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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001353-ME
AND
NO. 2012-CA-001757-ME

MARION HUGHES; RAYMOND S.
BATTS; JAMES A. CRUME; TERRI
A. ROGERS; PHILLIP L. WESTERN;
MARION HUGHES, ON BEHALF
OF ALL OTHER PERSONS SIMILARLY
SITUATED; RAYMOND S. BATTS,
ON BEHALF OF ALL OTHER PERSONS
SIMILARLY SITUATED; JAMES A. CRUME,
ON BEHALF OF ALL OTHER PERSONS
SIMILARLY SITUATED; TERRI A. ROGERS,
ON BEHALF OF ALL OTHER PERSONS
SIMILARLY SITUATED; AND PHILLIP
L. WESTERN, ON BEHALF OF ALL
OTHER PERSONS SIMILARLY SITUATED

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 07-CI-009996

UPS SUPPLY CHAIN SOLUTIONS,
INC.; AND UNITED PARCEL
SERVICE, INC.

APPELLEES

OPINION
AFFIRMING APPEAL NO. 2012-CA-001353-ME
VACATING AND REMANDING APPEAL NO. 2012-CA-001757-ME

** ** * * * * *

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Marion Hughes, Raymond S. Batts, James A. Crume, Terri A. Rogers, Phillip L. Western, Marion Hughes, on behalf of all other persons similarly situated, Raymond S. Batts, on behalf of all other persons similarly situated, James A. Crume, on behalf of all other persons similarly situated, Terri A. Rogers, on behalf of all other persons similarly situated, and Phillip L. Western, on behalf of all other persons similarly situated (collectively referred to as “appellants”) bring Appeal No. 2012-CA-001353-ME from a July 27, 2012, opinion and order of the Jefferson Circuit Court denying appellants’ motion for class certification and bring Appeal No. 2012-CA-001757-ME from an October 9, 2012, opinion and order of the Jefferson Circuit Court denying appellants’ Kentucky Rules of Civil Procedure (CR) 23.03(3) motion to amend the circuit court’s denial of class certification. We affirm Appeal No. 2012-CA-001353-ME and vacate and remand Appeal No. 2012-CA-001757-ME.

The primary issue in these appeals is whether the circuit court properly denied appellants’ motion for class certification. In 2007, appellants filed a complaint against UPS Supply Chain Solutions, Inc., and United Parcel Service, Inc. (collectively referred to as “UPS”). In the complaint, appellants alleged that they were employees of UPS in Kentucky. Appellants claimed that they and other

employees of UPS in Kentucky were required to enter workplace facilities through mandatory security checkpoints before clocking in and then exit through the security checkpoints after clocking out each day. As these employees were not compensated for this time, appellants alleged that UPS violated Kentucky's Wages and Hours law (Kentucky Revised Statutes (KRS) Chapter 337) by not properly compensating employees for work time. Appellants filed a motion for class certification and defined the class generally as all nonexempt UPS employees employed in this Commonwealth during the applicable limitations period.

By opinion and order entered July 27, 2012, the circuit court denied appellants' motion for class certification under CR 23.01 and CR 23.02.

Thereupon, appellants filed a notice of appeal (Appeal No. 2012-CA-001353-ME) from the July 27, 2012, opinion and order.¹

Thereafter, in the circuit court, appellants filed a motion to amend under CR 23.03(3) and sought to certify a more limited class. Appellants defined this proposed limited class as all nonexempt UPS employees who worked at the Elizabethtown facility, Louisville Technical and Logistics Center, and Worldport facility during the applicable limitations period (hereinafter referred to as the "limited class").

By opinion and order entered October 9, 2012, the circuit court concluded that the limited class also failed to meet the prerequisites of CR 23.01 and conditions of CR 23.02. Thus, the circuit court denied the motion and refused to

¹ Per Kentucky Rules of Civil Procedure (CR) 23.06, an order granting or denying class certification is appealable within ten days of entry.

certify the limited class. Appellants then filed a Notice of Appeal (Appeal No. 2012-CA-001757-ME) from the October 9, 2012, opinion and order.

These appeals (Appeal Nos. 2012-CA-001353-ME and 2012-CA-001757-ME) were consolidated by Order of this Court entered November 27, 2012. Both appeals involve the legal propriety of class certification; consequently, we begin by setting forth the applicable law.

