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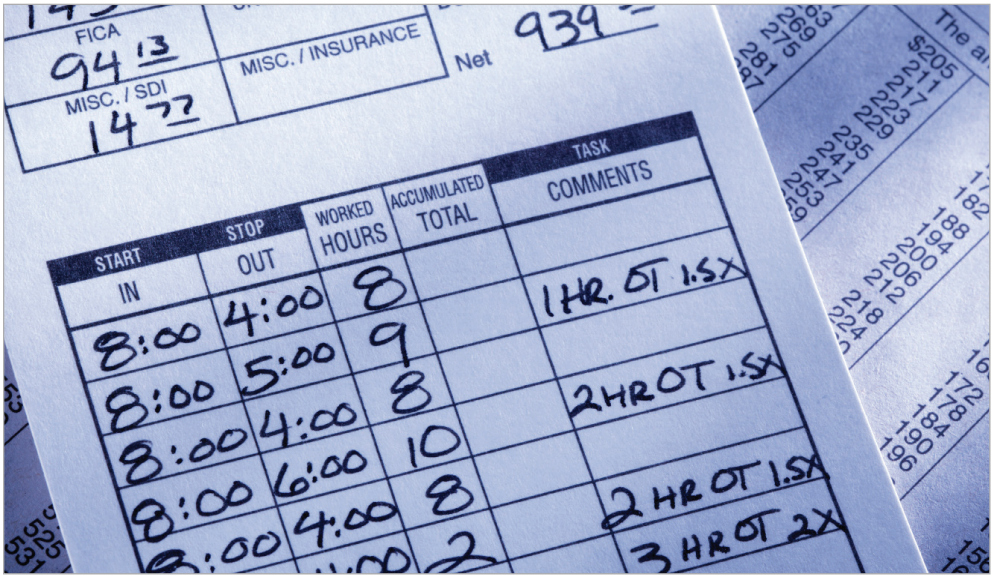

TWO NEW WAGE AND HOUR CASES: ONE GOOD NEWS FOR EMPLOYERS, ONE NOT SO GOOD

By Lloyd W. Aubry, Jr. and Tritia Murata

Two wage and hour decisions were recently issued – one by the United States Supreme Court and the other by a Court of Appeal in California – that are emblematic of the continuing onslaught of wage and hour class action litigation and the highly technical procedural and substantive issues that are still being litigated. In the U.S. Supreme Court case, *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court ruled that offering to settle a case with a named plaintiff in a Fair Labor Standards Act (FLSA) collective action lawsuit under certain circumstances can terminate the litigation because the plaintiff's claims are moot since the plaintiff has received all he or she is personally asking for in the litigation. A California case, *Gonzalez v. Downtown L.A. Motors*, did not come out so well for employers and, if the decision stands, it may require many employers to make significant changes to their piece rate and, potentially, even their commissioned sales compensation arrangements.

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Genesis Healthcare v. Symczyk

On April 16, 2013, the United States Supreme Court issued its highly anticipated decision in Genesis *Healthcare Corp. v. Symczyk*, holding that a named plaintiff in a putative wage and hour collective action could not continue to pursue her collective claims after her individual claims became moot.[1] Although the 5-4 decision is favorable for employers, the majority assumed without deciding the more interesting question of whether an unaccepted offer of judgment can actually moot a plaintiff's claims. As emphasized in Justice Kagan's vigorous dissent, the majority's avoidance of this question (which the dissent would have answered in the negative) is likely to limit the decision's practical application.

