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Justice Watch: 11th Circuit ruling could be setback for workers in wage suits

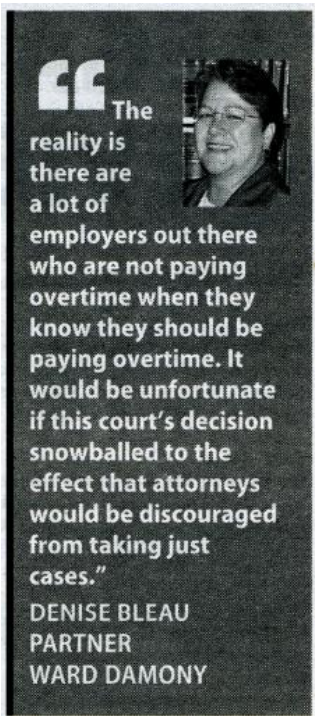
John Pacenti

Florida attorneys who represent companies in employment disputes receive a list every day of all cases filed under the Fair Labor Standards Act. These are overtime cases — employees, many in service or blue-collar industries, who say they were cheated out pay for work they performed beyond the 40-hour work week.

And every day, these practitioners are reminded how their clients are under attack.

"In Florida, particularly in southern Florida, FLSA takes up an inordinate amount of the federal court docket," said Cathy Stutin, a partner at Fisher & Phillips in Fort Lauderdale. "If you look under FLSA, there are 10 cases filed in the rest of the country, and there will be 20 filed in Florida."

She's not mistaken that FLSA is king in the Sunshine State. Florida accounted for 2,151 of 6,783 overtime cases — or 32 percent — filed in the nation in 2010, according to Pacer, the federal court electronic document system.



Both plaintiff and defense employment attorneys say judges don't like the proliferation of FLSA cases because they clog their dockets like matted hair in a drain.

Employment defense experts complain many cases are for nominal amounts and filed for the sole purpose of shaking down a business for attorney fees. "I think judges are very sensitive that plaintiff attorneys can exploit the law for the potential to recover fees," Stutin said.

So it was with great joy that the employment defense bar greeted a **June decision** by the 11th U.S. Circuit Court of Appeals saying attorney fees need not be paid if a company pays the disputed amount and a judge dismisses the case as moot.

"I love it. It's about time," said Mark J. Neuberger, of counsel in the Miami office of Foley & Lardner. He represents management in FLSA disputes as a member of the firm's labor and employment practice.

"It's an important step in turning back the onslaught of these FLSA claims," said attorney Lori Adelson, a Ruden McClosky partner in Fort Lauderdale who also represents employers. "It has been abused, and I think it has been overused."

SNOWBALL EFFECT

But not every employment law practitioner thinks the 11th Circuit opinion is earth-shattering. Some say the decision in the case of Perry Dionne of Lake County is limited to an unusual set of circumstances. Others say it could have a chilling effect on attorneys who represent workers who don't have the means to pay an attorney.

"The reality is there are a lot of employers out there who are not paying overtime when they know they should be paying overtime," said attorney **Denise Bleau**, a partner at **Ward Damon**, a boutique firm in West Palm Beach. "It would be unfortunate if this court's decision snowballed to the effect that attorneys would be discouraged from taking just cases."

Dionne's attorney, Richard Celler of Morgan & Morgan in Davie, said he has asked for en banc review by the full 11th Circuit, citing a conflict with a 1982 case that said a judgment must be rendered in all FLSA cases.

"There is an inherent conflict between their two decisions," he said. "I'm hearing a lot of comments that the sky is falling. The sky is not falling. First and foremost, this affects those cases that are the smaller garden variety."

He said it won't affect class action FLSA lawsuits because a defendant cannot attempt to make a case disappear by paying the named plaintiff.The nexus of this controversy is a three-page complaint filed by Dionne in 2008 seeking $3,000 in back pay from his former employer, Floormasters. The flooring supply and installation store ended up paying the money and filing a motion to dismiss.

In FLSA suits for unpaid overtime, fee awards are mandatory for prevailing parties. But Senior U.S. Judge William Terrell Hodges in Ocala did something unusual. He dismissed the case without rendering a final judgment.

Without a judgment, there is no prevailing party. With no prevailing party, there could be no award of attorney fees.

"The court finds that the plaintiff's claim for overtime compensation was in fact rendered moot when the defendants tendered full payment for all recoverable damages — a fact that the plaintiff admitted in its response," Hodges wrote in a 2009 order denying fees.

Celler said Hodges abdicated his duty as a judge by not reviewing the settlement to make sure it was fair and reasonable.

A three-judge 11th Circuit panel upheld Hodges on July 28. Judge Arthur L. Alarcon, sitting by designation from the 9th U.S. Circuit Court of Appeals, wrote Floormasters, while vigorously denying liability, deprived the district court of subject matter jurisdiction "by eliminating the absence of a case or controversy." Judge J.L. Edmonson and Senior Judge James C. Hill concurred.

LIMITED ACCESS

Celler said Hodges wanted to send a message to the plaintiff bar filing FLSA lawsuits, but the upshot is the decision is expected to limit access to the courts for the mostly blue-collar workers seeking overtime pay through the FLSA. He said lawyers take these type of cases on a contingency basis, knowing FLSA has the fee provision.

"What the court is saying to an employee is good luck finding a lawyer who is willing to risk time and money to help you recover a nominal wage," Celler said. "It turns the intent of FLSA on its head."Neuberger doesn't have a problem with that, saying the law enacted at the height of the Great Depression is outdated.

"At that time it made perfect sense. People who wore a blue shirt, mostly men, punched a time clock. People who wore a white shirt, again mostly men, had their salary capped," he said. "In 2011, society is a lot more complicated. We have a diverse work force, and we have a diverse economy, but the law has not kept pace with the way work is done."

Many workers would prefer a compensatory day off rather than overtime, but the FLSA looks at each pay period and whether overtime was duly paid, Neuberger said.

Stutin said employers acting in good faith have difficulty complying with the letter of the law, and plaintiffs are often workers who have been fired and are represented by fee-seeking lawyers. She said businesses are held hostage by FLSA because they know it is more expensive to litigate than settle and pay attorney fees.

Adelson agrees, saying the 11th Circuit ruling levels the playing field.

"It puts the burden off the employer to have to immediately think I'm on the hook here no matter what," she said. "It really gives them the opportunity to assess the claim."

Bleau, the West Palm Beach practitioner, is in a unique position for she represents both plaintiffs and defendants in FLSA cases. Despite worrying about the chilling effect of the appellate ruling, she said employers who acted in good faith should be given the opportunity to clear the books with a former employee.

Celler also doesn't have a problem with some colleagues in his field who have been disciplined by The Florida Bar for abusing FLSA. Attorneys representing workers must be willing to give employers a chance to settle the case out of court by sending a demand letter before filing a lawsuit, he said.

"There are firms who do it the right way," Cellar said. "We make less money on that case, but we are keeping it out of an already clogged judicial system."

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