The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017
PHILADELPHIA, MONDAY, OCTOBER 2, 2017 VOL 256 • NO. 64 An ALM Publication

WAGE AND HOUR

Court Defines 'Willfulness' Under FLSA and OKs Reduced Fee Award

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Special to the Legal

On Sept. 20, the U.S. Court of Appeals for the Third Circuit issued a precedential opinion in *Souryavong v. Lackawanna County* that is music to the ears of employers on two fronts. First, the court of appeals defined a willful violation under the Fair Labor Standards Act (FLSA) narrowly, requiring actual awareness of the specific FLSA violation and a degree of egregiousness. Second, the Third Circuit affirmed the district court's attorney fees award, applying a hybrid lodestar and multifactor test analysis, resulting in an award to the plaintiffs' counsel of approximately one-third of what the plaintiffs originally sought.

The plaintiffs were a class of employees who worked "in two separate part-time capacities for Lackawanna County." According to the Third Circuit, the county did not aggregate the hours of the employees in their separate jobs for purposes of calculating overtime. In 2011, the county became aware of their error. In the few months following this discovery, the county began aggregating the hours of the employees in calculating overtime.

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At trial, the county did not dispute the underlying FLSA violation, but argued that the violation was not willful. The statute of limitations under the FLSA is two years, which is extended to three years for willful violations. The plaintiffs introduced evidence that the county was generally aware of its obligations under the FLSA and was concerned about employees filing grievances because of how they were being paid for their two jobs. Upon motion at the close of the plaintiffs' case, the district court granted the county judgment as a matter of law, finding that the evidence proffered was insufficient to create a question for the jury as to willfulness.

The jury awarded the plaintiffs $5,588.30 and the district court granted their motion seeking liquidated damages, holding that the county's failure to take affirmative steps to determine the legality of its pay practices compelled an award of liquidated damages.

The plaintiffs' counsel moved for attorney fees and costs in the amount of $166,162.50, at a rate of $400 per hour for 367.6 hours of attorney time as well as other nonattorney time and costs. The district court rejected the hourly rate requested, instead finding that $250 per hour was the appropriate rate in the relevant market (the Middle District of Pennsylvania). Likewise, the district court reduced the number of hours that were compensable to 278 hours which equated to a lodestar of $69,550. In a detailed opinion, the district court then further reduced the attorney fees and costs awarded to $55,852.80, relying upon the amount of the judgment obtained at trial on behalf of the plaintiffs.

On appeal, the Third Circuit affirmed the district court both with respect to its analysis of willful violations

and its award of attorney fees. As to the question of willfulness, the Third Circuit found that there was no evidence adduced at trial showing that the county was "specifically aware of the two-job FLSA overtime problem"

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as it related to the appellants "prior to the dates of the violations." The Third Circuit analogized to cases in other circuits where there was a jury question as to willfulness, finding the facts in those cases far more egregious than those present in the case at bar. One of the cases involved a deliberate misclassification which was allowed to continue for nine years. Another involved a family that, despite its awareness of its minimum wage obligations, failed to pay its nanny the minimum wage and instructed her to lie about her employment.

In contrast, the Third Circuit reasoned, the county "apparently addressed the two-job FLSA problem within a year of the date" that an email raised it as an issue. Likening the county's error as a "bureaucratic failure" that was "perhaps an example of government morass," the Third Circuit reasoned that it fell far short of the "manipulation and concealment found" in the Eleventh Circuit case involving the nanny. Moreover, the Third Circuit made clear that general awareness of a possible wage-and-hour issue is insufficient to show willfulness; rather, an employer must be aware that there was a violation of the FLSA specifically.

While the Third Circuit's analysis of the FLSA's willful standard certainly will put an arrow in the quiver of employers seeking to limit plaintiffs to a two-year statute of limitations, perhaps the most significant aspect of the *Souryavong* opinion is its affirmance of the dramatically reduced attorney fees award.

The Third Circuit found that in assessing the propriety of requested attorney fees, a court should first use the lodestar approach, determining the appropriate hourly rate and the hours that rightly should be included in the calculation. This calculation carries a "strong presumption" of reasonableness, and a court may deviate from it where "the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." Accordingly, courts can consider the following *Johnson* factors (named for the 1974 Fifth Circuit case of *Johnson v. Georgia Highway Express*), so long as the factors are not already "subsumed in the lodestar calculation":

- The time and labor required.
- The novelty and difficulty of the questions.
- The skill requisite to perform the legal service properly.
- The preclusion of other employment by the attorney due to acceptance of the case.
- The customary fee.
- Whether the fee is fixed or contingent.
- Time limitations imposed by the client or the circumstances.
- The amount involved and the results obtained.
- The experience, reputation, and ability of the attorneys.
- The "undesirability" of the case.
- The nature and length of the professional relationship with the client.
- Awards in similar cases.

At issue in *Souryavong* was the eighth factor: "The amount involved and the results obtained." While the plaintiffs obtained a jury verdict of $5,588.30 (and were awarded an equal amount in liquidated damages), their counsel sought a fee award of $166,162.50. Given what the Third Circuit referred to as "the relatively modest damage award," it found that the district court did not abuse its discretion in reducing the lodestar result, ultimately awarding $55,852.85 in fees and costs, more than $110,000 less than the amount sought by the plaintiffs.

For employers, the *Souryavong* decision provides a welcome refinement of what a "willful" FLSA violation looks like, requiring prior awareness of the specific FLSA violation at issue. Likewise, the Third Circuit's affirmance of the district court's radically reduced attorney fees award highlights the continued vitality of the *Johnson* factors (especially the results obtained factor) working in tandem with the lodestar approach. •

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