

Deposing Named Plaintiffs in Employment Class and Collective Actions

Uncovering and Leveraging Issues of Adequacy and Commonality During Certification, Settlement, and Trial

TUESDAY, FEBRUARY 18, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Background

Class Action Standards

- Numerosity
- Commonality
- Typicality
- Adequacy
- Predominance
- Superiority

Class Action Standards

“What matters to class certification . . . is not the raising of common ‘questions’ -- even in droves -- but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338, 350 (2011)

Collective Action Standards

An action to recover the liability... may be maintained against any employer... in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court....

29 U.S.C.A. § 216(b)

Collective Action Standards

The parties do not dispute that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure. This opinion assumes, without deciding, that this is correct. For purposes of this case then, if certification of respondents' class action under the Federal Rules was proper, certification of the collective action was proper as well.

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036, 1045 (2016)

Employment Class and Collective Claims

- Examples:
 - Wage and Hour (minimum wage, overtime)
 - Equal Employment Opportunity (Title VII vs. ADEA)
 - Pay Equity
 - ERISA / Benefits

Strategy & Logistics

Strategic Timing

- FLSA-process Collective Action Certification
 - Some courts allow discovery prior to first stage collective action certification
 - *See, e.g., Silva v. Gordon Gaming Corp.*, 2006 U.S. Dist. LEXIS 71847, at *2, *9, *11 (D. Nev. Sept. 25, 2006) : Court denied motion for conditional certification, without prejudice, and agreed with the defendant's argument in opposition to the motion that the parties should conduct preliminary discovery prior to the court deciding a motion for conditional certification.
 - Some courts do not permit discovery prior to first stage collective action certification
 - *See, e.g., Randolph v. Centene Mgmt. Co.*, 2015 U.S. Dist. LEXIS 54168, at *6-7 (W.D. Wash. Apr. 24, 2015) (granting protective order to prevent defendant from conducting discovery re opt-in plaintiffs before court's ruling on plaintiff's motion for conditional certification); *Anderson v. Perdue Farms, Inc.*, 2007 U.S. Dist. LEXIS 94166 (M.D. Ala. Dec. 20, 2007) (denying defendant's request to take depositions prior to ruling on whether to conditionally certify a collective action)

Strategic Timing

- FLSA-process Collective Action Certification

- Depositions of opt-in plaintiffs:

See, e.g., Lloyd v. J.P. Morgan Chase & Co., 2015 U.S. Dist. LEXIS 35161, at *17 (S.D.N.Y. March 20, 2015) (“If defendants wish to select unilaterally the opt-ins to be deposed, they may do so.”); *O’Toole v. Sears Roebuck & Co.*, 2014 U.S. Dist. LEXIS 49408, at *12 (N.D. Ill. April 10, 2014) (“The defendant can depose up to 10% of the opt-ins. As with written discovery, the selection of deponents will be left to the defendant, who has the right to depose who its wants.”); *Smith v. Family Video Movie Club, Inc.*, 2012 U.S. Dist. LEXIS 142827, at *6-7 (N.D. Ill. Sept. 27, 2012) (permitting defendants to select forty-two opt-in plaintiffs for deposition in a collective action with 828 opt-in plaintiffs); *Hill v. R+L Carriers Shared Svcs., LLC*, 2010 U.S. Dist. LEXIS 105699, *6-7 (N.D. Cal. Sept. 22, 2010) (permitting defendants to depose “15 opt-in plaintiffs of its choosing”); *Gentrup v. Renovo Svcs., LLC*, 2010 U.S. Dist. LEXIS 143203, at *26 (S.D. Ohio Aug. 17, 2010) (“Defendants may depose 16 Plaintiffs of their choice”); *cf. Wellens v. Daiichi Sankyo, Inc.*, 2014 U.S. Dist. LEXIS 177877, at *13 (N.D. Cal. Dec. 29, 2014) (“Defendant may select 37 opt-in Plaintiffs who must respond to Defendants’ Interrogator[ies.]”).

Strategic Timing

- Rule 23 Class Actions
 - Discovery permitted after Rule 26(f) conference
 - No per se limitations on discovery prior to class certification
 - Depositions of absent class members are uncommon, typically not allowed absent “special circumstances”
 - Consider:
 - Purpose of deposition: e.g., summary adjudication motion vs. class certification motion
 - Timing of deposition: What other evidence is anticipated from the named plaintiff (declarations, written discovery, Rule 26 damages analysis, expert reports, etc.)

