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ALERT

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CASE UPDATES

FEDERAL - U.S. Supreme Court

Domestic Service Providers are Exempt From FLSA Minimum Wage and Overtime Wage Protections, Regardless of Whether They are Paid by the Family or by an Agency.

Evelyn Coke, a domestic worker, brought a lawsuit against her former employer, Long Island Care at Home, LTD., alleging that it failed to pay her minimum wage and overtime pay as required under the FLSA and New York law. The FLSA exempts "any employee employed in domestic service employment to provide companionship services for individuals who…are unable to care for themselves." 29 U.S.C. § 213(a)(15). At issue was whether the term "domestic service employee" includes only employees paid by the individual or family whom they serve, or whether it also includes employees paid by an agency to work in someone else's home, like the plaintiff. A Department of Labor (DOL) "interpretation" clarifies that the exemption includes those "companionship" workers who "are employed by an employer or agency other than the family or household using their services." 29 CFR § 552.109(a). However, a DOL "General Regulation" defines "domestic service employment" as "services of a household nature performed by an employee in or about a private home…of the person by whom he or she is employed." 29 CFR § 552.3.

The DOL argued that the interpretive regulation exempting third party domestic workers from the FLSA controls. The Court agreed, citing the unique expertise of the DOL, *Chevron* deference, and the statutory gap-filling role of agencies. Coke argued that the "interpretation" should be given less weight than the "regulation", but the Court found the distinction unavailing, in part because the same notice and comment process was followed for each. The Court also found the "interpretation" more specific than the regulation and therefore controlling. *Long Island Care at Home, LTD., et al. v. Coke*, 127 S. Ct. 2339 (6/11/2007; Breyer, writing for a unanimous Court)

Certiorari Granted on Whether Testimony by Other Employees Under Another Supervisor Claiming the Same Discrimination is Admissible at Trial.

The plaintiff claimed the elimination of her position in a company-wide reduction in force ("RIF") was due to age discrimination rather than legitimate business reasons. She wanted to admit testimony of other employees who claimed their positions were eliminated in the same RIF due to age discrimination. The district court granted the employer's motion in limine, excluding all evidence regarding testimony by employees who had different supervisors but claimed their positions were eliminated under the same circumstances as the plaintiff's. The case went to trial and the plaintiff lost. On appeal, the Tenth Circuit ruled that the district court had abused its discretion barring the evidence wholesale and reversed for a new trial including the evidence. The Court granted the employer's petition for certiorari. *Mendelson v. Sprint*, 466 F.3d 1223 (10th Cir. 2006*), cert. granted*, (6/11/07).

Court Rejects Requirement of Pleading Specific Facts

Just two weeks after arguably raising the bar for an antitrust complaint to survive a 12(b)(6) motion in *Bell Atlantic v. Twombly*, the Court held (7-2) in a prisoner civil rights case that the pleading of "specific facts" is not necessary to survive a motion to dismiss. The per curiam opinion both granted the pro se prisoner's petition for certiorari and reversed the judgment. The district court and the Tenth Circuit had held that the prisoner's allegations of harm resulting from the termination of medical treatment were "conclusory." The Court held that this ruling was contrary to the liberal standard for pleadings for pro se plaintiffs. Justice Thomas dissented. Justice Scalia would have denied the petition for certiorari. *Erickson v. Pardus*, 127 S. Ct. 2197 (2007).

FEDERAL - Ninth Circuit

Liability May Attach to an Employer Where a Biased Subordinate Initiates and Influences an "Independent" Employment Inquiry Resulting in an Adverse Employment Action.

Mr. Poland, a supervisor for the Customs Service in Portland, OR, filed a complaint of age discrimination with his employer. A year and a half later, Poland's boss, Hillberry, who had been the subject of Poland's complaint, recommended investigating Poland's work performance. Hillberry selected all of the witnesses who appeared before a panel to testify regarding Poland's performance. The panel concluded that Poland was unprofessional, confrontational, argumentative, and ineffective. To protect the employees in the Portland office who had testified against Poland, the Review Board transferred Poland to a nonsupervisory position in Virginia, "for the good of the agency." Poland accepted reassignment but quit the Service several months after beginning his work in Virginia. Poland prevailed at a jury trial on an ADEA claim of constructive discharge.

