Appellate Reports

Tyson Foods v. Bouaphakeo — *The U.S Supreme Court allows statistical evidence to fill evidentiary gaps in class actions*

By Jeffrey I. Ehrlich

Class actions; use of statistical proof: *Tyson Foods v. Bouaphakeo, et al.* (2016) __ S.Ct._ (U.S. Supreme)

Employees of Tyson's pork-processing slaughterhouse filed suit under federal and Iowa law, arguing that they were not properly compensated for the time they spent each day donning and doffing their required protective gear. The district court certified their lawsuit as a class action under FRCP 23. The employer opposed, arguing that because of the variance in the protective gear that each employee wore, their claims were not sufficiently similar for class treatment. Because the employer kept no records of the time that the employees spent donning and doffing the protective gear, the employees relied on a statistical study, which held that the average employee spent 18 to 21 minutes per day putting the gear on and taking it off. At trial, the jury awarded the class $2.9 million. The judgment was affirmed by the 8th Circuit. The Supreme Court affirmed.

Whether and when statistical evidence can be used to establish classwide liability depends on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action. Because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of a class. Respondents can show that the sample conducted by the plaintiffs' expert was a permissible means of establishing hours worked in a class action by showing that each class member could have relied on that sample to establish liability had each brought an individual action.

Here, the employees sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. Had the employees proceeded with individual lawsuits, each employee likely would have had to introduce the expert's study to prove the hours he or she worked. The representative evidence was a permissible means of showing individual hours worked.

This holding is in accord with *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374, where the underlying question was, as here, whether the sample at issue could have been used to establish liability in an individual action. There, the employees were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. In contrast, the employees here, who worked in the same facility, did similar work, and were paid under the same policy, could have introduced the expert's study in a series of individual suits.

This case presents no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions. Rather, the ability to use a representative sample to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the Court so long as the study is otherwise admissible.

FEHA, Associational-disability claims: *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) __ Cal.App.4th. __ (2d Dist. Div. 8.)

Plaintiff Luis Castro-Ramirez sued his former employer, Dependable Highway Express, Inc. (DHE), alleging causes of action for disability discrimination, failure to prevent discrimination, and retaliation under the Fair Employment and Housing Act (FEHA) as well as wrongful termination in violation of public policy. His son requires daily dialysis, and according to the evidence, the plaintiff must be the one to administer the dialysis. For several years, the plaintiff's supervisors scheduled him so that he could be home at night for his son's dialysis. That schedule accommodation changed when a new supervisor took over and ultimately terminated the plaintiff for refusing to work a shift that did not permit him to be home in time for his son's dialysis. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion to tax costs. Reversed.

The court held that the plaintiff demonstrated triable issues of material fact on his causes of action for associational disability discrimination, failure to prevent discrimination, retaliation, and wrongful termination in violation of public policy.

The FEHA provides a cause of action for associational disability discrimination, although it is a seldom-litigated cause of action. As to disability discrimination generally, the FEHA makes it unlawful for an employer, "because of the ... physical disability ... of any person, ... to discharge

the person from employment ... or to discriminate against the person ... in terms, conditions, or privileges of employment." (Gov.Code, § 12940, subd. (a).) The very definition of a "physical disability" embraces association with a physically disabled person. FEHA explains that the phrase "physical disability" includes a perception ... that the person is associated with a person who has, or is perceived to have a physical disability. (§ 12926, subd. (o).) Accordingly, when the FEHA forbids discrimination based on a disability, it also forbids discrimination based on a person's association with another who has a disability.

A prima facie case of disability discrimination under the FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this framework to the associational discrimination context, the "disability" from which the plaintiff suffers is his or her association with a disabled person. Respecting the third element, the disability must be a substantial factor motivating the employer's adverse employment action. Once the plaintiff establishes a prima facie case, the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias.

Here, whether the plaintiff here could perform his job with a reasonable accommodation (a modified schedule to administer dialysis to his son) was certainly relevant, and the circumstance that he might have required an accommodated schedule was no bar to his discrimination claim. DHE was not entitled to summary judgment on this ground. To the extent that federal cases under the ADA suggest otherwise, it is because the language of the FEHA and ADA differ in this area.

After reviewing the record, the court determined that a jury could reasonably infer from the evidence that the plaintiff's association with his disabled son was a substantial motivating factor in his supervisor's decision to terminate him, and furthermore, that the supervisor's stated reason for termination was a pretext.

Labor regulation; wage orders; working conditions; employee seating: *Kilby v. CVS Pharmacy, Inc.* (2016) __ Cal.4th __ (Cal. Supreme).

California wage orders state that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."

The Ninth Circuit certified questions about the wage orders to the Supreme Court, asking:

(1) Does the phrase "nature of the work" refer to individual tasks performed throughout the workday, or to the entire range of an employee's duties performed during a given day or shift?

