IN THE COURT OF APPEALS OF IOWA

No. 6-623 / 05-1760
Filed November 30, 2006

BRUCE J. ISHMAN, Individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

vs.

FEATHERLITE, INC., d/b/a FEATHERLITE MANUFACTURING, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Howard County, John Bauercamper, Judge.

Defendant appeals the certification of this action regarding employees' vacation benefits as a class action. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, Stochl, Braun & Churbuck, Charles City, for appellant.

Karl G. Knudson, Decorah, and Mark B. Anderson, Cresco, for appellee.

Heard by Huitink, P.J., and Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.

I. Background Facts & Proceedings

Bruce Ishman is employed at Featherlite, Inc. as a production worker. In October 2003, the company implemented a vacation policy for production employees which provided that each year on an employee's anniversary date, the employee would receive an allotment of vacation time based on the employee's years of service.[1] For example, Ishman had more than six years of employment and on his anniversary date of June 1, 2004, received four weeks of vacation (160 hours). Employees were not permitted to carry over vacation from one year to the next.

Effective December 31, 2004, the company changed its vacation policy to provide that all employees would be allotted vacation time on January 1, instead of their anniversary date. However, employees would earn the vacation time prorated over the calendar year. Employees could take vacation time previous to earning it, but if they terminated employment for any reason prior to earning the vacation hours they had taken, the company could request reimbursement for the unearned vacation time which had been taken.[2] Under the new policy, employees could carry over up to three days of vacation time to the next year.

The vacation policy was further modified on January 13, 2005, to implement transitional measures. Employees were given pro-rata vacation time

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[1] The company's vacation policies also contained provisions for personal days. In order to simplify matters, we have not separately discussed the provisions for personal days, which are similar to the provisions for vacation days.

[2] It is not clear this rule would apply to an employee age sixty-five or older who retired. A retiring employee could be paid for unused vacation time in the year of retirement.

from their anniversary date to December 31, 2004, less vacation time already used. This amount was added to the new allotment of vacation time on January 1, 2005. Ishman's pro-rata vacation time from June 1 to December 31, 2004, was ninety-four hours. He had taken eighty-eight hours of vacation and was given six hours of carry-over vacation time for 2005, in addition to his new allotment of 160 hours.

On March 17, 2005, Ishman filed a petition against Featherlite seeking to institute a class action on behalf of all production employees working in the State of Iowa as of December 30, 2004.[3] He alleged Featherlite had (1) intentionally failed to pay him and other class members wages under Iowa Code section 91A.3 (2005); (2) failed to pay wages which were due under an agreement or policy; (3) breached a contract for the payment of employee benefits; and (4) defrauded him and other members of the class. Ishman sought actual and punitive damages. Featherlite resisted the motion for class certification. The district court granted the motion for class certification, finding: (1) the requirements of Iowa Rule 1.261 of Civil Procedure had been satisfied; (2) a class action should be permitted for the fair and efficient adjudication of the controversy; (3) the representative party would fairly and adequately protect the interests of the class; (4) joint or common interests exist among the members of the class; and (5) the criteria of rule 1.263(1) were satisfied. The class was described as "persons who were employed as production workers in the State of

[3] The parties estimated there were about 700 Featherlite production employees in Iowa. Featherlite also has production employees in Florida. The motion for class certification requested that the district court defer a determination of a class action in Florida, due to differences in Iowa and Florida law.

Iowa by the defendant as of December 30, 2004, all of whom had earned the annual right to vacation pay in some amount as of their date of hire anniversary." Featherlite appealed the certification of the class action. *See* Iowa R. Civ. P. 1.264(3) ("An order certifying or refusing to certify an action as a class action is appealable.").

II. Standard of Review

We review a district court's decision to grant or deny a request to certify a class action for an abuse of discretion. *Luttenegger v. Conseco Fin'l Servicing Corp.*, 671 N.W.2d 425, 436 (Iowa 2003). We will find an abuse of discretion only where the district court's grounds were clearly unreasonable. *Varner v. Schwan's Sales Enters., Inc.*, 433 N.W.2d 304, 305 (Iowa 1988).

III. Class Certification

Featherlite contends this case should not have been certified as a class action. A district court may certify an action as a class action if it finds (1) the requirements of Rule 1.261 have been satisfied; (2) a class action will permit the fair and efficient adjudication of the controversy; and (3) the representative party will fairly and adequately protect the interests of the class. Iowa R. Civ. P. 1.262(2). Rule 1.261 provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if both of the following occur:
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> (1) The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted is impracticable.
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> (2) There is a question of law or fact common to the class.

The plaintiff has the burden to establish that these prerequisites have been met. *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 45 (Iowa 2003). A failure of

proof on any one of the prerequisites is fatal to class certification. *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 791 (Iowa 1994).

A. Featherlite contends Ishman did not present sufficient information to demonstrate that his claim exceeded the maximum jurisdictional amount for small claims court. Featherlite raised this issue in its memorandum in support of resistance to class certification. The district court did not specifically address the issue. In order to preserve error, a party seeking to appeal an issue presented to, but not decided by, the district court, must call the court's attention to the issue by a post-trial motion. *See Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). We conclude this issue has not been preserved for our review.