The case presented two significant questions. First, when can the animus of a biased subordinate employee (i.e. Hillberry) be imputed to the employer where the employee precipitates an "independent" investigation that leads to an adverse employment action? The court considered three possible answers.

The court found that a "but for" test--placing liability on the employer because the investigation was initiated by a biased party causing an adverse employment action that would not otherwise have taken place -- was too "expansive." Similarly, it found imputing a subordinate's animus to his employer only where the biased employee "dominates the investigatory process and the final decision is a perfunctory approval of the biased subordinate's inclination" to be too narrow. Instead, the court adopted a modified version of the "cat's paw" or "rubber stamp" doctrine: A subordinate's bias may be imputed to the employer where the subordinate, in response to a plaintiff's protected activity, sets in motion an "independent" investigation that is influenced by the biased employee and leads to an adverse employment action.

Left unresolved is how much "influence" is enough to impute liability. In a footnote, the court explained that "the plaintiff need not make such an extensive showing to establish the minimal causal link required at the prima facie stage of a retaliation claim under the *McDonnell Douglas* burden-shifting regime."

The second question raised was whether the plaintiff's demotion and transfer was sufficient, as a matter of law, to establish constructive discharge. The court reversed and vacated, holding that plaintiff failed to meet the high burden of "unendurable working conditions" and "conditions so intolerable that a reasonable person in the employee's position would have

felt compelled to resign." At trial, Poland had testified that the new job entailed no supervisory responsibility, consisted entirely of sorting paper from one side of his desk to the other, and was a "career ender." The court held that preferring his prior position was insufficient. Because Poland had moved locations regularly, the Customs Service asks all special agents to sign waivers acknowledging that they may be transferred anywhere in the country for the good of the agency, and Poland had accepted the reassignment and held the position for a number of months prior to quitting, the court found that the adverse employment action was not constructive discharge. The court declined, however, to join the majority of circuits which require plaintiffs to show that their employer intended to cause the employee to resign.

Dissenting in part, Judge Paez wrote that he would have upheld the finding of constructive discharge, finding ample evidence that over a period of a decade "Poland was subjected to treatment sufficiently intolerable that a reasonable employee would have felt compelled to resign." Judge Paez criticized the majority for circumscribing "a new area within which there can be no constructive discharge as a matter of law." *Poland v. Chertoff*, Nos. 05-35508, 05-35779 (7/20/07; Gould, Rawlinson, Paez).

LMRA Does Not Preempt Suit for Unpaid Travel Time

A group of unionized employees filed a class action under California wage and hour law for unpaid travel time in California state court. The employer removed to federal court based on section 301 of the LMRA, claiming that federal law completely preempted the employees' claims because there were collective bargaining provisions related to the payment of the wages at issue. The district court denied the employees' motion to remand and granted the employer's motion for summary judgment based on failure to exhaust contractual remedies and the LMRA six month statute of limitations. The Ninth Circuit reversed and ordered the case remanded to state court. The employees' state law claims were not preempted because they were based on a right independent of the collective bargaining agreement. The fact that unionized employees could under California law waive those rights in a collective bargaining agreement did not create preemption when no waiver had taken place. Only where there has been an actual waiver of such independent state law rights in a collective bargaining agreement does preemption arise. *Burnside v. Kiewit Pacific Corp.*, No. 04-57134 (6/20/07; Berzon, Pregerson, Wm. Fletcher).

WASHINGTON - Supreme Court

Arbitration Agreements Cannot Bar Class Actions

In this important case, the Washington Supreme Court ruled 6-3 that Cingular Wireless's standard subscriber arbitration clause was invalid because it barred class-actions. The class-action waiver made it impossible as a practical matter for plaintiffs to enforce their rights under the Consumer Protection Act. The plaintiffs claimed they had been unlawfully overcharged between $1 and $40 per month. Cingular's monthly phone bills contained a mandatory arbitration clause and a class-action waiver. The Superior Court ruled that the class-action waiver was valid and upheld the arbitration clause. The Supreme Court took direct review and reversed. Citing *Zuver* and *Adler*, the majority held that the class-action waiver was substantively unconscionable under Washington contract law. Justice Chambers's opinion recognizes the practical reality that no attorney is going to take on an individual claim involving a trivial amount of money. This is precisely why class actions were created in the first place. Justices Madsen, Bridge and Jim Johnson dissented. *Scott v. Cingular Wireless*, 161 P.3d 1000 (2007).

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