Other Timing and Logistical Considerations

- Early vs late in the case
 - Caution: prematurity arguments in opposition to certification
- Multiple named plaintiffs
 - Advantages to stacking depositions or scheduling them back-to-back
- Consider plaintiff-specific factors such as night jobs
- In person vs. by video conference
- Where case is venued or elsewhere

Timing and Location: Managing the Clock

- The 7-hour rule (Fed. R. Civ. Proc. Rule 30(d)(1))
 - Prioritize your questioning and use your time wisely
 - Seven hours is actual deposition time, including time spent reviewing exhibits
- Videotaped depositions maximize the ability to use time effectively
 - Deponent will be faster in his response to questions
 - Opposing counsel will be less inclined to be obstructionist because an audio record is being made of his/her behavior
 - Costs
 - Attire

Deposition Preparation

Preparation: Plaintiff

- Preparation begins before the case is filed
 - Plaintiff needs a basic understanding of the differences between a class action and an individual action; must be on-board with the goal of class-wide relief
- Deposition Goal: do no harm
 - “Winning” the case at the plaintiff depo isn’t a thing; make sure your client understands this
 - Simplify as much as possible: 3 key things to remember
- Logistics of the prep meeting
 - Outline: You may not need it, but it will force you to organize your thoughts in a logical way that will be easier for your client to understand and absorb
 - Documents: familiarity with key documents such as the Complaint and any discovery responses or declarations
- Last minute prep

Preparation: Defendant

- Research: Know your objectives, know the facts
- Think strategically when developing your deposition outline
 - Consider the world through the eyes of your witness (office layout, identity of trusted co-workers, pride of authorship, etc.)
 - Prioritize subjects and documents accordingly; proceeding chronologically may not be the best approach
 - Use timing to your advantage
 - Focus on what really matters: Don't waste time on irrelevant personal history, but explore all relevant employment history, even if obtained through a different employer
 - Standardize without being repetitive

Preparation: Rules of Engagement

- Know your procedural and evidentiary rules
 - Local and Federal Rules of Civil Procedure and Evidence
 - Scheduling and other Orders of the Court
 - Standing Orders of the Court
 - Protective Orders
- Keep copies of the rules on-hand during the deposition

At the Deposition

Style: Setting the Tone

- Be professional at all times
- Keep eye contact with the witness
- Control the pace of the deposition
- The art of conversation
 - Trust your instincts and don't let your outline restrict you
 - Don't read your questions, unless necessary to capture key terms or language
 - Develop harsh (interrogator) or soft (conversational) approaches and know when to use them effectively
 - Use a long pause to elicit a further response from the deponent

Style: Plaintiff's Counsel

- Be professional at all times
- Resist the temptation to argue or grandstand – it rarely reads well on a transcript
- Be firm and assertive in making objections
- Pay attention to your witness
 - Are there concepts they don't understand or aren't communicating effectively?
 - Are there questioning techniques your opponent is using that are effective in eliciting more than he or she "deserves"?
 - Do they need coffee, water, a break, etc.?
 - Any redirect? (should be rare)

Achieving Your Objectives

- Trust your instincts and consider human nature
- Don't focus exclusively on class certification issues: consider the benefit of summary judgment and/or summary adjudication
- Be prepared for unexpected answers and consider how you can use those answers to your advantage
 - For example, answers that hurt you on summary judgment may help at class certification
 - The converse is true as well

Achieving Your Objectives

- Credibility is paramount in some employment cases; test the credibility and reliability of your witness
 - Be prepared to seize on a lack of credibility, even on the smallest issues
 - Be prepared to seize on a lack of recollection
 - Use of documents to test credibility
- Don't sweat the small stuff – and make sure the plaintiff doesn't either
- In cases involving multiple named plaintiffs and/or opt-in plaintiff depositions:
 - Consider the uniqueness of each employee

Achieving Your Objectives

- Don't squander the opportunities re: class certification
 - Use of prior transcripts and testimony
 - Use of different experiences among class members
 - Use of declarations

Making the Record

- Listen carefully to answers
 - Did the witness answer the question?
 - Did the witness raise issues that warrant follow-up?
- Think about what the record will look like
 - Rephrase or re-ask to get crisp Q&A
 - Be mindful of the video record
 - Leave an area and come back to it later if necessary
- When to interrupt questioning

