03-7666

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EVELYN COKE,

Plaintiff-Appellant,

v.

LONG ISLAND CARE AT HOME, LTD.,
and
MARYANN OSBORNE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

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INTEREST OF THE SECRETARY OF LABOR

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae*. The Secretary has a strong interest in defending the Department of Labor's regulations against judicial challenge. The plaintiff candidly referred to this action as a "test case," conceding that she cannot succeed under the regulations as they currently stand. Her claim for back wages under the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 201, et seq., is based on her argument that the relevant regulations are inconsistent with congressional intent and,

therefore, are invalid. Given this posture, the Secretary believes that this Court would derive benefit from a presentation of her views on this case.

STATEMENT OF THE ISSUE

This case involves a challenge to the validity of the Department's regulations at 29 C.F.R. 552.6 and 552.109(a). Section 552.6 defines "companionship services," which are exempt from FLSA minimum wage and overtime coverage under 29 U.S.C. 213(a)(15), to include both "household work related to the care of the aged or infirm," and general, incidental household work not exceeding 20 percent of the total weekly hours worked.[1] Section 552.109(a) extends this exemption to employees who are employed by an employer or agency other than the family or household using the employees' companionship services. The

[1] Coke challenges the Secretary's regulatory definition of the statutory term "companionship services" on the ground that it includes both "household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services," and "the performance of general household work" that is "incidental" in nature. In the words of Coke, "The DOL's legislative regulation defining 'companionship services for individuals who (because of age or infirmity) are unable to care for themselves' to include an unlimited amount of 'household work' so long as it is 'related to the care of the aged or infirm person' and a significant amount of 'general household work' unrelated to the care of the aged or infirm person is inconsistent with Congress['] intent to exempt only employees providing 'companionship' - i.e. supervision and fellowship - from the minimum protections of the FLSA." Appellant's Brief, p. 4.

issue on appeal is whether these legislative rules interpreting the statutory exemption are reasonable and therefore should be upheld.

STATEMENT OF THE CASE

A. Statement Of Facts

By decision dated May 23, 2003, the district court granted the defendants' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), and denied the plaintiff's motion to certify a collective action under 29 U.S.C. 216(b). Coke v. Long Island Care At Home, LTD., 267 F. Supp.2d 332 (E.D.N.Y. 2003). The court's decision sets forth only a few rudimentary facts. Maryann Osborne is the owner and sole shareholder of Long Island Care at Home, Ltd. ("Long Island Care"), an agency that provides home healthcare to private individuals. Evelyn Coke ("Coke") has been employed by Long Island Care as a "home healthcare attendant" since 1997. Coke contends that, despite working more than 40 hours a week, she received no overtime payments and was paid less than the FLSA minimum wage. Coke acknowledges, however, that she cannot establish a claim under the FLSA if the Department's regulations that exempt workers who provide "companionship services" are controlling. 267 F. Supp.2d at 332. Thus, she brings this

action as a "test case" in order to challenge the validity of these regulations. Id. at 341.

B. Statutory And Regulatory Framework

At the time that Congress amended the FLSA in 1974 expressly to extend coverage to employees in "domestic service," it excluded from coverage "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. 213(a)(15) (emphasis added). See generally 29 C.F.R. 552.2.

Under this explicit grant of authority, the Secretary of Labor defined "companionship services," in pertinent part, as follows:

> [T]he term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however,* That such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.

29 C.F.R. 552.6. The Department's Wage and Hour Division has further clarified in an opinion letter that "such activities as cleaning the patient's bedroom, bathroom or kitchen, picking up

groceries, medicine, and dry cleaning would be related to personal care of the patient and would be the type of household work that would be exempt work for purpose of section 13(a)(15) of the FLSA. However, activities involving heavy cleaning such as cleaning refrigerators, ovens, trash or garbage removal and cleaning the rest of a 'trashy' house would be general household work or nonexempt work that is subject to the 20 percent time limitation." 1995 WL 1032475 (March 16, 1995) (emphases added).

The Secretary's regulations also state that the term "domestic service employment" as used in section 13(a)(15) "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3. However, the Secretary extended the section 13(a)(15) exemption for employees engaged in "companionship services" to those "who are employed by an employer or agency other than the family or household using their services." 29 C.F.R. 552.109(a).

Both these regulations, 29 C.F.R. 552.6 and 552.109(a), were promulgated pursuant to notice and comment rulemaking in 1975, soon after the enactment of the 1974 amendments to the FLSA, and thus have been in effect for over 28 years.

C. The District Court's Decision

The district court observed that this Court has never expressly ruled on the validity of either of these two regulations, but that nearly all other courts faced with the issue have upheld both. 267 F. Supp.2d at 336 (citing Johnston v. Volunteers of America, Inc., 213 F.3d 559, 562 (10th Cir. 2000) (upholding section 552.109(a)), cert. denied, 531 U.S. 1072 (2001); Salyer v. Ohio Bureau of Workers' Compensation, 83 F.3d 784, 787 (6th Cir.) (upholding section 552.6), cert. denied, 519 U.S. 964 (1996); McCune v. Oregon Senior Services Division, 894 F.2d 1107, 1110-11 (9th Cir. 1990) (same)). The court noted that one district court had recently reached a contrary result. Id. (citing Harris v. Dorothy L. Sims Registry, 2001 WL 78448, at *5 (N.D. Ill. 2001) (invalidating the definition of "companionship services" in section 552.6 "to the extent it exempts homemakers from [FLSA] coverage").

