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New Seventh Circuit Decision May Pave the Way for More Stringent Certification Standards in FLSA Collective Actions

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In a decision that may significantly impact certification and decertification decisions in FLSA collective actions, a three-judge panel of the Seventh Circuit Court of Appeals upheld the decertification of a Rule 23 class and FLSA collective action, essentially applying the standards set forth by the U.S. Supreme Court in *Dukes v. Wal-Mart* to an FLSA collective action.

In *Espenscheid v. DirectSat USA*, 2013 U.S. App. LEXIS 2409 (7th Cir. Feb. 4, 2013), Judge Posner, writing for the panel, expressly stated that "despite the difference between a collective action and a class action and the absence from the collective-action section of the Fair Labor Standards Act the kind of detailed procedural provisions found in Rule 23, there isn't a good reason to have different standards for the certification of the two different types of action. . . ." Noting that simplification is favored in the law and that one of the intentions of both FLSA collective actions and Rule 23 class actions is to promote efficiency, the court concluded that "we can, with no distortion in our analysis, treat the entire set of suits before us as if it were a single class action."

Thus, in deciding the propriety of class treatment for both the Rule 23 and FLSA claims, without specifically citing *Dukes*, the Seventh Circuit adopted the Supreme Court's rejection of "trial by formula" in class actions seeking back pay awards. As in *Dukes*, the Seventh Circuit rejected a "formulaic" approach and concluded that determining damages would require separate evidentiary hearings for each of the 2,341 putative class members, which would overwhelm the district court. The court also rejected plaintiffs' proposal that testimony at trial from 42 "representative" members of the class would suffice to establish liability and damages: "To extrapolate from the experience of the 42 to that of the 2,341 would require that all 2,341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage." In the absence of a feasible method of trying a class action with so many variances in each employee's situation, the court concluded, class treatment was inappropriate.

This decision is particularly significant in light of the increasingly high volume of FLSA collective actions filed in federal court each year (2,507 in 2012, which constituted an 8% increase from 2011 and over 90% of all employment class action filed), and the lenient standard typically applied to conditional certification of FLSA collective actions, in contrast to the more stringent standards applied to Rule 23 class actions.

Background

Espenscheid was filed on behalf of 2,341 installation technicians who were paid on a piece-rate basis, rather than a fixed hourly wage, asserting overtime claims under the FLSA and three state wage laws. In 2010, the district court had conditionally certified a class under the FLSA and three state law subclasses under Rule 23. As the case proceeded towards trial, however, the district court judge became concerned about the manageability of the case at trial and asked the plaintiffs to address these concerns in their trial plans. The plaintiffs proposed to have 42 "representative" technicians testify as representatives for the subclasses. The plaintiffs envisioned that after hearing the testimony of the 42 "representative class members" the jury would calculate the "average" number of uncompensated hours in each work week, and the parties would then use the jury's averages to determine the damages owed. The district court judge found the plaintiffs' proposal unfeasible and determined that the case could not proceed as a class, concluding that "were the jury to rule in plaintiffs' favor under its proposed plan, the jury would have to do so on the basis of proof that is not representative of the whole class, and defendants would be deprived of an opportunity to assert their individualized defenses . . . ." The case was decertified and the plaintiffs appealed.

The Seventh Circuit's Decision

The Seventh Circuit panel affirmed decertification, agreeing that the plan proffered by the plaintiffs was unfeasible. "There would be no problem," the court noted, "had the plaintiffs been seeking just injunctive or declaratory relief, because then the only issue would have been whether DirectSat had acted unlawfully." A "mechanical" calculation of damages was not possible in the situation presented because no formula could capture the variances between the class members. The technicians were paid on a piece-rate, with some working more efficiently than others, so that while some may have worked more than 40 hours per week, others may have worked fewer hours than that. Moreover, different technicians performed different tasks, which may have required different amounts of time.

The Seventh Circuit agreed with the district court that "representative" testimony was not an acceptable alternative to individualized damages hearings because the plaintiffs failed to present any evidence that the representative class members were in fact "representative:"

> The plaintiffs proposed to get around the problem of variance by presenting testimony at trial from 42 "representative" members of the class. Class counsel has not explained in his briefs, and was unable to explain to us at the oral argument though pressed repeatedly, how these "representatives" were chosen — whether for example they were volunteers, or perhaps selected by class counsel after extensive interviews and hand picked to magnify the damages sought by the class. There is no suggestion that sampling methods used in statistical analysis were employed to create a random sample of class members to be the witnesses, or more precisely random samples, each one composed of victims of a particular type of alleged violation. And even if the 42, though not a random sample, turned out by pure happenstance to be representative in the sense that the number of hours they worked per week on average when they should have been paid (or paid more) but were not was equal to the average number of hours of the entire class, this would not enable the damages of any members of the class other than the 42 to be calculated. To extrapolate from the experience of the 42 to that of the 2341 would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage . . . . No one thinks there was such uniformity.

The Seventh Circuit concluded that "if class counsel is incapable of proposing a feasible litigation plan though asked to do so, the judge's duty is at an end." Noting that plaintiffs' counsel likely believed that if the class was certified the employer would settle and thus a trial would be avoided, the court emphasized that "class counsel cannot be permitted to force settlement by refusing to agree to a reasonable method of trial should settlement negotiations fail. Essentially they asked the district judge to embark on a shapeless, free-wheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned."

Significantly, the Seventh Circuit also noted that there is a "promising alternative to class action treatment" that the plaintiffs had seemingly ignored. The plaintiffs could have, the court stated, complained directly to the U.S. Department of Labor (DOL) and obtained monetary relief

through that avenue, if they had not been properly paid. Pointing to a report by Littler attorney Laurent Badoux,[1] Judge Posner pointed out that the DOL collected $225 million in back wages for employees in 2011, and noted the DOL's ability to supplement employee testimony with the results of its own investigation of employers.

Littler is presenting similar arguments in a mandamus petition pending in the Fifth Circuit, and will continue to monitor developments in this fast-changing area of the law. It will be particularly important to note whether other courts follow the lead of the Seventh Circuit and begin to apply similar certification standards to FLSA collective actions as they do to Rule 23 class actions.

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1 Laurent Badoux, *Trends in Wage and Hour Litigation Over Unpaid Work Time and Precautions Employers Should Take* (ADP June 2011), *available at* http://www.adp.com/tools-and-resources/adp-research-institute/insights.aspx.