In this Commonwealth, CR 23.01 and CR 23.02 govern class certification.

CR 23.01 reads:

Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

And, CR 23.02 reads:

An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

- (a) The prosecution of separate actions by or against individual members of the class would create a risk of
 - (i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or,
 - (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the

adjudications or substantially impair or impede their ability to protect their interests; or

(b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) 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: (i) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (iv) the difficulties likely to be encountered in the management of a class action.

Taken together, CR 23.01 and CR 23.02 provide a comprehensive scheme to navigate the legal morass of class certification. Under this scheme, a class may be only certified if the legal mandates outlined in both CR 23.01 and CR 23.02 are fulfilled. Under CR 23.01, there are four separate prerequisites that must be satisfied, and under CR 23.02, one of three conditions must be satisfied.

The four prerequisites of CR 23.01 are:

(1) "numerosity"—the class must be so numerous as to make joinder of all members impractical; (2) "commonality"—there must be common questions of law or fact; (3) "typicality"—the claims or defenses of representative parties must be typical of the class; and (4) "adequacy of representation"—the representative parties

must fairly and adequately protect the interests of the class.

6 Kurt A. Phillips, Jr., David V. Kramer and David W. Burleigh, *Kentucky*

Practice – Rules of Civil Procedure Annotated, CR 23.01 (6th ed. 2005). And, the three conditions of CR 23.02 are:

(1) the prosecution of separate actions would create a risk of inconsistent or varying adjudications affecting individual members of the class, which would establish incompatible standards of conduct for the party opposing the class, or would create a risk of adjudications with respect to individual members that as a practical matter either would dispose of the interests of those not parties or would substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted in such a way that final injunctive relief or corresponding declaratory relief with respect to the class would be appropriate; or (3) the court finds that questions of law or fact common to the members predominate over questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication.

6 Kurt A. Phillips, Jr., David V. Kramer and David W. Burleigh, *Kentucky*

Practice – Rules of Civil Procedure Annotated, CR 23.02 (6th ed. 2005).

In practice, CR 23.01 and CR 23.02 create a two-step analysis for class certification. The first step requires a court to initially determine whether all four of the prerequisites of CR 23.01 are fulfilled. If any of the four prerequisites are not fulfilled, the court must deny class certification. On the other hand, if the court concludes that all four prerequisites of CR 23.01 are met, the court then proceeds to the second step and must determine whether one of the three conditions of CR 23.02 is satisfied. If none of the conditions of CR 23.02 is satisfied, class

certification must be denied; however, if at least one of the three conditions is satisfied, the court must certify the class.

In this case, we shall analyze each appeal separately under the above-stated legal precepts. And, our review of the circuit court's denial of class certification is for an abuse of discretion. *See Sowders v. Atkins*, 646 S.W.2d 344 (Ky. 1983). We observe that appellants sought class certification in Appeal No. 2012-CA-001353-ME of a larger more inclusive class, and after denial of certification, appellants then sought class certification in Appeal No. 2012-CA-001757-ME of a smaller more restrictive class (the limited class). We address each proposed class in its concomitant appeal.

Appeal No. 2012-CA-001353-ME

In this appeal, appellants' proposed class consisted of:

All current and former non-exempt [sic] employees of UPS who were employed in the Commonwealth of Kentucky during the applicable limitations period.

In its July 27, 2012, opinion and order, the circuit court determined that the above proposed class did not fulfill the prerequisite of CR 23.01(b) requiring that common questions of law or fact exist as to the class. In so concluding, the circuit court reasoned:

Here, every UPS employee was required to pass through security without receiving compensation and [appellants] allege that UPS has company wide rules that violate Kentucky Law. However, there are thirty-six different UPS facilities in Kentucky. Each facility has a different

delay based on its [sic] specific design, procedures, number of employees, and other factors which cause employees a delay getting through a UPS security checkpoint. These differences make each employee's "security wait time" facility-dependent, and potentially individually unique. Moreover, UPS claims that their practices and procedure are not entirely uniform to all facilities or to every employee. Therefore, the Court finds that there are not questions of law or fact common to the proposed class under CR 23.01(b).

