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Dukes Doesn't Bar Nurses' OT Collective Action, Judge Says

By **Ben James**

Law360, New York (June 20, 2013, 10:08 PM ET) -- An Ohio federal court granted a group of nurses' bid for collective action certification Thursday in their lawsuit alleging Liberty Healthcare Corp. shorted them on overtime pay, despite Liberty's argument that the U.S. Supreme Court's landmark Dukes decision raised the bar for Fair Labor Standards Act plaintiffs.

U.S. District Judge David A. Katz said former Liberty worker and nurse Tonya Ribby had shown she was similarly situated to the group of nurses and nurses' assistants she sought to represent, and ordered Liberty to fork over a list with the names and contact information for potential opt-in plaintiffs who worked for the now-shuttered Liberty Nursing Center of Toledo.

Liberty had argued that the case, which alleges it deprived nurses and assistants of overtime by failing to pay them for meal periods during which they had to work, wasn't right for collective action treatment because of the individual issues at play, but Judge Katz disagreed, allowing the suit to move forward on a collective basis.

"To the extent they exist in this case, individual issues exist in all collective actions, so a denial of certification on those grounds here would suggest that nearly all cases should be denied certification," the order said. "Given that the notice stage is fairly lenient and places a low burden on plaintiffs, the existence of individual issues is not an appropriate reason to deny conditional certification."

Ribby filed her suit in March, not long after the Feb. 7 closing of the Liberty Nursing Center, which she said Liberty owned and operated. Liberty automatically trimmed 30-minute meal breaks from nurses' pay despite the fact that they frequently had to work during those meal periods, the complaint alleges, adding that the deductions translated to nurses and assistants getting stiffed on significant overtime pay.

Liberty fought the conditional certification bid, arguing the U.S. Supreme Court's 2011 Wal-Mart Stores Inc. v. Dukes ruling raised the bar for plaintiffs bringing would-be collective actions under the Fair Labor Standards Act. Every court since the "game-changing" Dukes ruling has refused to grant conditional FLSA certification of FLSA overtime claims over scheduled meal periods that were supposedly interrupted, Liberty said in a May 8 filing.

Courts have recognized that there's no logical reason to have different legal standards for assessing a FLSA collective action and Rule 23 class actions like Dukes, Liberty argued. An employee looking to meet the standard for FLSA collective action certification has to come forth with significant proof, which a trial court is supposed to rigorously analyze, Liberty said.

"Dukes and its progeny have had the effect of imposing judicially heightened standards to

requests on behalf of plaintiff-employees to conditionally certify FLSA collective actions," Liberty argued.

Judge Katz didn't specifically mention the Dukes argument in Thursday's decision, but he did say that courts within the confines of the Sixth Circuit used a two-stage certification process in which plaintiffs only have to show at the first stage that "colorable basis for their claim that a class of similarly situated plaintiffs exists."

There's a stricter standard at the second stage, and a closer examination by the court as to whether the collective class members are similarly situated, but the more lenient initial standard applied to Ribby's motion because the case was in its early stages, Judge Katz wrote.

The collective action covers hourly paid nurses and assistants who worked at Liberty Nursing Center in the three years leading up to Feb. 7 and spent at least 37.5 hours on the job during more one more workweeks during that period.

"The court made the correct decision and applied the correct standard at this stage in the litigation," Anthony Lazzaro, an attorney for the plaintiffs, told Law360.

Attorneys for Liberty weren't immediately available for comment Thursday.

Liberty is represented by Keith L. Pryatel, Thomas Evan Green and Jaime Kolligian of Kastner Westman & Wilkins LLC.

Ribby is represented by Anthony Lazzaro of The Lazzaro Law Firm LLC.

The case is Ribby v. Liberty Healthcare Corp., case number 3:13-cv-00613, in the U.S. District Court for the Northern District of Ohio.

--Editing by Elizabeth Bowen.

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