WAGE AND HOUR CLASS ACTIONS UNDER FLORIDA LAW

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Sam J. Smith
Loren Donnell
Burr & Smith, LLP
442 W. Kennedy Blvd., Suite 300
Tampa, FL 33606
Tel: (813) 253-2010
Fax: (813) 254-8391
ssmith@burrahdsmithlaw.com
www.burrandsmithlaw.com

This paper reviews the current state of bringing class actions in Florida under the Florida minimum wage law and under common law theories. While pursuit of class actions under the Florida minimum wage law is certainly a viable option, few cases are available to guide the way and plaintiffs should be prepared to litigate these claims in state court as federal courts may decline supplemental jurisdiction when asserted along with FLSA claims. Common law claims for unpaid wages, including breach of contract, unjust enrichment, and *quantum meruit*, may provide plaintiffs with a vehicle to recoup unpaid wages not available under the FLSA or Florida's minimum wage law (at least not yet);[1] however, recent decisions from the Eleventh Circuit create doubt as to whether

[1] There is an argument, although not yet addressed by any court, that the language of the Florida minimum wage act should be interpreted to require minimum wage for each and every hour worked, rather than calculating the minimum wage based on an averaging method as done under the FLSA. The language of the Florida minimum wage act requires "Minimum Wage for *all hours worked* in Florida" as opposed to "*in any workweek*" under the FLSA. Art. X, Section 24, Fla. Const., § (c) (emphasis added) *See Curry v. High Springs Family Practice Clinic and Diagnosis Center*, 2008 U.S. Dist. LEXIS 99462 * 24 (N.D. Fla. December 9, 2008) (pointing out that Florida's act regulates minimum wage "for all hours worked in Florida"); *see also Armenta v. Osmose Inc.*, 135 Cal. App. 4th 314 (Cal. App. 2 Dist. 2005) (finding that

unjust enrichment and *quantum meruit* claims can be pursued as a class. Also, while breach of contract claims for unpaid wages face similar challenges, certification of breach of contract claims should not be counted-out.

I. Class Actions Pursuant to Florida's Minimum Wage Law

Class actions are expressly permitted under Florida's minimum wage law. *See Fla. Const. Art.* X, § 24(f). Aggrieved persons (who are not limited to the FLSA definition of "employees") may file a class action pursuant to Rule 1.220, *Fla.R.Civ.P.*. Any minimum wage claim within the statute of limitations period of 4 years, or 5 years for willful violations, may seek remedies including back pay, plus an equal amount of liquidated damages, attorneys' fees and costs, and any legal and equitable relief appropriate, which may include injunctive relief and reinstatement.

In enacting Florida's minimum wage law, the drafters provided the state legislature or the state Agency for Workforce Innovation an open-door to adopt any measure appropriate for the implementation of the minimum wage. *Fla. Const.* Art. X, § 24(f). In response, the Florida legislature enacted Florida Statute Section 448.110 as implementing legislation, which among other things, created a "notice" requirement for aggrieved persons wishing to bring a Florida minimum wage claim. *Id.* at § 448.110(6). Section 448.110(6)(a) requires that prior to filing suit aggrieved persons provide the employer with notice in writing of their intent to bring a Florida minimum wage claim "identify[ing] the minimum wage to which the person aggrieved claims entitlement, the

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the language in California Wage Order No. 4, § 4(A), which requires that an employer pay wages not less than the minimum wage *for all hours worked*, expresses the intent that employees be paid minimum wage for each hour worked and concluding that "where the language or intent of state and federal labor laws substantially differs, reliance on the federal regulations or interpretation to construe the state regulations is misplaced).

actual or estimated work dates and hours for which payment is sought, and the total amount of alleged unpaid wages through the date of the notice."[2]