The CR 23.01(b) prerequisite of common questions of law or fact is generally referred to as the "commonality" prerequisite. The commonality prerequisite mandates:

[T]he plaintiff to demonstrate that the class members "have suffered the same injury," *Falcon, supra*, at 157, 102 S. Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).²

² We observe that CR 23.01 and CR 23.02 are substantially similar to Federal Rules of Civil Procedure 23. We are authorized to utilize federal decisions as guidance in interpreting our Rules. See *Bellarmino College v. Hornung*, 662 S.W.2d 847 (Ky. App. 1983); *Lamar v. Office of Sheriff of Daviess Co.*, 669 S.W.2d 27 (Ky. App. 1984).

In the case *sub judice*, we believe the circuit court properly determined that the commonality prerequisite of CR 23.01(b) was not satisfied. Appellants' claims against UPS are based upon alleged violation of Kentucky's Wages and Hours law (Chapter KRS 337). Appellants contend that UPS violated the Wages and Hours law by failing to compensate members of the proposed class for time spent complying with mandatory security procedures upon entering/exiting UPS facilities in this Commonwealth.

The record reveals that UPS tendered the affidavit of Steve Hamm, who was its North America Security Director. In the affidavit, he clearly averred that employees did not pass through mandatory security at two UPS facilities in Kentucky. Hamm identified these facilities as the Prologis Park facility and the Lexington facility. Nevertheless, these employees were included in appellants' proposed class even though they did not suffer an injury common to other proposed class members. We view this lack of a shared injury as fatal under the commonality prerequisite of CR 23.01(b). *See Dukes*, 131 S. Ct. 2541.

Consequently, we are of the opinion that appellants' proposed class failed to meet the commonality prerequisite of CR 23.01(b), and the circuit court did not abuse its discretion by denying class certification in Appeal No. 2012-CA-001353-ME.

Appeal No. 2012-CA-001757-ME

In this appeal, the limited class was more restrictive and specifically defined as:

All current and former non-exempt [sic] employees of UPS who were employed in the Commonwealth of Kentucky during the applicable limitations period at the following locations: Elizabethtown, Louisville, Technical & Logistics Center, and Worldport.

In its October 9, 2012, order, the circuit court ostensibly denied class certification because two prerequisites of CR 23.01 and one condition of CR 23.02 were not met.³ The circuit court identified the two prerequisites of CR 23.01 as the commonality prerequisite and the typicality prerequisite. For the reasons hereinafter set forth, we conclude that the limited class satisfied both the commonality prerequisite and the typicality prerequisite.

Unlike the class proposed in the previous appeal (Appeal No. 2012-CA-001353-ME), the proposed members of the limited class were identified as employees at one of three UPS facilities in this Commonwealth – Elizabethtown, Louisville Technical and Logistics Center (LTLC) and Worldport. As to each facility, the record demonstrates security procedures and measures common to all three facilities.

Upon entering the Elizabethtown facility, employees removed personal items, passed through a metal detector, and presented any bags for search by security personnel. Upon exiting the Elizabethtown facility, employees again passed through a metal detector. Upon entering the LTLC facility, employees removed personal items, passed through a metal detector, and presented any bags for search by security personnel. Upon exiting the LTLC facility, employees again

³ The October 9, 2012, opinion and order incorporated the reasoning of the July 27, 2012, opinion and order.

passed through a metal detector. Upon entering the Worldport facility, employees were required to pass through a metal detector and remove all personal belongings. If an audible alert sounded, the employee again passed through a metal detector and could be wanded by security personnel if another alert sounded. The employees at Worldport followed the exact same security procedure upon exiting the facility. Upon review of these mandatory security procedures, we think there exists a common nucleus of facts relating to such security procedures at all three facilities. See 59 Am. Jur. 2d *Parties* § 73 (2013).

Additionally, we believe that all proposed class members are alleging a common wrong and suffered the “same injury.” See *Dukes*, 131 S. Ct. at 2551. In their complaints, appellants set forth the common contention that UPS did not compensate the proposed class members for time spent complying with the mandatory security procedures at the three facilities. See *id.* Specifically, appellants claimed entitlement to compensation under KRS Chapter 337 for the following work time:

- a. Entering: The work time expended after complying with Defendants’ mandatory *entry* security procedures and before being permitted to clock-in.
- b. Exiting: The work time expended after being required to clock-out and complying with Defendants’ mandatory *exit* security procedures.

