlike the nurses of *Okeke*, who all shared the same or similar job duties that would require them to work through meal breaks, these plaintiffs had many different job duties and work hours, and thus the liability and damages issues now predominated.

The Supreme Court's recent change of heart in *Mallett* is important for a few reasons. First, in deciding *Mallett*, the Supreme Court took the rare move of reversing the trial court's decision to certify the class, which has only happened a handful of times in recent history. When the Supreme Court has ruled against class certification, it has overwhelmingly been done through affirming the circuit court's decision against certification. The reversal in *Mallett* could indicate that the appellate courts will be less inclined to defer to the discretion of the trial courts in the future. Second, the majority's statement that ADVA's automatic-deduction policy is not, in and of itself, a violation of AMWA suggests that the courts may now be more willing to get into the merits of the underlying claims in deciding whether to certify.

The change in the make-up of the Supreme Court also may have played an important part in this certification shake-up from *Okeke* to *Mallett*. The majority in *Mallett* consisted of all three Justices who dissented in *Okeke* with the addition of the newest justice, Chief Justice Brill, adding the fourth vote. In contrast, Justice Hannah voted with the majority in *Okeke* and likely would have supported the dissenting view in *Mallett*. The change from Justice Hannah to Chief Justice Brill was enough to give the *Okeke* dissent the numbers it needed to become the majority in *Mallett*.

Mallett may hint at important changes to come in Arkansas class action law, or it may

prove an outlier in Arkansas' historically plaintiff-friendly class certification case law. Only time, and upcoming election results, will tell.



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