

PUBLICATION

U.S. Court of Appeals for the Fourth Circuit Vacates and Remands District Court's Order Certifying Class Seeking Unpaid Wages [Ober|Kaler]

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A very recent unreported decision from the U.S. Court of Appeals for the Fourth Circuit provides guidance for employment lawyers seeking to obtain or avoid class certification.

In Ealy, et al. v. Pinkerton Gov't Services, Inc., Case No. 12-1252, (4th Cir. Mar. 14, 2013), a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit, in a per curiam opinion, the three judge panel vacated and remanded the case to the U.S. District Court for the District of Maryland holding that the District Court failed to provide a rigorous analysis of class certification "sufficient to enable us to conduct a meaningful appellate review."

The dispute arose in a suit brought by employees of Pinkerton Government Services, Inc. ("Pinkerton"), which is a government contractor that provides security services at Andrews Air Force Base. The group of Pinkerton security employees filed suit for unpaid wages under both federal and Maryland law and sought class certification, which the District Court granted. Pinkerton then filed an interlocutory appeal seeking, *inter alia*, review of the District Court's grant of class certification. The Appellate Court held that the U.S. Supreme Court precedent in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), required the District Court to conduct a rigorous analysis of whether the plaintiffs (appellees) satisfied the requirements set forth in Rule 23 of the Federal Rules of Civil Procedure, and concluded that:

In this case, after reviewing the district court's oral ruling and brief written order, we find the district court abused its discretion by failing to provide a "rigorous analysis" sufficient to enable us to conduct meaningful appellate review.

Ealy, No. No. 12-1252 at *17.

Rule 23 of the FRCP contains two provisions that must be satisfied by parties seeking class certification in order to maintain a class action. Under Rule 23(a), an individual or group of individuals may operate as a representative of a class 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.

Fed. R. Civ. P. 23(a).

Additionally, the class representative must satisfy at least one of the requirements in Rule 23(b) which permits a class action if:

The Court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and effectively adjudicating the controversy.

Fed. R. Civ. P. 23(b)(3).

The Court of Appeals discussed in detail the requirements necessary to find such commonality and typicality among the class members, predominance of the questions of fact or law affecting the class, and the rigorous analysis to be conducted by the reviewing court.

5. Commonality. The Supreme Court held that “for purposes of Rule 23(a)(2), even a single common question will do.” Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011). But not just any common question. See *id.* Rather, to establish commonality the plaintiff must “demonstrate that the class members have suffered the same injury [,] – a shared injury that also springs forth from the same ‘common contention.’” Ealy, No. 12-1252 at *13 (quoting Wal-Mart, 131 S. Ct. at 2556). “That common contention . . . must be of such a nature that it is capable of class wide resolution, which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of its claims in one stroke.” Wal-Mart, 131 S. Ct. at 2551. The Fourth Circuit stated in Ealy that there appeared to be a common question of fact – whether or not the plaintiffs were compensated for their meal breaks. Ealy, No. No. 12-1252 at *17. And a common question of law among the plaintiffs could be whether or not the class members “should have been compensated for that time.” *Id.* However, it is for the District Court to determine initially “whether those common questions are dependent upon a ‘common contention,’ the resolution of which will resolve ‘each one of the claims in one stroke.’” *Id.* (quoting Wal-Mart, 131 S. Ct. at 2551).
6. Typicality. Typicality under Rule 23(a)(2) requires analysis of the representative’s ability to represent the entire class adequately, and “although the claims need not be ‘perfectly identical or perfectly aligned,’ the representative’s pursuit of his own interests ‘must simultaneously tend to advance the interest of absent class members.’” Ealy, No. No. 12-1252 at *13-14 (quoting Dieter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006)). The Fourth Circuit opined that a proper typicality analysis compares the plaintiffs’ claims or defenses with those of class members not yet opted-in, including “(1) a review of the elements of the plaintiffs’ *prima facie* case, (2) the facts on which the plaintiffs would necessarily rely in order to prove those elements,’ and (2) a determination of to what extent ‘those facts would also prove the claims of the absent class members.’” Ealy, No. No. 12-1252 at *13-14 (quoting Dieter, 436 F.3d at 466).
7. Predominance. The question of whether such common questions to the class predominate over individual questions is an inquiry, under Rule 23(b)(3), that must be completely separate from commonality and typically determination. Ealy, No. No. 12-1252 at *14 (quoting Wal-Mart, 131 S. Ct. at 2556). Though the Fourth Circuit stated that “common issues of liability may still predominate even when some individualized inquiry is required.” Ealy, No. No. 12-1252 at *14.
8. Rigorous Analysis. The Fourth Circuit stated that in the Wal-Mart case, “the Supreme Court emphasized that the Rule 23 prerequisites are not to be taken lightly,” and that “a party seeking class certification must affirmatively demonstrate compliance with the Rule [23]”; i.e., “that there are in fact sufficiently numerous parties, common questions of law or fact” and predominance of the issue. *Id.* at *16 (quoting Wal-Mart, 131 S. Ct. at 2556). Accordingly, the Fourth Circuit opined that “the trial court

may find it necessary to 'probe behind the pleadings' and ultimately will have to conduct a 'rigorous analysis' to determine compliance with Rule 23." Ealy, No. No. 12-1252 at *16 (quoting Wal-Mart, 131 S. Ct. at 2556).

In sum, the Fourth Circuit concluded its opinion by holding that, though the District Court noted common questions of law and fact with regard to non-payment of meal breaks, it did not determine whether such common questions were based on a "common contention," which if resolved would resolve each of the class members' claims simultaneously, as required by the Supreme Court. Ealy, No. No. 12-1252 at *17. Similarly, with regard to the typicality requirement, the Fourth Circuit held that the District Court's oral ruling and written brief did not "address the typicality requirement in any meaningful way." Id. at *18.

The Fourth Circuit also held that "the District Court did not conduct the required separate inquiry as to whether common questions of law or fact predominate over those affecting individual class members." Id. Rather, it was unclear if the District Court analyzed predominance at all, other than to note that some class members had different claims, such as compensation or not for disarming time. The Fourth Circuit went on to state that the District Court "did not address whether a class action is the superior method for resolving the controversy when compared with other alternatives." Id.

The Court summarized the requirements for the required rigorous analysis as having five distinct components. The first is "whether 'the class is so numerous that joinder of all members is impracticable.'" Id. (quoting Fed. R. Civ. P. 23 (a)(1)). The second is whether there is "a single question of fact or law [that] is common to the class," and whether the resolution of this common contention would "resolve 'an issue that is central to the validity of each one of these claims in one stroke.'" Ealy, No. No. 12-1252 at *21 (quoting Wal-Mart, 131 S. Ct. at 2551). The third component is whether the representative parties' claims "are typical of those of the class as a whole by comparing the claims of the representative with the claims of the absent class members and determining whether they intend to advance the same interest." Ealy, No. No. 12-1252 at *21. The fourth factor is a determination of "whether 'the representative parties will fairly and adequately protect the interest of the class,'" and the fifth requirement supporting a rigorous analysis is, if the court is satisfied that common questions in fact predominate, it should also "consider whether any alternative methods exist for resolving the controversy and whether the class action method" is the superior method. Id.

The Fourth Circuit then vacated the District Court's previous certification of the class and remanded the case for the required rigorous analysis.