

DAILY BUSINESS REVIEW

MIAMI-DADE

MIAMI ATTORNEY WINS REVERSALS IN CLASS ACTIONS AGAINST TYSON

Miami attorney Michael Mueller won two appellate reversals for longtime client Tyson Foods Inc., wiping out \$24 million in class action awards in two labor disputes.

The U.S. Court of Appeals for the Eighth Circuit ruled Aug. 26 that Tyson didn't specifically agree to pay employees for time spent donning and doffing protective equipment. Decisions in both cases came seven months after Mueller presented back-to-back oral arguments.

The Hunton & Williams partner has served as lead counsel in 35 Tyson wage-and-hour class actions since he began representing the Arkansas-based meat processing company in 1999. He said he believes he has brought more class actions to verdict than any other lawyer.

"These are tough cases," he said. "They raise all kinds of unique and challenging issues. It's a point of pride to be able to say you've tried one of them and certainly a point of pride to say you've tried a dozen of them."

His latest victories flowed from lawsuits filed by Tyson workers at beef- and pork-processing plants in Nebraska.

The facts of each case differed significantly. The beef plant was unionized and paid its workers a flat rate for four extra minutes of dressing and washing. At the pork plant, the number of minutes paid varied by job and changed over time, Mueller said.

The two classes sought relief under the Fair Labor Standards Act and Nebraska wage law. More than 13,000 workers were included in the two classes.

U.S. District Judge Joseph Bataillon in Omaha awarded \$6 million to the beef plant workers in 2013 and more than \$18 million to the pork plant workers in 2014.

The appellate court reversed both judgments, finding FLSA claims were not legitimate because the named plaintiffs hadn't filed forms indicating they wanted to opt in to the lawsuit.

"If you're going to start a case as an FLSA collective action, you need to file a consent form," Mueller said. "The rationale for this is that unions or someone else can't just slap your name on a lawsuit."

The court also dismissed state law claims on the grounds that Tyson had not agreed to pay for "donning and doffing" time.

Addressing the unionized beef plant, the court decided that if something is not covered by a collective bargaining agreement, the employer doesn't have to pay for it.

The appellate court didn't address two significant issues Mueller raised in oral argument because the U.S. Supreme Court agreed to consider them in its next term by hearing a third Tyson "donning and doffing" case, *Tyson Foods v. Bouaphakeo*.

The high court will address whether plaintiffs can use sampling or averages to establish liability and damages for a class and whether plaintiffs who haven't suffered harm can be part of a class.

The Tyson legal team has challenged the sampling question in all of the "donning and doffing" cases. The plaintiffs took an average of the time it took workers to don or doff protective gear in the locker room, on the production floor before their shift, and before and after lunch breaks.

"They didn't sample any one person doing all the activities," Mueller said. "What they did was they found a dozen or maybe a couple dozen people doing parts of all the activities."

An Eighth Circuit panel split 2-1 against Tyson on the issue. Then Mueller asked for the entire circuit to rehear the case en banc. Six judges, including a senior judge on the panel, voted to grant rehearing, and six voted against.

"When you get a court of appeals split down the middle, it gets the Supreme Court's attention, so they took the case," Mueller said.

Hunton & Williams partner Emily Burkhardt



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Vicente in Los Angeles and counsel Evangeline C. Paschal in Washington assisted Mueller with the trial and appellate briefs. Attorneys from Baird Holm in Omaha also represented Tyson at trial, and Thomas Walsh of Bryan Cave in St. Louis worked on the appeal. The Supreme Court oral argument has not been set.

But it's unlikely to be Mueller's most famous career case.

The litigator served as trial counsel for Food Lion in its landmark case against Capital Cities/ABC Inc. ABC News was slapped for allowing producers to lie by using false names on job applications for an investigative piece. Mueller deposed Diane Sawyer, reporter Sam Donaldson and then-network president David Westin.

"It's now a famous case," he said. "It's clearly the seminal case on why you shouldn't break the law to get the news. ... I'm proud of that because on principle alone we made a point, and it's still a point that's taught in school."

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