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CLIENT ALERT: FLSA Collective Action Dismissed As Moot After Named Plaintiff's Rejection of Rule 68 Offer of Judgment

An unaccepted Offer of Judgment made to an individual plaintiff in a Fair Labor Standards Act collective action may effectively end the case, according to an April 16, 2013 ruling of the United States Supreme Court. However, the significance of the 5-4 ruling in *Genesis HealthCare Corp. v. Symczyk*, remains to be seen. The case reinforces that employers and their counsel should consider early settlement of collective actions – including an Offer of Judgment – while there is limited interest in the litigation.

Background & FRCP Rule 68

Plaintiff Laura Symczyk worked as a Registered Nurse for approximately eight months in 2007. During that time, her employer had a practice of automatically deducting 30 minutes for lunch from each hourly employee's daily hours, regardless of whether they took a break or continued to work. Two years after her employment ended, Symczyk sued on her own behalf and on behalf of all similarly situated non-exempt employees who had been subject to the deduction arguing the practice violated of the Fair Labor Standards Act ("FLSA") 29 U.S.C. § 201 *et seq.* Symczyk's suit was filed as an FLSA collective action.

Shortly after Symczyk filed suit, Defendant Genesis made her a $7,500 Offer of Judgment under Rule 68 of the Federal Rules of Civil Procedure. Unlike an ordinary settlement offer in which a defendant offers money (or other valuable interests) in exchange for a dismissal, an accepted Offer of Judgment results not in a dismissal but an entry of judgment against the defendant in the case. Employers and their counsel may consider a Rule 68 Offer of Judgment rather than a simple settlement offer because Rule 68 includes a "fee shifting" provision. If the Offer of Judgment is rejected and the matter proceeds to trial but the Plaintiff recovers no more than he or she would have received in the Offer of Judgment, the Plaintiff is responsible for all costs Defendant incurred from the time of the Offer through trial. (Case law, however, has limited this recovery, making a Rule 68 Offer of Judgment less attractive than it appears.) Relative to the *Symczyk* matter, some federal courts have held that collective actions become moot where a named plaintiff rejects a *complete* Offer of Judgment which includes all damages and costs that the plaintiff could have recovered in the lawsuit. In other words, when a plaintiff declines an Offer of Judgment that would cover everything she would receive by proceeding through trial she loses the ability to serve as the representative plaintiff in a collective action. Not all courts agree on this point and – as this case makes clear – neither do all Supreme Court Justices.

In *Symczyk*, Plaintiff admitted the $7,500 Offer of Judgment was an amount that would cover any wages she was due from Defendant's error, as well as her attorneys' fees, costs and expenses; more than her likely recovery by proceeding through trial. The Offer of Judgment was open for 10 days and when Plaintiff did not respond – effectively rejecting the Offer – Genesis moved to dismiss the case as

"moot" arguing Symczyk turned down complete relief as to her individual claim and no longer possessed a personal stake in the outcome of the collective suit. Genesis won and the case was dismissed. After the Third Circuit reversed, the U.S. Supreme Court agreed to hear the matter.

The Supreme Court's Decision

The five-Justice majority found that a federal court has no jurisdiction over an FLSA collective action when the lone plaintiff's individual claim becomes moot. The collective action was appropriately dismissed for lack of subject-matter jurisdiction. Importantly, the majority *assumed* the case was moot because that was the conclusion reached by the lower courts. The Justices did not analyze whether rejecting a Rule 68 Offer of Judgment renders a collective action moot.

Writing for the four-Justice dissent, Justice Kagan argued the majority missed the point, based its holding on an erroneous assumption and, in doing so, has issued an opinion with "no real-world meaning or application." She and the other dissenting Justices argued "an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer – however good the terms – her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief."

Does *Symczyk* Provide Employers with a Viable Defense Strategy?

The Court answered the limited question before it but declined to answer the more important antecedent. According to the Court, *assuming* an unaccepted offer of judgment results in a moot individual claim, any putative collective action under the FLSA is also moot. But does an unaccepted Rule 68 Offer of Judgment result in a moot individual claim? The Circuits disagree and question remains open. Although not binding on other courts, readers in the First Circuit should be aware of *Nash v. CVS Caremark Corp.*, 683 F.Supp.2d 195 (D.R.I. 2010), a District Court case which strongly suggests the mootness doctrine under Rule 68 should not be applied to FLSA collective actions.

It remains uncertain whether this approach with a lead plaintiff (known as "picking off") can provide the basis for dismissal of an entire collective action lawsuit. Whether or not the strategy can effectively end a case, employers defending themselves in FLSA collective actions should consider strategic settlement – including a Rule 68 Offer of Judgment – early in the case, particularly when there are few Plaintiffs who are named or who have consented to join.

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