Litigation Employment May 1, 2013

Employers May Be Able to "Pick Off" Named Plaintiffs in FLSA Collective Actions

By Keith D. Hudolin and Julia E. Judish

In its April decision in Genesis Healthcare Corp. v. Symczyk*, the U.S. Supreme Court buttressed employers' efforts to "pick off" named plaintiffs in collective actions for unpaid wages brought under the Fair Labor Standards Act ("FLSA") with early offers of judgment that would satisfy only the named plaintiff's individual claims. Whether this strategy will work for employers, however, depends ultimately upon how the lower courts interpret this opinion.*

The 5-4 decision exposed the justices' sharply divergent views on the case's significance. The majority decision, authored by Justice Thomas, held that an FLSA lawsuit must be dismissed once a named plaintiff's claim is mooted through an offer of judgment prior to the opting in of other collective action plaintiffs. Lest other FLSA defendants adopt the offer of judgment as a defense strategy, however, the vigorous dissent of Justice Kagan warned that the majority decision rested on a "bogus" premise, rendering the decision (according to the dissent) merely the resolution of "an imaginary question, based on a mistake."

Plaintiffs Cannot Maintain a Collective Action After Their Individual Claims Have Been Mooted by an Offer of Judgment

The facts of the case are straightforward. Laura Symczyk, a former hourly employee of Genesis Healthcare, claimed that she was due $7,500 in unpaid wages because Genesis Healthcare automatically deducted time for 30-minute meal breaks, even when she had in fact worked during those breaks. While the monetary value of her individual claim was relatively small, Genesis Healthcare's potential liability was extensive: Ms. Symczyk claimed that Genesis Healthcare made the same improper deductions on the paychecks of many of its employees, and Ms. Symczyk had brought her claims as a collective action on behalf of herself and similarly situated employees.

The FLSA's collective action provisions allow plaintiffs to bring their claims on behalf of all similarly situated employees who "opt in" to the lawsuit. If the trial court "conditionally certifies" the collective action, the named plaintiff can send opt-in notices to similarly situated employees, allowing them to exercise their right to join the lawsuit as additional plaintiffs. Genesis Healthcare sought to avoid this potential liability by making Ms. Symczyk an offer under Rule 68 of the Federal Rules of Civil Procedure: It would agree to

have a judgment entered against it for the $7,500 that Ms. Symczyk had individually claimed as damages, plus her court costs and attorney's fees.[1] Genesis Healthcare extended its offer at the very onset of the litigation, making the offer at the same time that it filed its answer to the Complaint, before any "opt in" notices were sent to other employees. Ms. Symczyk wanted to proceed with a collective action, so she ignored the offer. Genesis Healthcare, however, claimed that even though its offer had not been accepted, the case was moot because it had offered Ms. Symczyk all of the individual relief she had sought and, according to Genesis Healthcare, there was thus no longer an actual controversy between the parties. The district court agreed and dismissed the Complaint.

On appeal, the Third Circuit rejected this effort to "pick off" the named plaintiff, holding that, even though an unaccepted offer of judgment could moot the individual plaintiff's claims, allowing it to do so before other employees had the opportunity to opt in would "frustrate the objectives served by [the FLSA]."[2] The Supreme Court disagreed. As a preliminary matter, the Court assumed – but did not decide – that Genesis Health's unaccepted offer of judgment mooted Ms. Symczyk's individual claim, because Ms. Symczyk had waived any counter-argument by not challenging the individual mootness holding before the Third Circuit. Based on this premise, the Court held that "[Ms. Symczyk's] suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action." In this respect, the Court held, it was irrelevant whether Ms. Symczyk had characterized her Complaint as an individual FLSA claim or a collective action: "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." Ms. Symczyk, therefore, was unable to proceed with a collective action or to recover the $7,500 that she had individually claimed.

On its face, the Court's decision appears to provide a roadmap for employers to early (and low-cost) dismissal of FLSA collective action complaints: If an employer-defendant is willing to offer a named plaintiff the full value of her claimed damages plus attorney's fees and costs prior to the opt-in stage of the collective action, the employer can guarantee dismissal of the lawsuit.

But Does an Offer of Judgment Actually Moot Individual Claims?