As the three facilities’ mandatory security procedures and the clock-in/out requirements are substantially similar, the members of the proposed limited class all suffered the same injury (unpaid work time), and UPS’s liability is dependent

upon common questions of law and fact, thus allowing a common resolution. *See Dukes*, 131 S. Ct. 2541. In short, we conclude that the commonality prerequisite of CR 23.01(b) is satisfied as to the limited class, and the circuit court erred by concluding otherwise.

As to the typicality prerequisite, we turn to CR 23.01(c). Thereunder, the prerequisite of typicality requires that the “claims or defenses of the representative parties are typical of the claims or defenses of the class.” CR 23.01(c). To meet this prerequisite, the class representatives’ interests must be coextensive with the interests of the proposed members of the class. 59 Am. Jur. 2d *Parties* § 65 (2013). More succinctly stated, “[t]he claims and defenses are considered typical if they arise from the same event, practice, or course of conduct that gives rise to the claims of other class members and if the claims of the representative are based on the same legal theory.” 6 Kurt A. Phillips, Jr., David V. Kramer and David W. Burleigh, *Kentucky Practice – Rules of Civil Procedure Annotated*, CR 23.01 (6th ed. 2005).

In this case, the class representatives and proposed class members were all employed at one of the three facilities and were subject to substantially similar security procedures at all three facilities. Moreover, the class representatives and proposed class members’ claims against UPS are based upon violation of the Wages and Hours law. Herein, we believe that typicality exists because the claims of the class representatives and proposed members are based upon a substantially similar course of conduct by UPS (mandatory security procedures at the three

facilities) and upon the same legal theory (violation of the Wages and Hours law). Thus, we conclude that the typicality prerequisite of CR 23.01(c) is satisfied as to the limited class, and the circuit court erred by concluding otherwise.

In Appeal No. 2012-CA-001353-ME, we hold that the circuit court erred by determining that the limited class did not fulfill the prerequisites of commonality and typicality under CR 23.01(b) and (c). As the circuit court so erred, we vacate the October 9, 2012, opinion and order and remand for the circuit court to determine whether the limited class satisfies the additional prerequisites of CR 23.01(a) and (d). These prerequisites are the numerosity prerequisite of CR 23.01(a) and the adequacy of representation prerequisite of CR 23.01(d). If the circuit court concludes that the limited class fails to satisfy either prerequisite as set forth in CR 23.01(a) or (d), the circuit court shall deny class certification. Conversely, if the circuit court determines that the limited class satisfies both prerequisites of CR 23.01 (a) and (d), the circuit court shall then determine if the limited class fulfills any one of the three conditions set forth in CR 23.02.⁴ If the circuit court decides that the class fails to satisfy all three conditions of CR 23.02, the class certification shall be denied. However, if the limited class satisfies at least one of the three conditions of CR 23.02, the circuit court shall certify the limited class.

In sum, we are of the opinion that the circuit court properly denied class certification in Appeal No. 2012-CA-001353-ME. In Appeal No. 2012-CA-

⁴ As we remand for reconsideration of the limited class under CR 23.01(a) and (d), any arguments as to compliance with CR 23.02 are rendered moot.

001757-ME, we hold that the circuit court erred by concluding that the limited class failed to meet the commonality prerequisite and the typicality prerequisite of CR 23.01(b) and (c). We remand for the circuit court to determine whether the limited class met the additional prerequisites of CR 23.01(a) and (d) and one of the conditions of CR 23.02.

For the foregoing reasons, Appeal No. 2012-CA-001353-ME is affirmed and Appeal No. 2012-CA-001757-ME is vacated and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Kevin C. Burke
Michael D. Grabhorn
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLANTS:

Kevin C. Burke
Louisville, Kentucky

BRIEF FOR APPELLEES:

Griffin Terry Sumner
David L. Hoskins
Kyle D. Johnson
Louisville, Kentucky

Kasey L. Bond
Florence, Kentucky

ORAL ARGUMENT FOR
APPELLEES:

Griffin Terry Sumner
Louisville, Kentucky