(2) When determining whether the nature of the work "reasonably permits" use of a seat, what factors should courts consider? Specifically, are an employer's business judgment, the physical layout of the workplace, and the characteristics of a specific employee relevant factors?

(3) If an employer has not provided any seat, must a plaintiff prove a suitable seat is available in order to show the employer has violated the seating provision?

The Supreme Court answered these questions as follows:

(1) The "nature of the work" refers to an employee's tasks performed at a given location for which a right to a suitable seat is claimed, rather than a "holistic" consideration of the entire range of an employee's duties anywhere on the jobsite during a complete shift. If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for.

(2) Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the totality of the circumstances. An employer's business judgment and the physical layout of the workplace are relevant but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee's characteristics.

(3) The nature of the work aside, if an employer argues there is no suitable seat available, the burden is on the employer to prove unavailability.

Arbitration; unconscionability; lack of mutuality of remedy: *Baltazar v. Forever 21, Inc.* (2016) _ Cal.4th __ (Cal. Supreme).

As a condition of her employment with defendants, plaintiff Maribel Baltazar signed an agreement to resolve any employment-related disputes by arbitration. The agreement provides that, in the event a claim proceeds to arbitration, the parties are authorized to seek preliminary injunctive relief in the superior court. The primary question before the Court was whether that clause rendered the arbitration agreement unconscionable, and therefore unenforceable, because it unreasonably favored the employer. The Court held that that the clause, which does no more than restate existing law (see Code Civ. Proc., § 1281.8, subd. (b)) did not render the agreement unconscionable, and that there were no other reasons to support Baltazar's claim of unconscionability. Accordingly, it affirmed the Court of Appeal opinion that affirmed enforcement of the arbitration agreement.

In reaching this conclusion, the Court noted that the failure by Forever 21 to provide Baltazar with a copy of the AAA rules for arbitration of employment agreements (which were adopted in the arbitration agreement), did not raise an issue of

procedural unconscionability because Baltazar's arguments for failing to enforce the agreement did not depend in any way on the terms of the arbitration rules.

Public Records Act requests; inadvertent production of privileged documents; waiver

Ardon v. City of Los Angeles (2016) __ Cal.4th __ (Cal. Supreme).

In civil discovery proceedings during the course of litigation between plaintiff Estuardo Ardon and defendant City of Los Angeles, the trial court determined that certain documents the City possessed were privileged under the attorney-client privilege or the privilege for attorney work product, and the City withheld them from plaintiff. Years later, plaintiff filed a request under the California Public Records Act (Gov. Code, § 6250 et seq.) seeking to obtain documents relating to the subject matter of the litigation. In response, the City's administrative office inadvertently provided the plaintiff with some of the privileged documents. The Court granted review to decide whether the release of privileged documents under these circumstances waives the privilege, thus allowing plaintiff to retain and use the documents and to disseminate them to others. Section 6254.5 of the Government Code, which is part of the Public Records Act, generally provides that "disclosure" of a public record waives any privilege.

But interpreting section 6254.5 in light of the Public Records Act as a whole, the Court concluded that its waiver provision applies to an intentional, but not an inadvertent, disclosure. Accordingly, a governmental entity's inadvertent release of privileged documents under the Public Records Act does not waive the privilege.

Arbitration; notice of arbitration agreement in website "terms of use"; "browsewrap" vs. "clickwrap":

Long v. Provide Commerce, Inc. (2016) __ Cal.App.4th __ (2d Dist., Div. 3.)

Long filed a UCL class action against Provide, after purchasing flowers on its website, www.proflowers.com. He claimed that the product he purchased was advertised as a completed assembled product, but actually arrived as a do-it-yourself-kit that required assembly by the recipient. Provide moved to compel arbitration under the Federal Arbitration Act, arguing that Long was bound by the arbitration agreement included in the website's "terms of use" agreement. At the time Long placed his order, the terms of use were available at the bottom of each page of the site by a capitalized, underlined link titled "TERMS OF USE."

The court explained that contracts formed on the internet tend to come in two flavors: "clickwrap" or click-through agreements, which require the user to click on an "I agree" box after being presented with a list of terms and conditions of use; and "browsewrap" agreements, in which the site's terms and conditions of use are generally posted on the site via a hyperlink at the bottom of the screen. Because the user can continue to use a site that uses a browsewrap agreement without visiting the page hosting the terms and conditions, the validity of the browsewrap agreement generally turns on whether the user has actual or constructive knowledge of the site's terms and conditions. More specifically, the validity of a browsewrap agreement typically turns on whether the site put a reasonably prudent user on inquiry notice of the terms of the contract.

The court held that "Terms of Use" hyperlinks on the Proflowers.com site were not sufficiently conspicuous to put a reasonably prudent internet consumer on inquiry notice, and that Long did not manifest his unambiguous assent to be bound by the "terms of use." Hence, the arbitration agreement within the "terms of use" was not enforceable.


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