Procedural Background

Plaintiff Laura Symczyk was formerly employed by Genesis as a registered nurse. She sued, contending that Genesis's policy of deducting thirty minutes from each employee's shift for meal breaks – regardless of whether the employee received an uninterrupted break – violated the FLSA. Symczyk brought her lawsuit as a collective action under Section 216(b) of the FLSA on behalf of herself and all "similarly situated individuals."[2] Before Symczyk filed a motion for conditional certification of her collective action, and before any other individuals had joined her suit, Genesis made Symczyk an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure, offering to pay her an amount she conceded would fully satisfy her individual claim. Symczyk did not accept the offer before it expired. Genesis then moved to dismiss her case for lack of subject-matter jurisdiction, contending that its offer of full satisfaction under Rule 68 divested her of a personal interest in the outcome of the suit and thus mooted the entire action. The district court agreed and dismissed the case.[3]

The Third Circuit reversed.[4] Although the Third Circuit agreed that Genesis's Rule 68 offer fully satisfied Symczyk's individual claim and that, under its precedents, such an offer generally moots a plaintiff's claim whether or not it is accepted, it nonetheless held that Symczyk's collective action was not moot. Relying on cases involving Rule 23 class actions, the Third Circuit reasoned that calculated attempts by some defendants to "pick off" named plaintiffs with strategic Rule 68 offers before certification could short circuit the process, thereby frustrating the goals of collective actions.

The Holding

The Supreme Court reversed, finding that the district court had properly dismissed the entire action for lack of subject-matter jurisdiction. After Symczyk's individual claims had been fully satisfied, she no longer had Article III standing to pursue collective claims on behalf of other employees similarly situated. Her entire lawsuit became moot when her individual claim became moot.

Rule 23 Actions Are Fundamentally Different from FLSA Collective Actions

Symczyk contended that even though her individual claims were moot, she retained a personal stake in pursuing her collective action claims. Not so, held the majority. The majority noted that Symczyk's arguments were founded on Rule 23 cases, which were inapposite based on their facts and because "Rule 23 actions are fundamentally different from collective actions under the FLSA."[5] For example, while "a putative class acquires an independent legal status" upon certification under Rule 23, "[u]nder the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action."[6] Conditional certification of a collective action merely authorizes the sending of a court-approved notice to putative collective action members, who can only become parties after affirmatively filing written consents to join the action. Thus, held the Court, even if conditional certification were granted on remand, Symczyk's lawsuit would still be moot.[7]

The Ability of an Employer to "Pick Off" Named Plaintiffs in a Collective Action Does Not Render the Plaintiffs' Claims "Inherently Transitory"

The Court further held that the relation-back doctrine applied to enable certification of Rule 23 actions involving "inherently transitory" claims did not apply to save Symczyk's collective action claims from mootness. In the Court's view, the ability of defendants to strategically use Rule 68 offers to "pick off" named plaintiffs before the collective action process is complete does not render the plaintiffs' claims "inherently transitory." The Court explained that the "inherently transitory" rationale applies to situations where a defendant's challenged conduct is so fleeting in nature that no plaintiff could possess a personal stake in the suit long enough for the litigation to run its course, rendering the conduct effectively unreviewable. This rationale does not apply in the context of claims for statutory damages that, unlike injunctive relief actions, cannot evade review. In the FLSA collective action context, a full settlement offer makes the named plaintiff whole, and putative collective action members – although they may be foreclosed from having their claims addressed in the named plaintiff's suit – nonetheless remain free to pursue their rights in their own separate lawsuits.[8]

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The Missing Link – Can an Unaccepted Offer of Full Satisfaction Moot a Plaintiff's Claim?

Justice Thomas's majority opinion assumed without deciding that Symczyk's individual claim became moot following Genesis's unaccepted Rule 68 offer of judgment. The majority conceded that "the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot."[9] But rather than resolving the circuit split, the majority instead found that Symczyk had waived the issue by failing to file a cross-petition challenging the Third Circuit's holding that her individual claim was moot, and by conceding the point initially in the district court.

