Justices won't hear Robert Half class arbitration challenge

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New York – The U.S. Supreme Court refused to hear a case from former Robert Half International Inc. workers challenging a ruling by the Third Circuit that the staffing agency could address overtime claims in individual arbitration rather than on a classwide basis, according to its Monday order list.

The high court denied former staffing managers David Opalinski and James McCabe's June petition for a writ of certiorari, which identified what they perceived as a circuit split on the issue of who determines the availability of class arbitration – a district court or an arbitrator. The Third Circuit had affirmed a New Jersey district court's ruling that class arbitration was not permitted under their employment agreements, which Opalinski and McCabe claimed directly contradicted an arbitrator's prior determination.

Justice Neil Gorsuch did not take part in the high court's decision.

"Robert Half essentially got two bites at the apple by successfully moving to compel arbitration and then running back to court when it did not like the result it obtained in

arbitration (despite not having previously challenged the court's allowing the arbitrator to decide this issue)," they wrote in the petition. "This case presents a prime example of the gamesmanship in which parties can partake, exploiting the uncertainty of the 'who decides' issue to their advantage."

Opalinski and McCabe had launched their lawsuit in New Jersey federal court against international staffing agencies Robert Half International Inc. and Robert Half Corp. in 2010, claiming that the companies misclassified them as overtime-exempt employees in violation of the Fair Labor Standards Act. Opalinski and McCabe sought to pursue individual claims as well as collective action claims on behalf of thousands of Robert Half staffing managers, according to court filings.

Robert Half, meanwhile, asserted that the employees had signed employment agreements containing arbitration clauses, trying to dismiss their claims and compel arbitration.

An arbitrator held in May 2012 that class arbitration was permitted under the employment agreements but the district court later disagreed, arguing that it was not permitted and dismissing the suit with prejudice. That decision was affirmed by the Third Circuit, which **refused to grant Opalinski and McCabe a rehearing** in March.

The workers petitioned the high court for a writ of certiorari in June, arguing that an arbitrator – not the district court – has the final say as to the availability of class arbitration. Their petition relies on the high court's precedent in the 2013 case Oxford Health Plans LLC v. Sutter, in which it upheld a an arbitrator's decision to permit class arbitration despite the fact that such an option was not mentioned in the class' agreements but put off resolving the broader question of who has the power to determine class arbitration availability.

The workers identified in their petition a circuit split on

the issue, arguing that while the Third Circuit ruled in their case that a district court must determine class arbitration availability, the Fifth Circuit has alternatively found that power lies instead with an arbitrator.

Robert Half countered before the high court that no such circuit split exists, quoting the Third Circuit's opinion in saying that no other circuit courts have "ruled, or even expressed a view on the issue before us." Rather, they claimed that the Third, Fourth, Sixth, Eighth and Ninth Circuits have ruled that "determining the availability of class arbitration presents a question of arbitrability that is presumptively for a court to decide," their reply brief states.

The company also noted that the case involves older arbitration agreements that make no mention of class arbitration, but parties have since evolved to address class arbitration head-on in their employment agreements, meaning the "present issue is headed towards total extinction."
Counsel for the parties did not immediately respond to requests for comment.

The workers are represented by Shannon Liss-Riordan of Lichten & Liss Riordan PC.

Robert Half is represented by Richard Alfred, Patrick J. Bannon and James M. Hlawek of Seyfarth Shaw LLP.

The case is David Opalinski, et al. v. Robert Half International, Inc., et al., case number 16-1456 in the Supreme Court of the United States.