2017 IL App (3d) 150749-U

Order filed September 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

KASANDRA MURPHY, FELICIA WRIGHT, and MICHELL CREAL, Individually and on Behalf of a Class of Similarly Situated Persons,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiffs-Appellees,	)	
v.	)	Appeal No. 3-15-0749 Circuit No. 12-L-138
GROUP O, INC., an Illinois Corporation,	)	
Defendant-Appellant.	)	Honorable Michael J. Powers, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in certifying a class action. The plaintiffs failed to show that common questions of law or fact would predominate over individual issues.

¶ 2 This action was brought in the circuit court of Will County to recover damages for alleged violations of the Illinois Minimum Wage Law (Wage Law) (820 ILCS 105/1 *et seq.* (West 2012)) and the Illinois Wage Payment and Collection Act (Act) (820 ILCS 115/1 *et seq.* (West 2012)). Plaintiffs sought certification on behalf of themselves and on behalf of other

similarly situated former employees of defendant pursuant to section 801(2) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-801(2) (West 2014)). The trial court granted class certification on September 30, 2015. Defendant appealed.

¶ 3 On appeal, defendant argues the circuit court abused its discretion and applied improper legal criteria when it (1) failed to conduct a rigorous analysis of the elements required to certify a class action under section 2-801 of the Code, (2) failed to recognize that Illinois law does not require that employers pay employees for clocked-in time and does not prohibit automatic meal deduction policies, (3) found that common issues of fact or law predominated over individual issues, (4) found that the representative parties and counsel will fairly and adequately protect the interests of the class, (5) found that a class action is an appropriate method for the fair and efficient adjudication of the controversy, and (6) certified an unascertainable "Fail-Safe" class. For the following reasons, we reverse.

¶ 4 FACTS

¶ 5 Between February 2009 and December 2013, defendant, Group O, Inc. (Group O), provided logistic, manpower, and supply-chain services for Caterpillar Inc. (CAT) at its plant in Joliet, Illinois. Group O employees worked one of three eight-hour shifts. During the relevant time period, 676 Group O employees and 32 supervisors worked at the Joliet plant, with up to 223 employees working at any one time in up to 27 different positions. Each position had different work duties and locations within the one-million square-foot plant.

¶ 6 In June 2015, plaintiffs, current and prior Group O employees, filed a motion for class certification pursuant to section 2-801 of the Code (735 ILCS 5/2-801 (West 2012)). Plaintiffs' motion alleged that each potential class member had been subjected to a time-keeping system

instituted and operated by Group O that tracked their hours in such a way as to violate their rights under the Wage Law and the Act. The precise class definition is as follows:

> "All hourly, non-exempt Group O, Inc. employees who worked at the Joliet, Illinois Caterpillar facility and who were compensated on an hourly basis, and who were denied wages for all hours worked, including overtime wages, to which they were entitled to under Illinois law during the period from February 2009 through December 2013."

¶ 7 In support of their motion for class certification, plaintiffs alleged that Group O failed to pay them legally as a result of impermissible hourly rounding practices. They claimed, according to Group O's workplace policies and practices, putative class members were frequently required to come to work earlier than their scheduled start time, and stay late at the conclusion of their shift. However, it was Group O's policy and practice throughout the period in question to indiscriminately "round off" hours or edit the putative class members' hours to avoid paying employees the wages they earned.

¶ 8 Additionally, plaintiffs alleged that Group O maintained a standard policy and practice of requiring employees to work during their scheduled lunch breaks. In particular, they claimed that putative class members would frequently perform necessary and indispensable work for Group O during their lunch breaks. However, Group O's timekeeping system would still automatically deduct 30 minutes' worth of pay.

¶ 9 The parties conducted written discovery and took depositions of 3 class representatives, 12 potential class members, and Group O's corporate representative. The following was adduced during discovery.

¶ 10 According to Group O's written employment policy, employees were to be paid for their scheduled shift time. Employees were required to be at their work stations at the beginning of their scheduled shift and were prohibited from working before or after their scheduled shifts unless they received approval to work overtime. In addition, from June 27, 2008, to October 11, 2011, Group O provided employees with paid lunch periods and employees were paid for eight-hour shifts that included a half-hour lunch period. Effective October 12, 2011, lunches were unpaid and employees were scheduled for 8½-hour shifts that included eight hours of work and one half-hour unpaid lunch. Group O policy stated that employees were required to take the full 30-minute meal period and to not perform any work during the meal period.

¶ 11 The amount of each employee's specific compensation was calculated by Group O's "Kronos" timekeeping system, and was based on the number of hours clocked in by each Group O employee on a given work day. Kronos is an electronic timekeeping and payroll system that records and stores employees' punch-in and punch-out times. Group O's Kronos system was programmed with a preset rounding policy. From prior to February 2009 through February 2011, Kronos paid to the scheduled shift when punches were made 30 minutes or less before the shift started or 30 minutes or less after the shift ended. If an employee punched in outside that timeframe, they were paid for their actual punch time but could be disciplined for unauthorized overtime. However, Group O frequently offered overtime to its employees. Between 2009 and 2013, Group O paid its Joliet employees $4.78 million for 265,833 hours of overtime.