Justice Kagan's spirited dissent criticized the majority's assumption that Symczyk's individual claim was moot, calling the assumption "bogus" and proclaiming that the majority opinion has "no real-world meaning or application" as a result.[10] The dissent explains that the situation the majority addresses "should never again arise," because (in the dissent's view) an unaccepted offer of judgment can never moot a case, and thus, individual damages claims in future FLSA cases will never become moot unless the individual plaintiff affirmatively agrees to resolve her individual claim in exchange for abandoning her case.[11] The dissent expressly cautioned the Courts of Appeals against applying the "mootness-by-unaccepted offer theory" adopted by the Third Circuit's decision below.[12]

Takeaways for Employers

Even though the majority opinion did not clarify whether an unaccepted Rule 68 offer can moot a plaintiff's claim, the decision is still a noteworthy one. The Court's holding that an FLSA collective action is no longer justiciable after the named plaintiff's individual claim becomes moot is beneficial to employers even outside of the Rule 68 context.[13] And interestingly, perhaps the most important portions of the *Genesis Healthcare* opinion will be its discussion of how Rule 23 class actions are fundamentally different from opt-in collective actions – a distinction the high court has not addressed in more than 20 years.[14]

Before *Genesis Healthcare*, at least one district court in the Ninth Circuit had already applied the same rationale to hold under the facts of that case that a rejected offer of judgment for the full amount of a named plaintiff's claim in a putative FLSA collective action mooted the entire action.[15] In *Genesis Healthcare*'s wake, we may see additional decisions along these lines. However, employers can expect to see plaintiffs in FLSA actions attempting to evade the impact of *Genesis Healthcare* by distinguishing their cases from the very specific facts and conditions giving rise to the majority opinion. And while the prospect of "picking off" a named plaintiff's claims with a Rule 68 offer of judgment may seem appealing, employers should exercise caution in deploying such a strategy, keeping in mind the possible impact an entry of judgment on the named plaintiff's individual claims might have on future cases that could be filed by putative class members.

Gonzalez v. Downtown L.A. Motors

In *Gonzalez v. Downtown L.A. Motors*, _____ Cal. App.4th _____, ordered published April 2, 2013, the court examined the typical piece-rate system used to compensate auto mechanics to determine whether minimum wage was being paid for each hour worked by the mechanics. The mechanics were paid according to a flag or flat-rate system in which they are paid a certain number of hours for a job at a designated rate no matter how long the job takes. For example, a brake job may be listed at three hours at a flag rate of $25. Thus, even if the mechanic does the job in two hours he will be credited with compensation of three hours of flag rate time or $75. However, the mechanic may also perform other job duties while waiting to do auto repair jobs, such as sweeping, cleaning, attending meetings or even just standing around waiting or taking rest breaks (i.e., non-productive time). The question for the court was whether those times when the mechanic was not actually working on auto repair jobs were uncompensated or whether the flag rate compensation could be averaged over all the hours the employee was "on the clock" and as long as the minimum wage was paid for all of the hours "on the clock," the mechanic had been fully compensated.

Background

In a piece-rate system like the kind used for auto mechanics, common practice has been to consider the piece rate to cover all hours worked or "on the clock." Indeed, under federal wage and hour law a specific regulation (29 C.F.R. § 778.318(c)) authorizes the legality of a system in which the parties understand that the piece-rate compensation system is intended to cover both productive and non-productive hours in terms of determining whether the minimum wage has been paid. The California Labor Commissioner had historically followed this interpretation issuing an Interpretative Bulletin in the mid-1980s which specifically followed the federal regulation.

In *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314 (2005), another appellate court in California issued a decision which would provide the basis for the *Downtown L.A. Motors* decision. In *Armenta*, which did not involve a piece-rate system, truck drivers were paid hourly but only for productive time. Non-productive time such as

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waiting for the truck to be loaded was uncompensated and everyone in the case conceded that the wage agreement did not include any hourly pay for such non-productive work time. The employer, in order to avoid liability, argued that it could average the pay for the productive hours over the non-productive, unpaid time to show that at least minimum wage had been paid for all hours worked. While there is some support for this proposition in federal law, the court ruled that it was not legal in California. The difference between the pay system in *Armenta* and a typical piece-rate system is that in *Armenta* all conceded that the non-productive hours were uncompensated and "off the clock" while in a piece-rate system all parties understand that both the productive and the non-productive hours are compensated by the piece rate.