While federal courts in the Middle District of Florida have found this provision unconstitutional, federal courts in the Southern District and Northern District of Florida have enforced it. *Compare Throw v. Republic Enterprise Systems, Inc.*, 2006 U.S. Dist. Lexis 46215 (M.D. Fla. June 30, 2005); *Bifulco v. Continental Foods, Inc. of Florida*, Case No. 8:09-cv-T-26TGW (Fla. M.D. April 1, 2009); *Moson v. MLM Int'l Services, Inc., et al*., Case No. 2:09-cv-154-FTM-UA-SPC (Fla. M.D. April 16, 2009) *with Resnick v. Oppenheimer & Co., Inc.*, 2008 U.S. Dist. LEXIS 1163 (S.D. Fla., January 8, 2008); *Dominguez v. Design by Nature Corp*., 2008 U.S. Dist. LEXIS 83467 (S.D. Fla. September 25, 2008); *Ramirez v. Martinez*, 2009 U.S. Dist. LEXIS 4573 (S.D. Fla. January 23, 2009); *Curry v. High Springs*, 2008 U.S. Dist. LEXIS 99462, *27-29 (N.D. Fla. Dec. 9, 2008); *see also Talmadge v. The Meadows at Cypress Garden, LLC*, Case No. 53-2007-SC-008933 (Fla. 10th Judicial Circuit October 26, 2009) (state court finding notice is not required).

Complying with notice by providing workers actual or estimated work dates, unpaid hours worked, and the total amount of unpaid wages due is clearly not compatible with class actions on behalf of unidentified class members. As there are no published orders directing the manner by which to comply with the notice requirement for class actions, it is our firm's practice to put the employer on notice of the claims of the named plaintiffs and putative class members claims in a detailed letter setting forth both the

[2] During the notice period, the statute of limitations tolled for a fifteen-day period for the employer to respond. *Id.* at 448.10(6)(b). If the employer fails to resolve the claim the grievant can file a claim for unpaid wages *consistent with the notice*. *Id*. (Emphasis added).

factual and the legal basis for their claims and to request workforce data sufficient to calculate potential damages. While such notice may not be required in federal courts in the Middle District, we have found that a strong detailed notice has in a number of cases resulted in early pre-litigation resolution on behalf of the plaintiffs and putative class. Florida Statute 448.110(9) also requires that in cases maintained as a class action "plaintiffs shall prove, by a preponderance of the evidence, the individual identity of each class member and the individual damages of each class member." Likewise, there are no reported discussions either evaluating or enforcing this provision.

Unlike the lenient standard for conditional certification of an FLSA collective action for unpaid minimum wages under *Hipp v. Liberty Nat'l Life Ins. Co.*, 273 F.3d 1118 (11th Cir. Fla. 2001), class actions may only be certified after a court conducts a "rigorous analysis" ensuring that all the requirement of Rule 23 of the Federal Rule of Civil Procedure, or Rule 1.220 of the Florida Rule of Civil Procedure, are satisfied. Class actions must meet the requirements of Rule 23(a)/Rule 1.220(a), numerosity, typicality, commonality, and adequacy of representation in addition to either Rule 23/Rule 1.220 (b)(1), (b)(2), or (b)(3). Several cases involving H-2A workers have survived this rigorous analysis and have been certified to pursue Florida minimum wage claims as a class under Rule 23(b)(3).[3] *See e.g. Moreno-Espinosa v. J & J Ag Prods.*, 247 F.R.D. 686, 690 (S.D. Fla. 2007); *Castillo v. N&R Services of Central Florida*, 2008 U.S. Dist. LEXIS 36882 (M.D. Fla., Tampa Div., May 1, 2008); Santiago v. Wm. G. Roe & Sons, Inc., 2008 US Dist, LEXIS 60761 (M.D. Fla., Tampa Div., May 15, 2008); *Mesa*

[3] While class certification may also be obtained under Rule 23(b)(1), (b)(2) or 1.220(b)(1), (b)(2), both require that injunctive or declaratory relief predominate over monetary relief. Plaintiffs may pursue injunctive relief under the Florida minimum wage law.

v. AG-Mart Produce, Inc., 2008 U.S. Dist. LEXIS 54958 (M.D. Fla., Ft. Myers Division, July 18, 2008). In these cases, courts have adopted similar analysis. One example is *Mesa v. AG-Mart Produce, Inc.*, 2008 U.S. Dist. LEXIS 54958 (M.D. Fla., Ft. Myers Division, July 18, 2008), in which the district court adopted the magistrates report and recommendation to certify plaintiffs' claims under the Migrant and Seasonal Agricultural Protection Act ("AWPA") and the Florida Minimum Wage Act on behalf of a class of H-2A workers.