Building A Useful Transcript

- Strive for sound bites
 - Stand alone Q&A
- Need self-contained references
 - Where you have a question, objection, and colloquy, need to re-ask the question or have court reporter read it back
- With a convoluted transcript, it is hard to leverage the key points in your brief
- Note, however, that a plaintiff's own words may mean more than canned or scripted answers

Style: Dealing with Opposing Counsel

- Ignore opposing counsel's efforts to bully or intimidate; the record will speak for itself.
 - If you anticipate trouble, bring the phone number for the judge's chambers
- Address improper conduct as soon as you see it
 - Politely, calmly ask counsel not to bully (defense) or coach (plaintiff)
 - If counsel keeps doing it and it is egregious, consider calling the court or threaten to walk out (careful with this because you may have to put your money where your mouth is)
- Plaintiff's counsel should keep the Plaintiff in mind.

Objections: Plaintiff

- Know your available objections
- Know your witness and know the facts
 - Prepare for the deposition as if you were the one taking the deposition
 - Anticipate issues that may be implicated by the questions
 - Address any inconsistencies between the record and the deponent's testimony with the deponent during the break
- Make sure the plaintiff knows what's coming and tailor based on personality
- Interrupt if necessary & have your speech ready if you anticipate unique issues that need to be on the record
- Save it for redirect

Dealing With Objections: Defendant

- Consider the objection, but don't be distracted by opposing counsel
- Don't waste time arguing with opposing counsel about objections, legal points, etc.
 - Avoid speeches on the record
 - Ignore counsel's comments or arguments
 - If necessary, remind opposing counsel that objections must be stated "concisely and in a non-argumentative and non-suggestive manner"
 - Do not threaten to go to the Court unless you are prepared to do so
 - If you need to move the Court because of opposing counsel's conduct, wait until you have a sufficient record

Redirect

- Rarely effective
- Use judiciously
 - What will best protect client and the claims?
- Make sure witness knows it is coming
- Keep in mind scope and leading

Social Media

Social Media – Considerations for Plaintiff's Counsel

- Social media is a spoliation minefield for Plaintiffs' counsel; cannot be ignored
- Research the Named Plaintiff online
- Ask about social media usage and talk to your client about how it could relate to the case
- Capture any relevant sites/postings immediately
- Prepare the Named Plaintiff to talk about social media if it is an issue in the case
- Consider a protective order; leverage “proportionality”

Social Media – Considerations for Defendant's Counsel

- Always ask about social media (esp. outlets you may not have considered)
- Use the deposition to ask for permission to access those sites
- Consider conducting your own searches through non-U.S. sites
- Avoid pretexting and always consider rules of professional conduct

Effective Use of Social Media

- Consider sites reflecting job duties/job searches
 - LinkedIn
 - Resume websites (Monster.com)
- Consider sites reflecting the physical/emotional state of your witness (cheaper than a private investigator)
 - Facebook
 - Blogs
 - YouTube
- Consider sites reflecting the financial status of your witness
- Consider the “After-Acquired Evidence Doctrine”
- Use social media as a tool to draw attention to individualized issues

After the Deposition

After the Deposition—Plaintiff's Counsel

- Debrief Your Client:
 - Discuss confusing / ambiguous areas of testimony
 - Reassure them!
 - Provide roadmap of next steps
 - Update contact info – you are going to need that Plaintiff again

After the Deposition—Defense Counsel

- Reassess case strategy and objectives
- Consider available and appropriate motions
- Assess deposition corrections

After the Deposition—Motions

- Discovery Motions
- Conditional / Class Certification
- Decertification
- Summary Judgment
- Motions in Limine

Use of the Deposition at Class Cert

- **Adequacy:** Inconsistencies or inaccuracies in Plaintiffs' testimony.
- **Commonality:** Individualized nature of Plaintiffs' grievances.
- **Predominance:** Whether remedies for the alleged misconduct are susceptible of class-wide resolution and will overwhelm any questions common to the class.

Use of the Deposition at Trial

Use of the Deposition at Trial

- **Impeachment:** Like with any other witness, the Plaintiff's deposition may be used at trial for purposes of impeachment. Fed. R. Civ. P. 32(a)(2).
- **Any Other Purpose:** Because the Plaintiff is a party, their deposition may be used by an adverse party at trial "for any purpose." Fed. R. Civ. P. 32(a)(3). This may include:
 - Offering the deposition as substantive evidence
 - Playing the deposition during opening statements
 - Using the deposition during the examination of other witnesses
 - Etc.

Any Questions?

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