

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
SECOND DIVISION

FILED IN COURT
TIME 5:10 p.m.

DEC 07 2015

**RICHARD SHUMATE, JR.; AND
DAMON REED, on behalf of themselves and all other
similarly situated persons and entities**

TROY B. BRASWELL, JR.
CIRCUIT JUDGE
PLAINTIFFS

v.

CASE NO. 23CV-12-855

CITY OF CONWAY, an Arkansas municipality

DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court issues the following *Findings of Fact and Conclusions of Law*, which are incorporated by reference into its *Order* concerning class certification issued of even date herewith.

Findings of Fact

1. The original Complaint in this matter was filed on September 18, 2012.
2. Plaintiff Shumate is a Police Officer with the Conway Police Department. He was hired in September 2007. (Pls. Ex. A¹).
3. Plaintiff Reed is a Firefighter with the Conway Fire Department. He was hired in 1994. (Pls. Ex. B²).
4. In 2001, the City of Conway faced a crisis: Its employees were “underpaid” and it was “losing trained [workers] to other cities.” (Pls. Ex. 1³, Page 29).
5. In an attempt to address this crisis, the Conway City Council passed Ordinance O-01-75. (Pls. Ex. 2).
6. Ordinance O-01-75 specifically called for the “levying of a one-fourth (1/4) percent sales and use tax within the City of Conway.” The tax was “dedicated for salaries, wages, employment benefits, employment compensation, and other related costs for the employees of the City of Conway, Arkansas.” (Pls. Ex. 2).
7. Ordinance O-01-76 was the call for the special election. (Pls. Ex. 4).
8. Thereafter, the Conway City Council passed Ordinance O-01-76, containing the corresponding ballot title which set a Special Election for August 28, 2001. (Pls. Ex. 4)
9. The ballot title provided to vote FOR or AGAINST the sales tax which was “dedicated for salaries, wages, employment benefits, employment compensation, and other related costs for the employees of the City of Conway, Arkansas.” (Pls. Ex. 2).

¹ Attached to the Plaintiffs’ Supplemental Documentation in Support of Motion for Class Certification.

² Attached to the Plaintiffs’ Supplemental Documentation in Support of Motion for Class Certification.

³ Ex. Designations refer to Exhibits attached to the Motion for Class Certification.

10. The controlling language in Ordinance O-01-75 and the ballot title language in Ordinance O-01-76 are identical.
11. As the election approached, the City sought to improve the prospects for passage of the tax by obtaining the support of the local Firefighter Union, Local 4016. (Pls. Ex. 1, page 10, Depo 33: 9-22). In fact, the Local 4016 was approached by Mayor Tab Townsell for an endorsement of the sales tax. *Id.* The Local 4016 was concerned that the tax would not be used exclusively to improve salaries. (Pls. Ex. 5, Paragraph 6).
12. As a consequence, the Conway City Council passed Resolution, R-01-18, which stated that the City Council desired to dedicate the proceeds of the ¼ percent sales and use tax, specifically, to improve the salaries of City employees whose salaries the City Council determined fell below “the market pay scale”; and, such proceeds from the sales and use tax were not to be used to supplant the current budget for city employees’ salaries. (Pls. Ex. 6)
13. Based on the Mayor and City’s word through the passing of Resolution R-01-18, the Firefighters and Police Officers agreed to ultimately support the tax increase. Further, Plaintiff Damon Reed, the President of Local 4016, agreed to work with the Mayor to “develop a game plan to ensure the passage of this tax.” (Pls. Ex. 1, Page 9, Depo 30: 2-3).
14. On or about August 28, 2001, voters of the City of Conway passed the tax increase.
15. The parties stipulated that the step pay grid increases were paid from 2001 through 2009 and that they have not been paid since that time.
16. The step pay grid applied to all City of Conway police officers and firefighters.
17. Numerous police officers and firefighters were hired subject to the step pay grids which is the basis of this lawsuit. (See Affidavits attached to Reply in Support of Motion for Class Certification).
18. The City of Conway maintained a website for recruitment efforts for the Conway Police Department. This website contained the step pay grid information. (Pls. Ex. 9 Mot. for Cert.)
19. Officer Sharen Carter was hired as a Conway Police Officer in 2005. Thereafter, she assisted in the recruiting of new officers. Officer Carter affirms that the pay grid was included in the recruitment paperwork and that his was approved by the Human Resource Representative for the City of Conway. *Id.*
20. Similarly, these officers and firefighters relied on the pay scale when making decisions to accept or continue employment with the City of Conway. (See Affidavits attached to Reply in Support of Motion for Class Certification).
21. The Plaintiffs’ requested class definition is set forth as follows:

- a. “All City Of Conway Policeman⁴ and Fireman⁵ (excluding department heads and elected officials) who were employed by the City of Conway during the period commencing December 1, 2001 through December 31, 2012 (the “Class Period”).

Excluded from the class are the assigned judge, and his/her staff and members of the appellate courts and their staff.”