In *Mesa*, the court found that the plaintiffs' satisfied numerosity as the plaintiffs had estimated the size of the class to exceed 3,000 persons. In addition, the wages sought would not be economically feasible for the class members to pursue on their own, the class members were geographically dispersed, and had a lack of sophistication and proficiently in English to make pursing individual actions or joinder practical.[4] In regards to typicality, the court was satisfied as the named plaintiffs and class members claims, which included that the defendant failed to provide wage statements with the number of compensable hours worked and failed to pay for worked performed, would arise out of the same conduct and essentially same facts. Commonality was satisfied as the plaintiffs asserted common questions of fact, including whether the defendant kept appropriate payroll records, whether their wage statements were adequate, and whether plaintiffs and class members were paid for their hours worked. Moreover, the court rejected the defendant's argument that the plaintiffs' claims were not common or typical because the plaintiffs and class members differed in work locations, in the amount of

[4] Under similar circumstances in *Moreno-Espinosa v. J & J Ag Prods*., 247 F.R.D. 686, 688 (S.D. Fla. 2007), the court found a class of 38 putative class members satisfied numerosity.

time worked, and in the type of work performed. The court found none of these issues changed the common issues of fact regarding compensation, wage statements, and appropriate record keeping.[5] The court also found adequacy of representation was satisfied. In evaluating whether Rule 23(b)(3) was satisfied, the court found common issues predominate over individual issues because resolution of the common issues, including whether accurate records were kept, wage statements were adequate, and wages were paid for work performed would resolve each class members underlying claim under the AWPA and the Florida Minimum Wage Act. The court also determined class adjudication was the superior method for the controversy. The magistrate found that maintaining both an opt-in and opt-out class in pursuit of an FLSA collective action and a Florida class action would not be so confusing that it will fail to promote the judicial efficiently of a class action over individual issues." 2:07-cv-0047-CEH-DNF, Dkt. 22, (M.D. Fla. March 31, 2008). Likewise, the district court said it would not be persuaded by an argument that administration of both an opt-in and opt-out class makes certification improper. *Mesa*, 2008 US Dist. LEXIS 54958 at *8, n. 3.

While the court in *Mesa* did not have issue with the plaintiffs' pursuit of Florida minimum wage and AWPA class claims along with FLSA claims in federal court, and cited other cases in agreement, the court in *Santiago v. Wm. G. Roe & Sons*, 2008 U.S. Dist. LEXIS 60719 (M.D. Fla., Tampa Div., July 29, 2008) (Whittemore, J.), declined to assert supplemental jurisdiction over the plaintiffs' Florida minimum wage and breach of contract claims concluding that the state law claims substantially predominate over the

[5] *See Moreno-Espinosa v. J & J Ag Prods.*, 247 F.R.D. 686, 690 (S.D. Fla. 2007) (finding that "[a]lthough there appear to be some factual variations in the specific claims of the individual class members, the underlying issues in this matter are common to all. The existence of these factual variations does not cause the overarching common issues to break[] down into an unmanageable variety of individual legal and factual issues.") (internal quotations omitted).

FLSA claims.[6] The court found that the state law claims would involve a greater number of issues, including the application of Florida contract law, and would provide a more comprehensive remedy.

II. Wage and Hour Class Actions Under Common Law Breach of Contract, Unjust Enrichment, or *Quantum Merit* Theories

Courts in Florida have not readily certified class cases for unpaid wages an unjust enrichment, *quantum merit*, breach of contract theories. Courts often find the proof required to establish the elements of the common law claims for unjust enrichment, *quantum merit*, and breach of contract are too individualized in the employment setting.

