

VERDICTS & SETTLEMENTS

Wage-and-Hour Class Issues Can Complicate Arbitration

By Tamadhur Al-Aqeel
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LOS ANGELES — Wage-and-hour claims typically seek — and win — class certification from a judge.

But in a recent case involving managers at La Salsa, well-known labor defense attorney Robert Millman went to arbitration. The neutral denied class certification.

Though still uncommon, the case raises issues over the role arbitrators play in class certifications.

"That's a hot potato," said retired Judge Lawrence C. Waddington, who is an arbitrator with JAMS and a former Los Angeles Superior Court judge.

Arbitrating to determine class status is very new, he said, and many judges disagree as to whether it's ethical.

"Who will decide discovery disputes?

[If the arbitrator does it], is that a conflict of interest?" he asked.

Suppose they win the class status, but "suppose some opt out [of the class]. Who will try the opt-outs?"

Typically, lawyers don't want to arbitrate such decisions because they are binding.

But in this case, the defense had an arbitration agreement, and the potential class comprised only 57 managers.

"We thought we had a relatively small class," and arbitration would be less expensive, said Millman, of Littler Mendelson in Los Angeles, who represented La Salsa (*De Luna*

v La Salsa Holding Co. Inc. (JAMS Reference 1220032168).

The plaintiffs' lawyers wanted to go to court.

"They fought us, and we had to file a petition to compel," Millman said. "We won that."

The arbitrator, retired Judge G. Keith Wisot, found that the group of employees did not qualify as a class.

The plaintiffs' attorneys contend Wisot did not understand that he

was supposed to look for similar experiences in the members of the class, not identical experiences. Wisot could not comment because the case is still open.

"We're of the opinion that the arbitrator misinterpreted [his] role," said Susan E. Abitanta, a plaintiffs' attorney at Quisenberry Law Firm in Los Angeles. "He really needed to see if [the managers'] experiences

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were typical."

"He saw that the individual predominated over the common issues," said Robert Drexler of Quisenberry, who also represented the plaintiffs.

"It's a little perplexing to us to see employers always arguing that you have to look at these people individually, when [La Salsa] classified them as a group to deny them overtime," Drexler said.

The three plaintiffs were managers at La Salsa restaurants. Each claimed that on a typical day, because of budget restrictions, they

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had to send the hourly workers home after eight hours and complete the work themselves. This commonly lead to a 50-to-60 hour workweek, they said.

But the arbitrator noted that on occasions where the hourly employees had worked overtime, the managers were not disciplined orally or in writing. In his opinion, Wisot wrote, "the arbitrator finds the responses on work tasks and time allocations show significant variation from general manager to general manager."

In the coming weeks, the plaintiffs will decide whether or not to pursue their claims as individuals.

Drexler said the firm used similar arguments to win class certification in court on behalf of employees of Abercrombie & Fitch, Claim Jumper Restaurants and Staples. Abercrombie & Fitch settled for a maximum of \$2 million. The other two cases are pending.

"Much of the same evidence was presented in all these cases, and it's hard to determine where a judge will come down," Drexler said. "It's hard to predict a pattern."

The Quisenberry firm handled another case this month in which class certification was denied. *Sepulveda v. Wal-Mart*. U.S. District Judge Dale S. Fischer denied that assistant managers at Wal-Mart were a class.

But because this was decided in court, rather than in a binding arbitration, they can appeal. The plaintiffs have filed an appeal.



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"Private dispute resolution is becoming more in vogue every day. When you're paying for a private arbitrator, they pay more attention," labor defense attorney Robert Millman said of the changes he sees.

"Private dispute resolution is becoming more in vogue every day," Millman said. "I'm not suggesting for a moment that one size fits all. Each company needs to decide what's best for them."

Millman does see advantages, though. Judges

tend to have large caseloads.

"In state court especially, it's a wide body of cases that each judge has," he said. "When you're paying for a private arbitrator, they pay more attention."