22. The estimated putative class size for the period listed is approximately 200 individuals.
23. Plaintiffs’ counsel have tried and/or participated in numerous class action lawsuits.
24. Plaintiffs Reed and Shumate have participated in the lawsuit, provided depositions, and attended a hearing in front of this court.

Conclusions of Law

25. Ark. R. Civ. Pro. 23(a) requires that the party seeking class certification prove six factors: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy; (5) predominance; (6) superiority. *Lenders Title Co. v. Chandler*, 353 Ark. 339, 107 S.W.3d 157 (2003); *Williams v. Sanofi Winthrop Pharms, Inc.*, 347 Ark. 89, 60 S.W.3d 428 (2001).
26. The Arkansas Supreme Court has repeatedly held that the court need only determine whether there is a common issue of law or fact among the potential class members and whether class adjudication improves judicial efficacy in place of individual adjudications, and not whether the underlying cause of action has merit. *United American Ins. Co. v. Smith*, 2010 Ark. 468, 371 S.W.3d 685 (2010); *SEECO, Inc. v. Hales*, 330 Ark. 402, 954 S.W.2d 234 (1997). See also *Lenders Title v. Chandler*, 358 Ark. 66, 186 S.W.3d 695 (2004) (holding that the court will not examine “the merits of the underlying claims when deciding whether the Rule 23 requirements have been met”).
27. Further, the Court has held that “circuit courts are given broad discretion in matters regarding class certification and that we will not reverse a circuit court’s decision to grant or deny class certification absent an abuse of discretion.” *Union Pac. R.R. v. Vickers*, 2009 Ark. 259, 308 Ark. S.W.3d 573.

Numerosity:

28. In this case, there are over 200 members of the putative class. Over 40 affidavits were attached to the Plaintiffs’ Motion. At a minimum, common sense reveals there are numerous prospective class members. As such, the Plaintiff has satisfied this requirement.

⁴ Code Enforcement Officer, Officer I-IV, Master Officer, Sergeant, Lieutenant, Major and Chief.

⁵ Firefighter, Lieutenant, Captain, Division/District Chief and Chief.

Commonality:

29. “[T]he commonality requirement is satisfied when a *single* common issue is present among the class members[.]” *Phillip Morris v. Miner*, 2015 Ark. 73. Moreover, when the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons. *Id.*
30. In this case, the Plaintiffs allege the Defendant entered into a contract with the class members by promising to pay salary increases consistent with a step pay grid. Moreover, Plaintiffs allege that the Defendant breached the contract with each class member. Specifically, they assert that the class members relied on the Defendant’s promise to pay salary increases⁶ by accepting or continuing employment and suffered damages as a result. The damage alleged is the difference in what the Plaintiffs have been paid and what they should have been paid pursuant to the step pay grid. As such, there are several questions of law and fact common to the class.
31. Specifically, such common questions include, but are not limited to: (1) is the Resolution a promise to pay all employees the salary increases? (2) Is accepting or retaining employment adequate consideration? (2) If so, for how long are the raises promised? (3) Is the failure to pay the salary increases a breach of the contract? (4) If so, what are the damages?
32. The Court agrees that there are individual questions. This is true in almost all class action cases. For instance, individual questions may be: (1)What are the start and end dates for employment? (2) How much should they have been paid pursuant to the step pay grid?
33. Similarly stated, the issues of fact and law in this case are the same for each class member. The court’s ruling on one case will have a common effect on the others. Further, the defenses are common for all members. While there are some issues that are individual in nature, it is clear that the commonality of issues outweighs the individual issues.
34. The Defendant relies on the Court’s ruling in *Sanofi*⁷ to defeat the Plaintiffs’ Motion for Certification. In *Sanofi*, the Arkansas Supreme Court held that “class action on a breach-of-contract claim [is] difficult.” However, this court finds important distinguishable facts are present which warrants class certification.
35. In *Sanofi*, the Court was concerned with each class member having a different understanding of the applicable incentive program and whether they were eligible to be paid pursuant to the incentive program. In the present case, only one step pay grid exists. It is not alleged to contain errors like the incentive program did in *Sanofi*. The issue in this case is related to pay for length of service with the City as opposed to increased pay based on performance. No such performance measure is required in this case.

⁶ The pay increases were to be consistent with the step pay grid approved by the Mayor and City Council through the passing of Resolution R-01-18.

⁷ *Williamson v. Sanofi Winthrop Pharms. Inc.*, 347 Ark. 89, 60 S.W.3d 428 (2001).

36. Further, both the Plaintiffs and the Defendants share the same understanding of how the step pay grid operated. Further, the step pay grid applied to all firefighters and police officers. Step pay grid payments were made to all class members employed from 2001-2009 and none of them were paid thereafter. A simple review of the city's financial records and step pay grid will reveal the amounts possibly due to the Plaintiffs. Further, unlike in *Sanofi*, this court has over 40 affidavits supporting that each has a common claim and common understanding of the step pay grid and reliance thereon. In *Sanofi* it does not appear that there was any testimony presented from putative class members at the trial court level.
37. The alleged cause of action at issue is for breach of contract. Based on the affidavits, the Plaintiffs allege: (1) competent parties (officers/firefighters and the City of Conway), (2) subject matter (salary increases), (3) legal consideration (accepting or continuing employment), (4) mutual agreement (Resolution), and (5) mutual obligation (payment of salary increases and the police and firefighters accepting or continuing employment with the city.)
38. The resolution of a common legal issue is not dependent upon a factual determination that will be different for each putative class member. As such, class certification is appropriate.

