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Recent Federal Circuit Court Decision Invalidates Private Settlement of Wage Claim Under the FLSA

By Michael Mishlove

A recent decision by the federal Court of Appeals for the Eleventh Circuit, in which the Court refused to give effect to a settlement agreement entered into by an employee who had sued her former employer and its owner for unpaid overtime, highlights the uncertainty that attends efforts to privately settle claims for back pay under the federal Fair Labor Standards Act ("FLSA").

In this July 29, 2013, decision, [Nall v. Mal-Motels, Inc.](#), No. 12-13528, 2013 WL 3871011 (11th Cir. July 29, 2013), Candace Nall had worked for Mal-Motels as a front desk clerk and night auditor. She reported her hours verbally to Mal-Motels' owner ("Malik"), who called her hours in to a payroll company that issued paychecks to Nall based on the hours reported by Malik. Nall claimed she "periodically" worked in excess of 40 hours per week but was not paid at time-and-a-half for those hours as required under the FLSA. She claimed Mal-Motels owed her at least \$3,780 in unpaid overtime, plus an equal amount in liquidated damages as provided for by the FLSA, for a total of \$7,560. Mal-Motels conceded that it owed Nall some unpaid overtime pay but disputed the number of hours Nall claimed to have worked. No accurate records of the hours Nall worked exist.

Nall quit her job because she was not being paid overtime and hired an attorney who filed a lawsuit against Mal-Motel and Malik. Malik, who is not an attorney, filed an answer on behalf of himself

and Mal-Motels. The court struck the answer and entered a default judgment against Mal-Motels because Malik could not represent it in the lawsuit.

Thereafter, Malik contacted Nall and invited her to meet with him at the Motel to discuss settlement. Malik told Nall not to bring an attorney. When they met, Malik told her she was ruining his business, and it would be better for him if she settled the case. Malik presented Nall two documents, which he explained to her but did not allow her to read, and offered her a check for one thousand dollars and an additional one or two thousand dollars in cash if she agreed to sign the documents and dismiss her case. One document was a letter to Nall's attorney advising him that she had settled the case and the other was a voluntary dismissal of her complaint with prejudice. Nall testified that, although she felt Malik was pressuring her, she agreed to sign the documents -- and did sign them -- because she trusted him and "was homeless at the time and needed money."

The voluntary dismissal was filed with the court; however, the district court refused to give effect to the voluntary dismissal because Nall's complaint had been filed by an attorney and she had not been granted permission to appear in the case without her counsel. Thereafter, the owner of the company retained counsel who filed a motion to vacate the default judgment and enforce the settlement agreement. Following an evidentiary hearing, the court found that there was a dispute between the parties about the number of hours Nall had worked and the agreement was a "fair and reasonable resolution of a bona fide dispute under the FLSA." Accordingly, over Nall's objection, the court dismissed her complaint with prejudice.

On appeal, the Eleventh Circuit held fast to its opinion, first articulated over 30 years ago in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982), which has been followed by most federal circuit courts that have addressed the issue, that claims for back wages arising under the FLSA can only be settled or compromised in only two ways: (1) through payment by the employer to employees - under the supervision of the Secretary of Labor - of back wages owed them as determined by the Secretary, or (2) by means of a stipulated judgment entered by a court (in the context of lawsuits to recover back wages for violations of the FLSA brought by employees directly against their employer) after first making a determination that the terms of the parties' proposed settlement are fair. Because the settlement between the plaintiff and her former employer was not supervised by the Secretary of Labor and the judgment approving the settlement and dismissing the case entered by the district court was not a stipulated judgment, the Court of Appeals held that the district court should not have granted the motion to approve and enforce the settlement

agreement. Accordingly, the case was sent back to the district court for further proceedings.

Nall is particularly noteworthy because it is the first appellate decision to address the issue since the Fifth Circuit's decision last August in *Martin v. Spring Break '83 Prods.*, 688 F.3d 247 (5th Cir. 2012), in which the court bucked the trend of appellate opinions and enforced a private settlement agreement that compromised and waived a former employee's FLSA claim.

In *Martin*, it could not be determined whether the plaintiffs had actually worked on the days for which they claimed not to have been paid overtime pay; hence, there was a bona fide dispute about the amount of time worked by the plaintiffs. Under the circumstances, the Fifth Circuit held that the settlement agreement at issue was "an enforceable resolution of [the plaintiffs'] FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves." By framing the settlement in this manner, the Fifth Circuit found the settlement was not at odds with Supreme Court precedent holding that employees' substantive rights under the FLSA cannot be waived. The Fifth Circuit's opinion in *Martin* generated some optimism among legal pundits that the tide may be turning toward greater judicial receptivity to private settlements and waivers of FLSA claims. The Eleventh Circuit's *Nall* decision significantly dashes that optimism.

So where are we left in the wake of these two diametrically opposed appellate court decisions? One thing seems certain; this issue is bound to make its way to the Supreme Court for resolution of this split of opinion between the circuits. As a pragmatic matter, the prevailing view is that private extrajudicial settlement of claims arising out of employers' alleged failure to pay minimum wage or overtime pay as required by the FLSA are unenforceable. The roots of this proposition can be traced to decisions of the Supreme Court dating back to the 1940s that have underscored the nonwaivable quality of an employee's rights to a minimum wage and overtime pay under the FLSA. In that vein, the Supreme Court has held that FLSA rights cannot be abridged by contract or otherwise waived because it would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. However, language can be found in those decisions that leaves the door open for settling FLSA claims where the settlement resolves a bona fide dispute between the parties as to the hours worked by the plaintiff or the amount of back pay is due and owing from the employer. To maximize the likelihood that a settlement compromising an employee's FLSA will pass judicial scrutiny, it is absolutely essential that the settlement agreement be drafted in such a way as to make clear that the settlement does not purport to compromise or waive any known and certain FLSA rights, but rather simply resolves a

good faith dispute as to the employee's entitlements under the FLSA in the first instance.

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