Advisory
LABOR AND EMPLOYMENT PRACTICE GROUP | MARCH 2010

WIGGIN AND DANA
Counsellors at Law

Fair Labor Standards Act (FLSA) Update

Our most recent, as well as our upcoming, HR Circle seminars are dedicated to wage and hour issues, an area that has been a hotbed for litigation over the past few years. Unfortunately for employers, the well-chronicled wave of FLSA litigation, highlighted by a virtual onslaught of class actions, shows no sign of slowing down. In an effort to keep you apprised of significant developments in this rapidly evolving and challenging sphere of employment law, this advisory will summarize several recent wage and hour decisions of note that have been handed down by federal courts in Connecticut and New York.

In ***Young v. Cooper Cameron Corp.,*** 586 F.3d 201 (2d Cir. 2009), the Second Circuit affirmed a trial court's findings that an engineer was improperly classified as an exempt professional and that the employer's FLSA violation was willful, thereby extending the recovery period from two years to three.

The plaintiff in this case, Andrew Young, was a high school graduate who had worked for better than twenty years as a detailer, draftsman and designer, and was a member of the American Society of Mechanical Engineers. In 2001, Cooper Cameron offered Young the non-exempt position of Mechanical Designer. Dissatisfied with the salary Young rejected this position. Shortly thereafter, Cooper Cameron invited Young to fill an opening for a Product Design Specialist II ("PDS II"), a position that paid a salary of $62,000.00 per year and, after extensive review, was classified by the company as exempt from the FLSA's overtime pay requirements. No formal advanced education was required for this position and, in fact, none of Cooper Cameron's PDS II's possessed an advanced degree.

The first issue on appeal was "whether a position can be exempt notwithstanding the lack of an educational requirement, if the duties actually performed require knowledge of an advanced type in a field of science or learning." Answering this question in the negative, the Second Circuit explained that "[i]f a job does not require knowledge customarily acquired by an advanced degree-as for example when many employees in the position have no more than a high school diploma-then, regardless of the duties performed, the employee is not an exempt professional under the FLSA." Because "the PDS II position required no advanced educational training or instruction and ..., in fact, no PDS II had more than a high school education," the Second Circuit found it "clear that Young is not exempt."

Cooper Cameron fared no better on the willfulness issue. Because the actual duties Young performed were essentially the same as those of a non-exempt Mechanical Designer, the Second Circuit concluded that the district court did not err in determining that Cooper Cameron willfully violated the FLSA. The Department of Labor has long taken the position that actual job duties, not job titles, are determinative of exempt status. Young hammers home the point.

In ***Archibald v. Marshalls of MA, Inc.,*** 2009 U.S. Dist. LEXIS 106467 (S.D.N.Y. Nov. 12, 2009), the United States District Court for the Southern District of New York struck a blow to employers with operations in New York, rejecting Marshalls' arguments that the New York Labor Law (i) does not recognize a cause of action for overtime pay, and (ii) bars class actions where plaintiffs seek liquidated damages, a remedy expressly available for a willful failure to pay wages.

As to the first issue, the Court noted that although the New York Labor Law makes no

continued next page

specific reference to overtime compensation, regulations promulgated pursuant to the State's wage and hour laws require that non-exempt employees be paid 1.5 times the regular rate for hours worked beyond forty in a workweek. The Court found that these regulations have the force of law.

Turning to the second issue, the Court was not persuaded by Marshalls' argument that because the plaintiffs alleged a willful violation of New York's Labor Law, and liquidated damages are an available remedy for such a violation, a class action could not lie. Although the Court agreed with Marshalls that as a general rule class actions are not permitted under New York law in cases where a plaintiff seeks liquidated damages, the Court noted that plaintiffs had the right to waive any claims for liquidated damages and pursue only actual damages and class relief.

Archibald is an important decision for a variety of reasons, not the least being that wage claims under New York law are subject to a six-year limitations period, meaning that a New York-based plaintiff can potentially recover six years of unpaid overtime, as opposed to the two or three years of back pay allowable under the FLSA. [In Connecticut, the statute of limitations for wage claims is two years].

In ***Reiseck v. Universal Communications of Miami, Inc.,*** 591 F.3d 101 (2d Cir. 2010), the Second Circuit Court of Appeals held that a Regional Director of Sales for a travel magazine was primarily engaged in sales-type functions, as opposed to marketing, and so was improperly classified as an exempt administrative employee.

Applying the Department of Labor regulations in effect at the time of the alleged violation (i.e., prior to the revision of the white-collar exemptions in August 2004), the Second Circuit focused attention on the administrative exemption's requirement that the employee's "primary duties consist of ... the performance of office or non-manual work directly related to the management policies or general business operations of [her] employer [and] require the exercise of discretion and independent judgment." Since Reiseck obviously engaged in non-manual work, and it was undisputed that she exercised substantial discretion and independent judgment in the performance of her duties, at the heart of the matter was the proper interpretation of the term "directly related to management policies or general business operations." Particularly pertinent to the matter at hand, the then-operative regulations provided that sales promotion, or marketing, work was administrative in nature whereas selling was not.