Typicality:

39. The Arkansas Supreme Court has repeatedly stated that "the typicality requirement is satisfied if the representative's claim arises from the same common wrong alleged against the members of the class." *Simpson v. Housing Solutions, LLC v. Hernandez*, 2009 Ark. 480, 347 S.W.3d 21. Moreover, "the essence of the typicality requirement is the conduct of the defendants and not the varying fact patterns and degree of injury to individual class members." *Teris, LLC v. Chandler*, 375 Ark. 70, 289 S.W.3d 63 (2008).
40. Both of the named plaintiffs were employed by the City of Conway and at one time received step pay increases. Similarly, both stopped receiving the step pay increases after 2009. As such, their claims are typical of those of the other members of the putative class.

Adequacy of Representation:

41. The Supreme Court has previously held that three elements must be met to satisfy the adequacy requirement: (1) representative counsel must be qualified, experienced, and generally able to conduct the litigation, (2) there must be no evidence of collusion or conflicting interest between the representative and the class, and (3) the representative must display some minimal interest in the action, familiarity with the practices challenged, and an ability to assist in the decision making as to the conduct of the litigation. *Advance Am. Servicing of Ark. v. McGinnis*, 2009 Ark. 151, 300 S.W.3d 487.
42. In this case, the representative counsel is qualified, experienced, and generally able to conduct this litigation. See Affidavits of counsel attached as Exs. B, C, and D to the Plaintiffs' Reply to Motion for Class Certification.

43. There is no evidence of collusion or conflicting interest between the class representatives and the class.
44. The named plaintiffs have displayed more than a minimal interest in the action, familiarity with the practices challenged, and the ability to assist counsel in decision making with respect to the conduct of the litigation.

Predominance:

45. The Plaintiffs' allegations are that the Firefighters and Police Officers were in a contract with the City of Conway to receive increases in salaries pursuant to the step pay grid. They allege that they were promised certain pay and did not receive it. Whether a breach of the contract occurred or the amount of any damages is not for the Court to determine as it is not to delve into the merits of the case.
46. The Arkansas Supreme Court has stated that "the starting point in examining the issue of predominance is whether a common wrong has been alleged against the Defendant." *Gen. Motors Corp. v. Bryant*, 374 Ark. 38, 285 S.W.3d 634 (2008). *Campbell v. Asbury Auto., Inc.*, 2011 Ark. 157, 381 S.W.3d 21.
47. The Court does "not merely compare the number of the individual verses common claims. Instead [the court] must decide if the issues common to all Plaintiffs "predominate over" the individual cases...Conducting a trial on the common issue in a representative fashion can achieve judicial efficiency." *Phillip Morris, Co. v. Miner* 2015 Ark. 73.
48. In the case at bar, the issues common to all Plaintiffs predominate over the individual cases.

Superiority:

49. The superiority requirement is satisfied if class certification is the most "efficient" way to handle the case and is fair to both sides. *Johnson's Sales Co. v. Harris*, 370 Ark. 387, 260 S.W.3d 273 (2007).
50. It would not be cost effective for each putative class member to file separate lawsuits.
51. The Faulkner County Circuit Court would have difficulty scheduling, hearing and ruling on this case over 200 times.
52. Further, because the above issues of commonality⁸ can be asked *en masse*, it renders a class action proper because it is the superior manner in which to handle the case.


Conclusion

53. The Plaintiffs are suitable and acceptable class representatives.
54. Plaintiffs' counsel are suitable and acceptable class counsel.

⁸ These common issues are listed above in the courts analysis of the commonality factor.

55. The certified class satisfies the numerosity requirement of Rule 23 of the Arkansas Rules of Civil Procedure.
56. The certified class satisfies the commonality requirement of Rule 23 of the Arkansas Rules of Civil Procedure.
57. The class representatives satisfy the typicality requirement of Rule 23 of the Arkansas Rules of Civil Procedure.
58. The issue of fact and law affecting the class predominate over any issues of fact or law that may be related to individual class members.
59. Maintenance of this action as a class action is the superior method of resolving the factual and legal issues involved in the case.

IT IS SO ORDERED AND DECREED.



TROY B. BRASWELL, JR.
CIRCUIT JUDGE
12-7-15

DATE

PREPARED BY THE COURT:

cc: Mr. Thomas Thrash, Attorney for Plaintiff
Mr. Russell Wood, Attorney for Plaintiff
Mr. Michael Mosely, Attorney for Defendant
Mr. Tom Kieklak, Attorney for Defendant
Mr. Justin Eichmann, Attorney for Defendant