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Reed Russell

At Phelps Dunbar LLP, Reed Russell practices in the area of labor and employment, focusing on representing employers in wage and hour and employment discrimination law, with an emphasis on collective and class action litigation, other complex litigation and strategic advice. He also represents employers in claims raising equal employment opportunity issues, including claims of single-plaintiff, multiplaintiff or class discrimination, and provides advice on employment practices, including through statistical analysis.

Russell is the former legal counsel of the Equal Employment Opportunity Commission, where he was responsible for developing agency policy on the federal anti-discrimination statutes and serving as the EEOC chairman's chief legal adviser.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Dunbar v. Albertsons Inc., Case No. RG04146326 (Alameda Sup. Ct.): a class action challenging the classification as salaried exempt employees of the No. 2 managers at the Albertsons grocery stores in California. I was the junior team member of Randy Teslik of Akin Gump and Karen Kubin (now) of Morrison & Foerster.

First, the case was filed in the wake of the California Supreme Court's decision in Sav-on Drug Stores, which had reinstated a class of salaried exempt assistant managers in a decertified class action challenging their exempt classification. Sav-on and Albertsons were owned, at the time, by the same parent company, and, more important, many trial courts were regularly certifying classes in exemption cases in the wake of the Sav-on decision.

Thus, out of the box, there was a dual challenge of convincing the court that the Sav-on decision was primarily about the discretion of trial court judges to make certification decisions and that facts surrounding the work circumstances of the Albertsons grocery managers made the case unsuitable for class treatment in any event. This second component was particularly challenging, given the theory that had some currency in California at the time - significantly undermined since then by, among other decisions, the U.S. Supreme Court's decision in Dukes - that sample testimony could be used to fix liability for all class members.

Second, plaintiffs' counsel aggressively communicated with current and former employees and obtained a large number of declarations to support their claims. We had to determine how, if at all, to respond to plaintiffs' counsel's aggressive communications strategy, develop competing and more compelling declaration and other documentary evidence in the midst of the aggressive communications campaign and to overcome the "sampling" argument and develop and execute a manageable plan for taking depositions of plaintiffs' declarants that the court would permit.

Even after defeating class certification - a decision affirmed on appeal in the first published decision in California denying certification in an exemption case - we had to fight off an effort by plaintiffs' counsel to issue a new notice to former putative class members about potential claims against Albertsons. It was a wild ride.

Q: What aspects of your practice area are in need of reform and why?

A: In Fair Labor Standards Act collective actions, too many courts issue conditional certification without appearing to consider fully how that decision alters permanently the landscape of the litigation. The conditional certification decision is often justified on the grounds that it is conditional and will be revisited later, and the statute of limitations is running because the FLSA's opt-in mechanism does not toll the limitations period for any class member until he or she files a consent to join the suit with the court.

The issue of the statute of limitations is resolvable through negotiation in many cases. As to the revisiting of the conditional certification decision, that ignores the "hydraulic pressure" it creates on companies - especially public companies - to settle the case in light of the risks associated with a mass lawsuit. Because many courts refuse to delve into merits issues or even consider merits arguments at the conditional certification stage, it cannot be said honestly that companies who settle are doing so because they have violated - or even think they may have violated - the FLSA.

Even if the case is decertified, it has wasted enormous resources and may spawn dozens more individual lawsuits, none of which necessarily has any more merit than the original one. Thus, by casually issuing notice to hundreds or thousands of workers, who, if they have read any newspaper, believe they have a reasonable chance of getting some kind of payment (whether deserved or not), courts invite a proliferation of such cases being filed and impose enormous costs on employers (and, indirectly, the public).

Q: What is an important issue or case relevant to your practice area and why?

A: The 2012 Fifth Circuit decision in Martin v. Spring Break '83 Productions LLC, holding that private settlements (i.e., not submitted for court approval) of FLSA claims are enforceable if based on a bona fide dispute about liability provides the potential for relief from the increasingly intrusive nature of court approval of FLSA settlements. Many courts in FLSA cases insert themselves deeply into the process of evaluating the fairness of FLSA settlements, even individual settlements negotiated on behalf of those parties by experienced counsel.

Due largely to an overbroad reading of a relatively unique 11th Circuit case from the early 1980s, Lynns Food Stores, many district courts across the country, and in Florida especially, impose costs on parties in settling FLSA cases that sometimes outrun the costs of the cases up to the point of the parties negotiating the settlement and submitting it for court approval and well more than the alleged unpaid wages at issue.

A few district courts have cited Martin for the proposition that private settlements of FLSA claims do not always need court approval. If that case gains traction beyond the Fifth Circuit, it could simplify and reduce the costs of settlements.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Randy Teslik at Akin Gump, who[m] I worked with as a more junior lawyer. Randy led many teams of lawyers working on high-stakes class action cases and was (is) a go-to for lawyers needing help in challenging cases. He was as dogged as any litigator but professional, courteous and a terrific example to follow. His demeanor to clients, judges and even opposing counsel also translated internally to his ability to keep "the ship" steady with a team of diverse and sometimes challenging personalities working under stressful circumstances.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Only one? In an early case I had, the plaintiff sought discovery of contact information for certain employees at a client's location. There was a discovery hearing, and on most issues, the rulings went in our client's favor. When it came to the list of contact information, though, the judge asked me, paraphrasing, "It's not really a problem for your client to produce that list, right?" I said, "right." Technically, it was not a problem to produce. However, turning a list of employees over to the plaintiff was, most definitely, a problem.

Lawyers are taught - correctly - that it is unwise to fight with the judge. There is a difference, however, between fighting with the judge and, when needed, refusing to agree with the judge to the point of forcing him or her to order your client to take some action. I have been ordered many times by judges since then to have a client take an action and never regretted making him or her do so.

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