SANDBERG PHOENIX

CLASS ACTION BLOG

Immigration Detainee Class Certification Affirmed by Tenth Circuit

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Summary: GEO Group (GEO) owned and operated a private contract detention facility in Aurora, Colorado (Aurora Facility) under a contract with the federal Immigration and Customs Enforcement Agency (ICE). The Aurora Facility had in place (1) a housing unit Sanitation Policy (Policy) which required all of its detainees to clean their common living areas, and (2) a Voluntary Work Program (VWP) which paid working detainees $1.00 a day for performing various jobs. The detainees filed suit alleging that the Policy violated the Trafficking Victims Protection Act (TVPA), which prohibited forced labor and the VWP violated the Colorado unjust enrichment law by paying the detainees only $1.00 a day. The District Court certified a TVPA class, which included all of the detainees housed at the Aurora Facility in the prior 10 years, and an Unjust Enrichment Class, which included all detainees who participated in the Aurora Facility's VWP the prior three years. GEO filed a Rule 23(f) petition for permission to appeal challenging the class certifications. GEO primarily contended that certifying the claims was unjustified because proving the claims "require[d] predominantly individualized determinations, making class treatment inappropriate." The 10th Circuit affirmed.

Menocal v. GEO Group, Inc.

The Aurora Facility's Policy had two major components: "(1) a mandatory housing unit Sanitation Program, and (2) a general disciplinary system for detainees who engaged in 'prohibited acts' including refusal to participate in the housing unit Sanitation Program." The possible sanctions for refusing to fulfill the cleaning assignments included filing criminal proceedings, imposing solitary confinement, the loss of commissary privileges, the loss of job, restriction to the housing units, reprimand, or a warning. The facility's assistant warden confirmed that all detainees had a cleaning assignment at some point.

The VWP paid each detainee $1.00 a day for "voluntarily performing jobs such as painting, food services, laundry services, barbershop, and sanitation." Volunteers in the program had to sign an agreement that they would be paid $1.00 a day. Detainees had the option of working without pay if no paid positions were available.

The TVPA included a forced labor provision in U.S.C. § 1589. That forced labor provision prohibited persons from, among other things, knowingly providing or obtaining labor or services of persons by means of threats of physical restraint, serious harm or threats of serious harm, or any scheme, plan, or pattern intended to cause the person to believe that serious harm or physical restraint would be suffered if that person refused or failed to perform the labor or services demanded. The Court noted that the term "serious harm" included "any harm, whether physical or non-physical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to [render labor]... to avoid incurring that harm." § 1589(c)(2).

Regarding the TVPA class, the Court considered application of the forced labor provision and the District Court's analysis in light of Rule 23's requirements. Although GEO attacked the class certification on multiple fronts, the Court pointed out that the parties focused primarily on the predominance issue, which the Court described as "the closest issue." The common questions identified which would result in common answers included "(1) whether the Sanitation Policy 'constitutes improper means of coercion' under § 1589, (2) whether GEO 'knowingly obtain[s] detainees' labor using [the Policy]', and (3) whether a civic duty exception exempts the Sanitation Policy from § 1589." The Court agreed that "the answers to these questions would 'resolve an issue that is central to the validity of each of the claims in one stroke.'" (*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).) The Court further noted that typicality was satisfied because the claims of the class members and those of the class representatives "are based on the same legal or remedial theory." Similarly, the Court found that the Rule 23(b)(3) superiority prong was satisfied because "the putative class members reside in countries around the world, lack English proficiency, and have little knowledge of the legal system in the United States."

Relying on its earlier opinion in *CGC Holding Company v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014) the Court noted that "Rule 23(b)(3)'s predominance requirement 'regularly presents the greatest obstacle to class certification.'" The Court found that requirement did not defeat "the TVPA class in this case." GEO contended the causation and damages elements were not susceptible to generalized proof.

Beginning with the causation element, the Court referred to its holding in *CGC Holding* which recognized "that plaintiffs may prove class-wide causation based on inference from common circumstantial evidence." *CGC Holding* dealt with civil RICO claims, but the 10th Circuit held that its reasoning in *CGC Holding* applied "with equal force to the facts in this case because (1) a court could permit an individual TVPA class member to establish causation through circumstantial evidence, and (2) the TVPA class members share the relevant evidence in common because their claims are based on allegations of a single, common scheme." In *Menocal*, the 10th Circuit concluded a class member detainee could succeed both for the individual detainee and all members of the class by establishing the Policy caused that detainee to work simply by proving "(1) the detainee received notice of the Sanitation Policy's terms, including the possible sanctions for refusing to clean; and (2) the detainee performed housing unit cleaning work for GEO when assigned to do so."