At first glance, the Court of Appeals observed, Reiseck's duties seemingly straddled the sales/marketing divide-"[o] n the one hand, plaintiff was a salesperson responsible for selling specific advertising space" whereas "[o]n the other hand, Reiseck also 'promoted sales' in some sense" because by its very nature advertising is a marketing device designed to generate sales of the product being advertised. In an effort to refine the distinction between non-exempt sales work and exempt marketing work, the Second Circuit adopted the reasoning of the Third Circuit in Martin v. Cooper Electric Supply Co., 940 F.2d 896 (3d Cir. 1991) and honed in on the target of the employee's overtures. That is, according to the Second Circuit, "an employee making specific sales to individual customers is a salesperson for the purposes of the FLSA, while an employee encouraging an increase in sales generally amongst all customers is an administrative employee for the purposes of the FLSA." Viewed from this vantage point, it became clear to the Court that Reiseck's primary duty was in the nature of selling, hence she was non-exempt.

Although, as noted, the case was not governed by the current DOL regulations, the Second Circuit noted that the "[r]ecent amendments to the interpretive regulations provide helpful guidance to support our conclusion" that Reiseck was misclassified as an exempt administrative employee. Drawing a parallel to the financial services industry, the Court pointed out that the now operative version of the regulations provide that "an employee in the financial sector whose primary duty includes 'marketing, servicing or promoting the employer's financial products' likely falls under the administrative exemption... [b]ut the regulations then specify that 'an employee whose primary duty is selling financial products does not qualify for the administrative exemption." (Emphasis in original). The Second Circuit found that Reiseck's primary duty more closely resembled the sale of financial products as opposed to the marketing, servicing or promoting of those products. [Note that Reiseck did not visit customers or otherwise engage in sales activities outside the office so the exemption for outside salespersons was inapplicable].

Finally, ***Pomposi v. GameStop, Inc.,*** 2010 U.S. Dist. LEXIS 1819 (D. Conn. Jan. 11, 2010) strikes a far more positive chord for employers. There, the United States District Court for the District of Connecticut enforced a class action waiver contained in an alternative dispute resolution policy and dismissed an FLSA collective action, leaving the lead plaintiff to pursue his individual claims in arbitration.

The lead plaintiff in this purported collective action, Justin Pomposi, was a former Store Manager at a GameStop retail store located in Meriden, Connecticut. In September 2007, GameStop introduced the "GameStop C.A.R.E.S. Rules of Dispute Resolution Including Arbitration" ("C.A.R.E.S.") during an annual conference in Las Vegas, Nevada. Shortly thereafter, Pomposi executed a written acknowledgement confirming receipt of the Store Manager's handbook, which contained a copy of the C.A.R.E.S. program and provided: "I understand that by continuing my employment with GameStop following the effective date of GameStop C.A.R.E.S., I am agreeing that all workplace disputes or claims, regardless of when those disputes or claims arose, will be resolved under the GameStop C.A.R.E.S. program rather than in court. This includes legal and statutory claims, and class or collective actions in which I might be included." Pomposi remained in GameStop's employ until August 5, 2008, when he was terminated for failing to bring deposits to the bank in a timely manner.

In March 2009, Pomposi filed the instant collective action on behalf of himself and all other similarly situated Store Managers who, Pomposi alleged, were unlawfully denied overtime compensation in violation of the FLSA. GameStop moved to dismiss the action and compel arbitration of the FLSA claims pursuant to the C.A.R.E.S. program. The court agreed with GameStop that Pomposi executed a valid agreement to arbitrate and by thereafter continuing to report to work waived his right to bring claims in court, including class and collective actions. In so finding, the court rejected Pomposi's contention that continued at-will employment is insufficient consideration for an agreement to arbitrate as incompatible with district court precedent.

The court also rejected Pomposi's argument based upon the Second Circuit's "vindication of statutory rights analysis" as set forth in In re American Express Merchandise Litigation, 554 F.3d 300 (2d Cir. 2009). Under that analysis a purported waiver of statutory rights, such as a class action waiver, is unenforceable if it "removes a plaintiff's only reasonably feasible means of recovery." The district court concluded that because Pomposi's claims were straightforward and readily provable without the aid of an expensive expert, and the arbitration provision allowed for an award of attorneys' fees to the prevailing party, Pomposi failed to meet his burden of showing that the disparity between his potential recovery and anticipated litigation costs were so great that the case could not be effectively prosecuted on an individual basis.

Finally, the court rejected Pomposi's contention that the class and collective action waiver provision rendered the arbitration agreement substantively unconscionable, citing numerous decisions standing for the proposition that "the right to bring a collective action under the FLSA is a right that can be waived."

Wiggin and Dana's Labor, Employment and Benefits attorneys are available to discuss these recent developments in the law or any FLSA question you may have. For more information about the FLSA stay tuned for details concerning our upcoming HR Circle which will focus on FLSA collective actions involving claims for overtime pay, and particularly the FLSA's white-collar exemptions for executive, administrative, professional and outside sales employees.

WIGGIN AND DANA
Counsellors at Law

EMPLOYMENT DEPARTMENT CONTACTS

John G. Zandy, Chair
203.498.4330, jzandy@wiggin.com

Karen L. Clute
203.498.4349, kclute@wiggin.com

Sherry L. Dominick
203.498.4331, sdominick@wiggin.com

Mary A. Gambardella
203.363.7662, mgambardella@wiggin.com

Peter J. Lefeber
203.498.4329, plefeber@wiggin.com

Lawerence Peikes
203.363.7609, lpeikes@wiggin.com

Joan Allen Rowe
203.498.4548, jrowe@wiggin.com

Rachel B. Arnedt
203.498.4397, rarnedt@wiggin.com

Jonathan M. Bardavid
203.363.7638, jbardavid@wiggin.com

Gregory A. Brown
203.498.4401, gbrown@wiggin.com

Meghan D. Burns
203.498.4382, mburns@wiggin.com

Bryan S. Watson
203.498.4442, bwatson@wiggin.com