¶ 12 From February 2011 through December 2013, Kronos paid to the scheduled shift when punches were made 15 minutes or less before the shift started or 15 minutes or less after the shift ended. Again, if an employee punched in outside that timeframe, they were paid for their actual punch time but were subject to discipline. However, if an employee punched in after his or her

scheduled start time or before his or her scheduled end time, the employee was paid for the time that he or she actually punched in. The Kronos system utilized the same 15-minute rounding policy with regard to overtime work. According to Group O's corporate representative, Group O employees were instructed *not* to punch in more than 14 minutes before their shifts.

¶ 13 In signed declarations, named class members, Kasandra Murphy and Michell Creal[1], stated that Group O regularly required them to perform work for approximately 10 minutes prior to each of their scheduled shifts, and they were instructed not to leave work until they completed all of their assignments. According to the declarations, Group O did not pay them for this work. Neither Murphy, Creal, nor any putative class member testified that this was a uniform policy on the part of Group O.

¶ 14 During her deposition, Creal testified that employees were expected to be at their desks working during their scheduled shift times. Creal was not required to punch in before her scheduled shift time, but she occasionally worked overtime due to the unique nature of her position. She did not have any counterparts working the next shift and was required to finish tasks before she left for the day. Creal stated that Group O sometimes paid her overtime for this work and sometimes not.

¶ 15 Time clocks at the CAT facility were located at one of two entrances to the building. Walking straight from the time clock to a given work station in the building took anywhere from a few seconds to 12 minutes. After punching in and before starting work, some employees testified they would have breakfast or coffee at the CAT Shack restaurant, some would socialize or read at the picnic tables, and some would smoke in the smoking area adjacent to the building.

[1] Named class member, Felicia Wright, submitted a similar declaration. However, Wright was not an employee of Group O during the relevant time period.

After their shifts were over and before clocking out, some employees stated they would stop to talk to friends, some would get a snack or beverage, and some would wait for their ride home.

¶ 16 With regard to working during the lunch period, Murphy testified that she was not required to work through lunch, but, rather, she chose to work through lunch to get her work done by the end of her shift and get home to her children. Creal testified that she would take a six-minute, round-trip golf cart trip from her desk to the smoking area during her lunch period. Sometimes she would eat at her desk because in her unique position within the company, she had to deal with "hot parts" of an urgent nature. Several other Group O employees testified that they understood that Group O's policy required them to take a full half-hour lunch and to perform no work during it.

¶ 17 The trial court heard arguments on plaintiffs' motion to certify in August 2015. On September 30, 2015, the court issued its oral ruling on the motion. The transcript of that oral ruling is as follows:

> "THE COURT: I am going to grant the class certification. And I went through the Statute 735 ILCS 5/2-801, which is also patterned after the Federal rule, which all the case law you submitted and both Federal law and state law. And the four questions the Court had to address was, first: That the class is so numerous, that joinder of all members is impracticable. There is various payroll periods where there is estimates from a couple hundred to 100 and something. So it does seem like there is a significant number of potential members of the class.

Now, the second question which I answered in the affirmative, there are questions of fact or law common to the class which common questions predominate over any questions affecting only individual members. It basically is pertaining to nonexempt employees who are paid on an hourly basis subject to the same wage policy and procedures and issue as to working during the lunch hour without being compensated or the rounding procedure as to whether or not the employees were not being compensated, one, with over-time or at all because of that particular procedure.

Now, there was one particular – – it was pointed out in the response brief, I think it was with Plaintiff Wright, that she was not working at Group O during the period of time that they are seeking class certification. So she was the exception to that in terms of whether or not there were common questions of fact or law.

So that delves into the third question, that representative parties will fairly and adequately protect the interests of the class. As I have pointed out, as pointed out in the Respondent's brief, there is issues as to – – I believe it is Wright, isn't it?

MR. GANIYU: Wright is the one that was employed.

THE COURT: Correct. I just want to make sure I have that right on the record. But as to the other two, they are not subject to the same, for lack of a better word, infirmities in terms of being a

> class representative. And then last, that class action is an appropriate method for the fair and efficient adjudication of the controversy. Yes, I think it is narrow issues in here that is appropriately addressed by a class action instead of having all these individual lawsuits. Also, a couple of the cases, the *Cruz* case, which is a Second District case, had very similar facts to the facts in this particular case. And also, one of the cases cited was a Third District case. And we are in the Third District, *Ramirez*, and where the Third District indicated in that particular case that if the Judge has a great amount of discretion whether to grant or not and if there is effectively a close call to err on the side of allowing the class certification. And I think that was a 2007 case, I believe, on the Third District."

¶ 18 Following its oral pronouncement, the trial court entered a written order stating that plaintiff's motion to certify the class was granted.

¶ 19 Group O appealed.

