

Litigator of the Week: Michael Mueller of Hunton & Williams

By Scott Flaherty

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Meat and poultry workers have fired off a slew of class action lawsuits against Tyson Foods Inc. over the years, complaining that the meat processing giant stiffens them on wages. But you'll hear no complaints from the company's go-to outside lawyer, Michael Mueller, who estimates that he's represented Tyson in 35 such cases.

Mueller, co-head of Hunton & Williams' retail and consumer products litigation group, boasts on his firm's website that he's likely tried more class actions to verdict than any other lawyer. This week he shot down two more of them for Tyson, winning a pair of appellate reversals that erased \$24 million in class action awards for plant workers in Nebraska.

The U.S. Court of Appeals for the Eighth Circuit issued both rulings on Wednesday, rejecting claims by two separate groups of plaintiffs that Tyson didn't adequately pay them for time spent putting on and taking off protective equipment.

Mueller was lead trial and appellate counsel for Tyson in each of the cases, *Acosta v. Tyson Foods* and *Gomez v. Tyson Foods*. Both are so-called donning and doffing lawsuits brought against the food processing company in 2008, and both included claims under Nebraska's Wage Payment and Collection Act and the federal Fair Labor Standards Act.

U.S. District Judge Joseph Bataillon in Omaha awarded the workers in *Acosta* nearly \$19 million in January 2014 following a bench trial. The same judge entered an approximately \$6 million judgment in favor of the *Gomez* workers the year before.

On appeal, Mueller and his team challenged a host of the lower court's prior rulings, including class certification decisions and denials of summary judgment. But the Eighth Circuit's opinions—at 11 pages in *Acosta* and six pages in *Gomez*—addressed a much smaller set of issues.

Mueller said one of his prime goals when he argued the appeals in January was to keep things simple.

"We figured we could get them to enter judgment on these nar-

row grounds, so they didn't have to get to all these other issues," said Mueller. "The focus at oral argument was to give them a road map."

The strategy paid off. The appeals court held that the plaintiffs' FLSA claims in both cases were undermined because they failed to sign written consents as required under that law. As for the workers' state claims, the panel found that the Nebraska law could only have been violated if Tyson had agreed to pay for donning and doffing time. There wasn't any evidence of such an agreement, the court ruled.

"To read the opinions," said Mueller, "you'd think there was nothing to these cases."

Mueller said he first began counting Tyson as a client in 1999, when he was at Akin Gump Strauss Hauer & Feld. The company stuck with him when he joined Hunton & Williams in 2008. ("I think the answer is because I'm a good litigator," he said.)

The biggest challenge yet for Mueller and his longtime client may be in a case now pending before the U.S. Supreme Court—one in which Mueller's efforts at the Eighth Circuit fell short last year.

In June the justices agreed to take up *Tyson Foods v. Bouaphakeo*, a closely watched wage-and-hour class action that raises key questions about class certification. Their decision is expected to address whether plaintiffs in class and collective actions can use sampling or averages to establish liability and damages, and whether classes can include members who haven't suffered any harm.

Mueller led Tyson's efforts at the lower courts and remains co-lead counsel in the case. Sidley Austin's Carter Phillips is counsel of record at the high court, however, and will argue the case once the justices set a hearing date.