Employers cannot yet treat the *Genesis Healthcare* decision as the approved mechanism for disposing of FLSA collective actions, however. The Supreme Court's decision contains an important caveat: it held only that *once a plaintiff's individual claims have been mooted*, that person cannot proceed with a collective action. The Court explicitly declined to decide the more fundamental question of whether an unaccepted offer of judgment that fully satisfies a named plaintiff's claims actually renders those claims moot in the first place, finding that Ms. Symczyk had not properly raised this issue on appeal.

The Courts of Appeals have previously split on whether an unaccepted offer moots a plaintiff's claims. There is a strong possibility, however, that, if the issue were properly in front of it, the Supreme Court would hold that it does (at least if the issue is presented to the current membership of the Court). In a footnote, the majority opinion pointed out that some lower courts have held that an unaccepted offer of judgment alone can moot a named plaintiff's claims, and other courts have entered judgment against the plaintiff's wishes in accordance with an unaccepted offer of judgment, which then moots the named plaintiff's claims. According to the majority, therefore, "nothing in the nature of FLSA actions precludes

[1] Rule 68 allows a defendant to serve on a plaintiff, at least fourteen days before trial, "an offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. Proc. 68(a). If the defendant's offer is not accepted and the judgment the plaintiff finally obtains is "not more favorable than the unaccepted offer," then the plaintiff must pay the costs the defendant has incurred since the date of the offer. Fed. R. Civ. Proc. 68(d).

[2] *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 201 (3d Cir. 2011).

satisfaction – and thus the mooting – of the individual's claim before the collective-action component of the suit has run its course."

Four members of the Supreme Court, however, vehemently disagreed with the assumption on which the majority decision rested. In her dissent, Justice Kagan argued that the majority's opinion will have no practical import to future cases because, in her view (and in the view of three other justices), a plaintiff who has rejected or ignored an offer of judgment maintains an individual interest in the case, and thus that plaintiff's claims are not moot. Justice Kagan therefore urged parties in FLSA actions to "[f]eel free to relegate the majority's decision to the furthest reaches of [their] mind[s]: The situation it addresses should never again arise." Her dissent described the Third Circuit's mootness holding as "wrong, wrong, and wrong again," and expressly warns lower courts not to treat unaccepted offers as mooting claims. While some legal experts have – correctly – noted that the dissent does not have the weight of binding precedent, nonetheless the reasoning and strong language of Justice Kagan's dissent may influence lower courts that must rule on the effect of an unaccepted offer of judgment.

Uncertain Implications

Until the Supreme Court renders a decision as to whether an offer of judgment moots individual claims, it will be up to the lower courts to determine the scope of the holding in *Genesis Healthcare*. On the one hand, *Genesis Healthcare* could erect a substantial roadblock for plaintiffs bringing large-scale FLSA collective actions that seek only identified monetary relief, because it allows employers to pick off the named plaintiff with only a modest payment to cover that individual's own claims. On the other hand, *Genesis Healthcare* could, as Justice Kagan's dissent contends, "have no real-world meaning or application" and "turn out to be the most one-off of one-offs." In the meantime, the decision has focused a spotlight on Rule 68's option for defendants to extend offers of judgment. On the employers' side, the decision will likely encourage employers to try "pick-off" strategies to settle or dismiss FLSA claims at a very early stage. On the plaintiffs' side, because the *Genesis Health* decision was limited to FLSA collective actions, it may encourage employees to file complaints designed to avoid full redress through a Rule 68 offer of judgment. In cases in which the plaintiff seeks non-monetary relief or does not specify the amount of monetary damages, it will be more difficult for employers to demonstrate that a Rule 68 offer of judgment fully satisfies the named plaintiff's claims. In addition, employers may see a rise in complaints that line up multiple named plaintiffs before filing suit, thus avoiding the issue entirely.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Julia E. Judish(bio)
Washington, DC
+1.202.663.9266
julia.judish@pillsburylaw.com

Keith D. Hudolin (bio)
Washington, DC
+1.202.663.8208
keith.hudolin@pillsburylaw.com

Marcia L. Pope(bio)
San Francisco
+1.415.983.6487
marcia.pope@pillsburylaw.com

Paula M. Weber (bio)
San Francisco
+1.415.983.7488
paula.weber@pillsburylaw.com