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Job Applicants Can't Consolidate Waffle House Class Actions

By **Joyce Hanson**

Law360, New York (October 26, 2017, 8:58 PM EDT) -- A Florida federal judge has ruled that a group of job applicants in their proposed class action against Waffle House Inc. and a public-record website may intervene in another job-applicant group's earlier and similar action, but he refused to consolidate the two cases and instead sent the earlier case to arbitration.

U.S. District Judge Roy B. Dalton on Wednesday granted job applicants Alex Holt and William Jones' **Aug. 28 motion** to let Holt intervene in the Jones action involving the restaurant chain's allegedly secretive background checks brought earlier by Jones — who is currently incarcerated and serving a five-year sentence — but the judge denied their motion, also made Aug. 28, to let Holt consolidate his suit with Jones' suit. Further information about Jones' incarceration was unavailable.

On Thursday, proceedings were held before Judge Dalton about the Aug. 28 motion, where Waffle House requested the court to compel Jones to begin arbitration "as required," according to hearing minutes. Judge Dalton granted the request, saying Jones is compelled to begin arbitration within 20 days.

Judge Dalton's three-page order on Wednesday gave no explanation for his reasoning, but the judge did direct the plaintiffs to file a consolidated complaint for the Jones action by Nov. 8. The Waffle House defendants should file their response to the consolidated complaint by Nov. 22, he said. The judge also ordered the job applicants to voluntarily dismiss the Holt action by Nov. 14. Failure to do so, he said, would result in the court dismissing the Holt action as duplicative.

Waffle House and paid-search website PublicData.com, owned by The Source For Public Data LP, **told Judge Dalton on Sept. 11** that the later-filed action by Holt shouldn't be combined with the earlier one filed by Jones because Jones must arbitrate his claims against Waffle House. Instead, if the suits are to be consolidated, any Jones claims against Public Data should be folded into the Holt lawsuit, Waffle House argued.

"To the extent the court is inclined to entertain consolidation, it should consolidate the remaining Jones claims against Public Data into the Holt lawsuit, which already involves 20 plaintiffs, and let that matter proceed," Waffle House said. "As the court has observed, the classes in the two cases are overlapping and it makes little sense to litigate them in a piecemeal fashion."

Waffle House went on to say in its response to the Aug. 28 bid to consolidate that it opposes the attempted intervention of the Holt plaintiffs into the Jones action. The Holt plaintiffs are trying to circumvent a no-tolling rule set by the Eleventh Circuit for "piggy-back" class actions that may result in endless rounds of litigation, Waffle House said.

Also on Sept. 11, The Source for Public Data filed its own response to the motion to intervene and consolidate, saying that while it doesn't oppose a decision to consolidate, Jones is jailed and is in no position to lead the actions. They, along with two other actions, should be led by Holt, The Source said.

The suits allege that Waffle House violated the Fair Credit Reporting Act through the background checks it ran on applicants for jobs. In the first suit, filed in October 2015, Jones said Waffle House

and various data reporting companies violated the FCRA by not giving him a copy of a background check run on him when he applied to work at a Waffle House restaurant in Florida. He seeks to represent a class of Waffle House applicants who were not hired based on a background check.

Jones said the restaurant didn't tell him when he was applying that a pre-employment background check would be conducted, and that after deciding not to hire him, Waffle House didn't give him notice about the consumer reporting agency used and other information required by the federal law.

Until March 2015, Waffle House used Public Data for its checks, but Public Data maintains that it is not a consumer reporting agency and thus is not subject to the FCRA, according to court filings.

A few months later, Jones was hired at a Waffle House in Kansas City, Missouri. Without telling his attorneys in the Florida suit about the job or his new employer about the suit, Jones on his first day signed an agreement sending employment-related claims "past, present or future" to arbitration. After a Waffle House paralegal working on Jones' case noticed a pay stub in his personnel file, the company moved for arbitration.

In July 2016, Judge Dalton denied the company's motion to dismiss Jones' suit, saying that the arbitration agreement was effectively an illegal communication between Waffle House's attorneys and Jones that led him, unwitting, to undermine his suit, but the Eleventh Circuit **overturned that ruling on Aug. 7**. The appeals court said the arbitration agreement applies and that it is clearly up to an arbitrator to decide whether the dispute should be arbitrated.

While that case was paused on appeal, Holt filed a similar class action in April 2017 in the same court. In their Aug. 28 consolidation motion, the plaintiffs pointed out that even though the Holt suit was filed a year and a half after the Jones suit, both are at similar stages of litigation because the Jones suit was **paused for a year**.

Representatives for the parties didn't immediately return requests for comment Thursday.

The plaintiffs are represented by Michael Pascucci and Joshua Eggatz of Eggatz Lopatin & Pascucci LLP, and Alexandria Kachadoorian, Anthony J. Orshansky and Justin Kachadoorian of CounselOne PC.

Waffle House Inc. and WH Capital LLC are represented by Richard Smith of Cole Scott & Kissane PA, and David Gettings and John Lynch of Troutman Sanders LLP.

Data defendants The Source For Public Data LP, Shadowsoft Inc., Harlington-Straker-Studio Inc. and Dale Bruce Stringfellow are represented by Thomas Loffredo of GrayRobinson PA, and Timothy St. George and Ronald Raether Jr. of Troutman Sanders LLP.

The cases are Jones et al. v. Waffle House Inc. et al., case number 6:15-cv-01637, and Holt et al. v. Waffle House et al., case number 6:17-cv-00693, in the U.S. District Court for the Middle District of Florida.

--Additional reporting by Carolina Bolado, Braden Campbell and Nathan Hale. Editing by Orlando Lorenzo.