Even if the issue had been preserved, however, we would find plaintiff's claims would exceed the jurisdictional amount. Under section 631.1(1), if a civil action raises a claim for a money judgment of $5000 or less, the action should be brought as a small claims action. Our supreme court has stated, "We hold the claims in a uniform rule class action may be aggregated for the purposes of determining whether the minimum jurisdictional exception applies." *Ackerman v. Int'l Bus. Machs. Corp.*, 337 N.W.2d 486, 489 (Iowa 1983). [4]

B. Featherlite claims plaintiff failed to present sufficient information to show that the proposed action met the requirements of rule 1.261–that the class was so numerous that joinder was impracticable, and there were common questions of law and fact. There was testimony at the class certification hearing

[4] The supreme court's discussion in *Ackerman Int'l Bus. Machs. Corp.*, 337 N.W.2d 486, 489 (Iowa 1983), actually concerned whether a party seeking to bring a class action was required to meet the amount in controversy requirement of Iowa Rule of Appellate Procedure 6.3 in order to file an appeal. We believe the same rule of aggregation would be applied in district court.

that there were about 700 production workers at Featherlite. Where the number of proposed class members exceeds forty, this is generally sufficient to show impracticality of joinder. *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 368 (Iowa 1989).

In considering whether plaintiff has raised common issues of law and fact, we do not inquire into the merits of the class action claims. *Luttenegger*, 671 N.W.2d at 438. A court needs only sufficient information to form a reasonable judgment in deciding whether to certify a class action. *Martin*, 435 N.W.2d at 367-68. In the present case, plaintiff claimed that he and other production employees had vested vacation time on their anniversary dates, and that part of this vacation time was eliminated by the company when it adopted its new policy.[5] Plaintiff alleged the vacation hours received under the new policy were not comparable because employees could be asked to reimburse the company if they took more vacation than they had earned and then quit. Plaintiff claimed he and other production employees were damaged by the change in vacation policies.

There is no requirement that individual claims be carbon copies of each other. *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 322 (Iowa 2005). "If a 'common nucleus of operative facts' is present, a class action can be brought even without a complete identity of facts relating to all class members." *Vos*, 667 N.W.2d at 45 (citations omitted). Generally,

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[5] Specifically, Ishman had 160 hours of vacation time on June 1, 2004. Featherlite gave him credit for only ninety-four of those hours, and the rest were eliminated when it changed to the new policy.

> [w]hen common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than an individual basis . . . .

Comes, 696 N.W.2d at 322 (citations omitted).

Although other production employees had different anniversary dates and had different amounts of vacation time eliminated by the switch to the new policy, common issues of law and fact predominate in this case. A common issue arises as to whether the employees had a vested interest in their vacation time under the old policy and if they were damaged by the switch to the new vacation policy. We find no abuse of discretion in the district court's determination that plaintiff met the requirements of rule 1.261.

C. Featherlite asserts plaintiff failed to present information that a class action was necessary for the fair and efficient adjudication of the controversy, as required by rule 1.262(2)(*b*). Rule 1.263(1) lists thirteen factors to be considered in determining whether a class action would permit fair and efficient adjudication of a controversy. Featherlite focuses on four on these factors: (*a*) whether a joint or common interest exists among members of the class; (*c*) whether adjudications with respect to individual members substantially impair or impede their ability to protect their interests; (*f*) whether other means of adjudicating the claims are impracticable or inefficient; and (*m*) whether the claims of individual class members are insufficient in amount in view of the expenses of the litigation to afford significant relief to the members of the class. *See* Iowa R. Civ. P. 1.263(1).

The criteria of rule 1.263(1) have two broad considerations, achieving judicial economy by encouraging class litigation while preserving, as much as possible, the rights of litigants–both those presently in court, and those who are only potential litigants. *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 744 (Iowa 1985). The district court has broad discretion in considering the factors in rule 1.263(1). *Vos*, 667 N.W.2d at 36. We consider only whether the court has come to a reasoned conclusion as to whether a class action would permit a fair and efficient adjudication of the controversy. *Luttenegger*, 671 N.W.2d at 437. We conclude the district court did not abuse its discretion in finding a class action should be permitted for the fair and efficient adjudication of the controversy.

D. Featherlite contends plaintiff did not present sufficient information that he was a representative party who could fairly and adequately protect the interest of the class, as required by rule 1.262(2)(*c*). Rule 1.263(2) lists several factors for a court to consider in determining whether a representative party will fairly and adequately protect the interests of the class. Featherlite claims Ishman was not damaged by the change in vacation policies, and he cannot adequately represent the class.

As noted above, at this point in the proceedings, plaintiff is not required to prove he will ultimately succeed on his claims. *Luttenegger*, 671 N.W.2d at 438 ("In short, the question of certification is a procedural one 'that does not ask whether an action is legally or factually meritorious.'" (citation omitted)). Plaintiff has raised claims that he and the other production workers (approximately 700) were damaged by the change in vacation policies. Featherlite's challenge to the class certification is focused primarily on the merits of the cause of action. If it

were determined in subsequent proceedings that the claim(s) were not meritorious, the class could be decertified.

Featherlite also claims Ishman has not shown he has or can acquire financial resources to protect the interests of the class. Ishman filed a statement that he had collected $300 from seventeen potential members of the class for anticipated costs of the action. He also filed an agreement with two attorneys who had agreed to represent the class, which states the attorneys will advance the costs of prosecuting the suit, and they will later be reimbursed. The agreement listed the duties of a class representative. We determine the district court did not abuse its discretion in concluding the representative party fairly and adequately would protect the interests of the class.

We affirm the decision of the district court.

AFFIRMED.