As an initial matter, *Fla. Stat*., Section 448.08 provides for attorneys' fees and costs to prevailing parties for claims of "unpaid wages." However, Section 448.08 is not an independent cause of action and a plaintiff must assert "some other law" as a vehicle to pursue its unpaid wages claim. *Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1270-71 (11th Cir. 2009). Common law claims constitute "some other law" that can be alleged to recover unpaid wages in Florida. *Id*. at 1271.

To establish a claim for *quantum merit* in Florida a plaintiff must show that they "provided, and the defendant assented to and received, a benefit in the form of goods or services under circumstances where, in the ordinary course of common events, a reasonable person receiving such a benefit normally would expect to pay for it." *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr. Inc.*, 728 So. 2d 297, 305 (Fla. 1st DCA 1999). In a recent decision the Eleventh Circuit asserted that the highly individualized inquiry necessary to establish a claim in *quantum merit*, including the element of whether the employees expected compensation for the work performed,

[6] However, under the Class Action Fairness Act of 2005, the district court may have original jurisdiction over class actions if the amount in controversy is over $5 million. *See* 28 U.S.C. § 1332(d).

precludes certification under Rule 23(b)(3). *Babineau v. Federal Express Corporation*, 576 F. 3d 1183, 1194 (11th Cir. 2009).

Likewise, in another recent Eleventh Circuit decision, the court found pursuit of unpaid wages under a claim for unjust enrichment theory was too individualized an inquiry to allow certification pursuant to Rule 23(b)(3). *Vega v. T-Mobile USA, Inc.*, 564 F.3 1256, 1274 (11th Cir. 2009). In Florida, unjust enrichment requires "(1) a benefit conferred upon a defendant by the plaintiff, (2) the defendant's appreciation of the benefit, and (3) the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof." *Rollins, Inc. v Butland*, 951 So. 2d 860, 876 (Fla. 2d DCA 2006). In *Vega*, the Eleventh Circuit recognized that courts, including its own, have found that "the necessity of this inquiry into the individualized equities attendant to each class member, . . .[makes] unjust enrichment claims inappropriate for class action treatment." 564 F.3d at 1274. Furthermore, the court found that in this particular case, the plaintiffs could not satisfy the low threshold of commonality, let alone predominance. The court found that "whether or not a given commission chargeback was 'unjust' will depend on what each employee was told and understood about the commission structure and when and how commissions were 'earned.'" *Id*. The court deemed these individualized questions of foundational importance to liability and rendered class certification inappropriate.

Although Florida courts have not been receptive to certifying unpaid wage claims pursuant to *quantum meruit* and unjust enrichment theories, they have certified classes with these common law claims for purposes of settlement. *See e.g. Stahl v. MasTec, Inc*., Case No. 8:05-CV-01265-JDW-TGW, 2008 U.S. Dist. LEXIS 33858 (M.D. Fla. Apr. 23,

2008); *Signorelli v. UtiliQuest, Inc.*, Case No. 5:08-CV-38-OC-10GRJ, LLC, 2008 U.S. Dist. LEXIS 109357 (M.D. Fla. July 25, 2008).

Courts may also find that breach of contract claims under Florida law may be too individualized for class treatment. Claims for breach of contract require: (1) the existence of a contract, (2) a material breach of that contract, and (3) damages resulting from that breach. *Friedman v. NY Life Ins. Co.*, 9845 So. 2d 56, 58 (Fla. 4th DCA 2008). First, to maintain a class action under breach of contract there must be a common contract that was breached. Without a common contract,[7] as the Eleventh Circuit recently considered in *Vega*, there can be no commonality of an employment agreement as required by Rule 23(a)(2), *Fed.R.Civ.P*.

> these mandatory elements of each class member's claim depend on such individualized facts and circumstances as when a given employee was hired, what the employee was told (and agreed to) with respect to compensation rules and procedures at the time of hiring, the employee's subjective understanding of how he would be compensated and the circumstances under which his compensation might be subject to charge backs, and when and how any pertinent part of the employee's compensation agreement or understanding thereof may have changed during the course of that employee's tenure at T-Mobile. 564 F.3d at 1272.