Downtown L.A. Motors Decision

The court in *Downtown L.A. Motors* rejected the distinction between a piece-rate system and the hourly system in *Armenta* and, based on *Armenta*, held that all of the non-productive time spent sweeping, cleaning, in meetings, waiting and potentially during rest periods was like the non-productive time in the *Armenta* case and thus the employer was not allowed to average the flat-rate hours paid to the auto mechanics to cover the non-productive time even though there had been an agreement that the flat-rate hours were intended to compensate for all of the time "on the clock" consistent with the federal regulation cited above. The court held that federal law did not apply and that California law based on *Armenta* was actually stricter; and that the piece rate only covered the productive time when the employees were actually performing the auto repair work that resulted in the piece-rate or flag rate pay. Any other time was uncompensated by that piece rate and therefore had to be paid by separate hourly pay at least at the minimum wage.

Since many auto mechanic shops operate with a flag or flat-rate system, the decision has sent shockwaves through that industry in California. Indeed there were a number of amicus briefs filed in support of *Downtown L.A. Motors* by state and national automobile dealers associations. The decision was originally unpublished meaning it could not be cited but earlier this month it was ordered published. No doubt the decision will be appealed to the California Supreme Court, which may or may not take the case. The court also has the power to depublish it, meaning that it can no longer be cited by lower courts even though the decision itself would not be overturned. And, if the Supreme Court does decide to accept the case for review, the decision would be void.

Ramifications

For employers who pay on a piece-rate basis, this decision clearly presents problems of application and record keeping. The decision would require that all non-productive time in a piece-rate system be compensated separately which would have to be recorded throughout the day in order to ensure that the employees are being properly paid. While the court specifically said that it was not deciding the issue of rest periods, the logic of its decision arguably means that, by definition, 20 minutes of additional pay in a typical 8-hour day should be paid at least at the minimum wage rate because rest periods would clearly be non-productive time. The decision may also create problems for employees who are paid solely by commissions since they too may well be engaged in both productive and non-productive activities. Employers who are paying employees on either a piece-rate system or solely on commissions may want to review their systems and consult with legal counsel to determine the applicability of this decision.

Conclusion

Both of these cases present opportunities and challenges for employers though admittedly on very technical issues. In a larger sense they also represent the continuing popularity of wage and hour litigation which has shown no signs of abating. Employers are well advised to continually monitor their wage and hour practices to ensure that they are in compliance with this fast changing and ever developing area of the law.

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1 569 U.S. ___ (2013).

2 29 U.S.C. § 216 (b).

3 *Symczyk v. Genesis Healthcare Corp.*, No. 09-5782, 2010 U.S. Dist. LEXIS 49599 (E.D. Pa. May 19, 2010).

4 *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189 (3d Cir. 2011).

5 Slip Opn., p. 6.

6 Slip Opn., p. 8.

7 *Id.*

8 Slip Opn., pp. 9-10.

9 Slip Opn., p. 5 (citing *Weiss v. Regal Collections*, 385 F. 3d 337, 340 (3d Cir. 2004) and *McCauley v. Trans Union*, LLC, 402 F. 3d 340, 342 (2d Cir. 2005).).

10 Dissenting Opn., p. 1.

11 Dissenting Opn., pp. 2, 3, 6.

12 Dissenting Opn., p. 4.

13 See, e.g., *Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119 (9th Cir. 2009) (holding that FLSA plaintiff who voluntarily settled his individual claims had no personal stake in appealing the district court's certification denial, where no opt-in plaintiffs had joined the case).

14 See *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989).

15 *Alma Banks v. Robinson*, No. 2:11-cv-00441-RLH-PAL, 2011 U.S. Dist. LEXIS 135622, *5-*6 (D. Nev. Nov. 22, 2011) (plaintiff's lawsuit mooted by unaccepted Rule 68 offer where no other plaintiffs had opted in, the Court had denied the plaintiff's motion for circulation of the pendency of the action and the plaintiff had failed to dispute that the amount of the defendant's offer fully satisfied her claims).

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