¶ 20 **ANALYSIS**

¶ 21 On appeal, Group O argues the trial court abused its discretion and applied improper legal criteria in granting plaintiffs' motion for class certification. Specifically, Group O claims the trial court erred when it (1) failed to conduct a rigorous analysis of the elements required to certify a class action under section 2-801 of the Code, (2) failed to recognize that Illinois law does not require that employers pay employees for clocked-in time and does not prohibit automatic meal deduction policies, (3) found that common issues of fact or law predominated

over individual issues, (4) found that the representative parties and counsel will fairly and adequately protect the interests of the class, (5) found that a class action is an appropriate method for the fair and efficient adjudication of the controversy, and (6) certified an unascertainable "Fail-Safe" class.

¶ 22 Under section 2-801 of the Code, the following four requirements are necessary to maintain a class action:

> "(1) The class is so numerous that joinder of all members is impracticable.
>
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interest of the class.
>
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801 (West 2012).

¶ 23 Section 2-801 is patterned after Rule 23 of the Federal Rules of Civil Procedure and, because of this close relationship between the state and federal provisions, "federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125 (2005). The proponent of the class action bears the burden to establish all four of the prerequisites set forth in section 2-801. *Id.* In order to grant class certification, the trial court must be "satisfied,

after a rigorous analysis" that each of the four prerequisites have been met. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

¶ 24 Decisions regarding class certification are within the discretion of the trial court and will not be disturbed on appeal unless the trial court abused its discretion or applied impermissible legal criteria. *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 447 (2006). As an appellate court, our review is limited to an assessment of the trial court's exercise of discretion; we cannot indulge in an independent, *de novo* evaluation of the facts alleged and the facts of record to justify class certification. *Health Cost Controls v. Sevilla*, 365 Ill. App. 3d 795, 805 (2006). In reviewing the trial court's decision on the question of class certification, we are "only to assess the discretion exercised by the trial court and may not instead assess the facts of the case and conclude for itself that a case is well-suited for a class action." *Id.* Where, for example, the trial court has granted class certification, in order to reverse, we would have "to find that no other reasonable conclusion could be reached but that a class action would be [in]appropriate." *Id.*; *Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 760-61 (2008).

¶ 25 Addressing the merits of Group O's appeal, we agree that the trial court abused its discretion when it concluded that common questions of law and fact would predominate over questions affecting only individual class members. "Determining whether issues common to the class predominate over individual issues requires the court to identify the substantive issues that will control the outcome, assess which issues will predominate, and then determine whether these issues are common to the class." *Smith*, 223 Ill. 2d at 449. "Such an inquiry requires the court to look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law." *Id.* "Satisfaction of section 2-801's predominance requirement necessitates a showing that 'successful adjudication of the purported class representatives'

individual claims will establish a right of recovery in other class members.' " *Id.* (quoting *Avery*, 216 Ill. 2d at 128). "Where the predominance test is met, a judgment in favor of the class members should decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim." (Internal quotation marks omitted.) *Id.*

¶ 26 Here, in granting plaintiffs' motion for class certification, the trial court relied entirely upon the fact that all class members were subject to Kronos' rounding procedure. However, as Group O correctly points out, the law does not proscribe the rounding of nonwork time. Federal regulation specifically provides that a rounding practice "will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 CFR § 785.48(b); see also *Kerbes v. Raceway Associates, LLC*, 2011 IL App (1st) 110318, ¶ 25 (noting that in construing the Wage Law, Illinois courts look to the regulations and decisions interpreting the analogous provisions of the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.* (2014)).

¶ 27 Thus, the common issue of law or fact cannot be that Kronos automatically deducted time. Rather, the issue must be that employees were forced, by Group O, to work during the time that was automatically deducted. However, aside from Murphy and Creal's signed declarations (which were, for the most part, contradicted by their deposition testimony), plaintiffs have failed to set forth any common policy or scheme that required all class members to work before or after their shifts or during lunch periods without compensation.

¶ 28 On the contrary, employees who claimed to have worked before or after their shifts or during their lunch periods without compensation did so under individualized circumstances. For example, Murphy testified that she sometimes worked during lunch in order to leave on time to be at home with her children. Creal, on the other hand, testified that she sometimes worked

through lunch and stayed late due to the uniqueness of her position. Other employees testified they were not working at all during this uncompensated clocked-in time—they would eat at the Cat Shack, socialize with friends, smoke, or wait on their rides near the door.

¶ 29 In short, plaintiffs have failed to set forth any uniform mandate requiring all putative class members to work without compensation. The proposed class contained over 100 Group O employees who worked in 1 of 27 different positions within the company. Each of these positions had different duties, locations, shifts, and supervisors. Some work stations were a 12-minute walk from the time clock across a one-million square-foot building while others were just a few minutes away. Some employees could leave at the end of their shifts because there would be employees on the next shift to continue their work while others, like Creal, had no replacement.

¶ 30 Put another way, to award plaintiffs the relief they seek, the trial court would have to discern which employees were actually working when clocked in, why, and for how long. These are exactly the type of individual determinations that render a class action unfavorable. Accordingly, we conclude that the trial court abused its discretion when it determined that common issues of law or fact would predominate over individual issues. Because we reverse the trial court's grant of plaintiffs' motion for class certification on this issue, we need not address plaintiffs' remaining contentions of error.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we reverse the judgment of the circuit court of Will County.

¶ 33 Reversed.