However, even with a common contract, there still may be "significant individualized issues with respect to breach, materiality, and damages" that would preclude a finding that common issues predominate as required by Rule 23(b)(3), *Fed.R.Civ.P*. For example, in *Vegas*, the plaintiff was a sales representative who filed claims for breach of contract and unjust enrichment due to the defendant's new policy of

[7] A provision in an employee manual attesting that it compensates employees for "all hours worked" may not constitute an enforceable agreement in Florida to support a breach of contract claim as an employee manual is not a common contract in Florida unless explicitly and mutually agreed to by the parties. *Quaker Oats Co. v. Jewell*, 818 So. 2d 574,576-77 (Fla. 5th DCA 2002). Something more is required. *See e.g. Castillo v. N&R Services of Central Florida*, 2008 U.S. Dist. LEXIS 36882, * 2-3 (M.D. Fla. May 1, 2008) (H-2A workers clearance orders sent out the actual terms and conditions of employments and the material terms and conditions of the job).

charging back employees commissions on cellular phone plans they sold if the account was deactivated for inactivity. The defendant presented affidavits of employees that affirmed they were aware of the defendant's new charge back policy. The defendant also argued it could defend against each class member's breach of contract claim by showing that they knew or should have known about the charge back procedures. The court held that the individualized evidence needed to determine each class member's understanding of the defendant's policy and the defenses the employer may mount would preclude certification. *See also Babineau v. Federal Express Corporation*, 576 F. 3d 1183, 1192 (11th Cir. 2009); *Clausnitzer v. Federal Express Corporation*, 248 F.D.R. 647, 659 (S.D. Fla. 2008).

Notwithstanding these challenges in *Figueroa-Cardona v. Sorrells Bros. Packing Co. Inc.*, 2007 U.S. Dist. LEXIS 15777 (M.D. Fla. Feb. 14, 2007), *Castillo*, and *Santiago*, agricultural H-2A workers were successful is certifying their breach of contract claims. The courts did not attempt to engage in a traditional breach of contract analysis. In *Figueroa-Cardona v. Sorrells Bros. Packing Co. Inc.*, 2007 U.S. Dist. LEXIS 15777 (M.D. Fla. Feb. 14, 2007), the court found the plaintiffs satisfied the Rule 23(b)(3) requirement that common issues predominate over individual issues by asserting that the remedies sought by the class were common and that the resolution of the breach of contract claims would resolve that issue for the class as a whole. In addition, the plaintiffs affirmed they would not seek to resolve any factual or legal issue not applicable to all class members.

In addition to certification challenges presented by the elements required to establish common law claims, cases must still meet all the requirements of Rule 23,

Fed.R.Civ.P, or Rule 1.220, *Fla.R.Civ.P*, standards. For example, in *Clausnitzer v. Federal Express Corporation*, 248 F.D.R. 647 (S.D. Fla. 2008), the plaintiffs had claimed hourly employees were not paid for the time between arriving at work and their scheduled start times, for the time worked between the end of their scheduled stop time and actually leaving work, and for working during breaks. The plaintiffs pursed these claims under breach of contract and *quantum meruit* theories. The court determined that the plaintiffs satisfied the low hurdle of Rule 23(a)(2) commonality because all hourly employees signed employment agreements and in finding that company manuals were universally available to employees. Further, the court found that whether gap time was unpaid was a common issue in dispute that satisfied commonality. The court also found the plaintiff's claims were typical of class members due to the fact that the plaintiff's allegations were based on a corporate policy applicable to all hourly employees. However, the court found that the plaintiffs could not satisfy Rule 23(b)(3) predominance because there were too many reasons for why the gap time may have occurred and a plethora of non-work related activities the employees may be performing during that time. In a companion case on appeal, *Babineau v. Federal Express Corporation*, 576 F. 3d 1183 (11th Cir. 2009), the Eleventh Circuit applied the same rationale in affirming the district court's denial of class certification for the plaintiffs' off-the-clock claims.