The allegations of the TVPA class members were based on a single, common scheme meaning that those class members "share[d] the relevant circumstantial evidence in common, thus making class-wide proof possible." Similar to *CGC Holding*, "the TVPA class members allege that GEO 'coerced [their] labor through a *uniform* policy subjecting detainees who refuse to perform such uncompensated work to discipline, up to and including solitary confinement.'" Accordingly, "the Sanitation Policy provides the 'glue' that holds together the class members' reasons for performing housing unit cleaning duties assigned by GEO." As in *CGC Holding*, the Court saw no reason "why a putative class containing plaintiffs who all [performed housing unit cleaning work under the Uniform Sanitation Policy], 'should not be entitled to posit the same inference to a fact finder on a class-wide basis.'" The Court concluded that "a reasonable fact finder [could] conclude by a preponderance of the evidence that each TVPA class member would not have performed [the] assigned cleaning duties without being subject to the Sanitation Policy." The Court determined that a fact finder could infer reliance from those facts making the causation element susceptible to class-wide proof.

Concerning damages, the Court noted the "presence of individualized damages issues does not defeat the predominance of questions common to the TVPA class." The 10th Circuit found the District Court reasonably ruled that the TVPA class could proceed based on "the class action model in the face of individualized damages" by limiting the class action to liability issues. *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013).

The Court similarly ruled the District court's certification of the Unjust Enrichment class was proper. As with the TVPA class, the commonality, typicality, and superiority prongs were easily satisfied. The predominance requirement was also the closest issue for the Unjust Enrichment class with the Court noting that "GEO contends that two of the unjust enrichment class's issues are not susceptible to generalized proof: (i) the unjustness element, and (ii) damages. But as we show below, (i) the unjustness element is susceptible to generalized proof, and (ii) the individual damages assessments would not dominate over the class's common issues."

Relying once again on *CGC Holding*, the Court found that the unjustness element presented a common question "because the class members seek to establish this element through shared circumstances susceptible to class-wide proof." Furthermore, GEO's argument to the contrary failed because Colorado law did not require plaintiffs to "establish a reasonable expectation of payment on the part of the class members" as an element of unjust enrichment. The Court agreed that plaintiff could "establish the unjust nature of GEO's benefit based on 'evidence of a common course of conduct by GEO—the uniform VWP and the uniform payments.' … because the class members' theory of unjustness depends on shared rather than individualized circumstances, the unjustness question is common to the class and does not defeat predominance." The 10th Circuit arrived at that holding by relying on *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016).

The 10th Circuit noted the Colorado Supreme Court ruled in *Ninth Dist. Prod. Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788, 799-800 & n.19 (Colo. 1991) that "the plaintiff's reasonable expectation of payment is… not [an element of] unjust enrichment (or implied-in-law contract) claims." The Court concluded its analysis regarding the unjust enrichment claim stating that like "the TVPA class, the presence of individualized damages issues does not defeat the predominance of questions common to the unjust enrichment class." The 10th Circuit agreed the District Court had reasonably ruled "that individual damages would not predominate over the liability issues common to the class—including (1) whether GEO received a benefit from the class members VWP labor, and (2) whether it retained such a benefit unjustly." The Court further found that determining individual damages "should be easily calculable using a simple formula 'based on number of hours worked, type of work performed, and fair market value of such work.'"

The Court's ruling in *Menocal* stressed adherence to the teachings by the United States Supreme Court in *Dukes*, *Tyson Foods*, and the 10th Circuit's earlier ruling in *CGC Holding*. The Court found Rule 23(a)'s commonality and typicality requirements and Rule 23(b)(3)'s superiority requirement easily satisfied. The Court's primary focus was on whether the District Court's predominance findings were supportable. It looked to *Tyson Foods* and its earlier ruling in *XTO Energy* finding that the individualized damages issues would not bar class certification as long as the predominance requirement was satisfied regarding liability issues. The Court relied heavily on its earlier ruling in *CGC Holding* to find that the predominance requirement concerning liability was satisfied for both the TVPA and Unjust Enrichment classes.