The district court recognized that the Department's longstanding interpretation of the FLSA, promulgated pursuant to specific congressional authorization, is "entitled to great weight" if reasonable. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). The court proceeded to discuss in detail the Department's proposal to amend both regulations, which was published for comment in

January 2001, because the court also recognized that an agency's "'revised interpretation deserves deference.'" 267 F. Supp.2d at 337 (quoting Rust v. Sullivan, 500 U.S. 173, 186 (1991)).

In that proposal, the Department, pointing to the fact that some home health care workers were performing duties and working in situations not envisioned when the regulations were promulgated, offered three alternatives to the definition of "companionship services" in section 552.6, each of which would increase the emphasis on fellowship (as opposed to the kind of work performed by a maid or household worker) as a "critical component of a companion's duties." 66 Fed. Reg. 5481, 5488 (January 19, 2001). Each alternative also would have eliminated the current 20 percent tolerance for general household work. The Department also proposed to amend section 552.109(a) in order to make the section 13(a)(15) exemption applicable "only with respect to the family or household using the worker's services." 66 Fed. Reg. at 5485. The court observed, however, that the Department withdrew these proposed amendments in April 2002. 67 Fed. Reg. 16,668, 2002 WL 516833 (April 8, 2002).

The court discounted the Harris decision because it "relied heavily on the proposed amendments" in reaching its conclusion that the definition of "companionship services" is invalid. 267 F. Supp.2d at 338. As noted by the district court, the court in

Harris reached this conclusion after the proposed amendments were issued, but before they were withdrawn. Although the court found the reasoning of Harris and the Department's statements in the proposed amendments to be "somewhat compelling," it nonetheless concluded that other factors counseled against holding the unrevised regulations unenforceable. 267 F. Supp.2d at 340. These included "strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years." Id.

The court deemed the entire definition of "companionship services" contained in section 552.6 to be reasonable and in accordance with the statute. It stated in this regard that "[t]he 20% requirement seemingly attempts to keep the exemption limited to those who predominately provide companionship, which is consistent with the legislative history." 267 F. Supp.2d at 340. The court upheld section 552.109(a) because it promotes "the reasoning behind the companionship services exemption" -- "to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the

procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA." Id.

The court specifically rejected the plaintiff's argument that Congress, when it extended coverage to domestic service employees in 1974, did not intend to remove coverage of home healthcare employees employed by third parties who, prior to 1974, would have been covered under the Act's "enterprise coverage" provisions when they worked for large agencies. In this regard, the court was persuaded by the language of section 13(a)(15) which exempts "any employee employed in domestic service employment to provide companionship services" (emphasis added), a point explicitly noted by the Administrator in promulgating the regulation at section 552.109(a).[2] 267 F. Supp.2d at 340. The court stated, "It may be that Congress did not intend to exempt employees hired by a third-party. However, based on the wording of the statute and the lack of any clear legislative history discussing the specific issue, this Court

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[2] The district court mistakenly quoted the language of section 13(a)(15) that applies only to babysitting services, i.e., "any employee employed on a casual basis in domestic service employment." The Department's regulations make clear that the Act's "casual" limitation does not apply to companionship services. See 29 C.F.R. 552.106. It is clear, however, that the district court was relying on the statutory language referring to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15).

may not say that the Administrator's interpretation is arbitrary or unreasonable." Id.

In sum, the district court, referring to the fact that Congress has done nothing to change the Department's regulations despite amending the FLSA several times since 1974, concluded that "[w]hile this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit Congressional mandate." 267 F. Supp.2d at 341.

SUMMARY OF ARGUMENT

Because sections 552.6 and 552.109(a) were both promulgated in 1975 in response to an express delegation of authority by Congress and are the products of notice and comment rulemaking, they are entitled to Chevron deference. Under Chevron, the Secretary's regulations must be upheld if they represent reasonable, permissible interpretations of the statute.

The section 552.6 definition of "companionship services" is reasonable because it is consistent with legislative history indicating that Congress did not intend that the performance of either "household work related to the care of the aged or infirm person," or a limited amount of general, incidental household work, would disqualify an employee from being exempt under

section 13(a)(15). The inclusion within the "companionship services" exemption, under section 552.109(a), of companionship workers who are employed by third party employers also reflects a reasonable interpretation of the statute. As noted by the courts, section 552.109(a) is consistent with the policy underlying the exemption of making companionship services more financially affordable to the elderly and disabled, who might otherwise need to be institutionalized. Moreover, the Administrator recently issued an opinion letter reaffirming the Department's position under section 552.109(a) that employees of a third party employer working as domestic service employees in private homes may qualify for the section 13(a)(15) exemption.

With one exception, all courts that have addressed the validity of either of these regulations have upheld them. The one exception, Harris v. Dorothy L. Sims Registry, 2001 WL 78448, at *5 (N.D. Ill. 2001), may be easily discounted because the district court improperly relied upon proposed amendments to the regulations that were subsequently withdrawn and, consequently, had no controlling effect.

These regulations are also "entitled to great weight" because they were promulgated soon after the 1974 statutory amendments to the FLSA were enacted and thus have been in effect continuously for over 28 years. Additionally, although the FLSA

has been amended numerous times since these regulations became effective, Congress has not taken any of these opportunities to address or countermand the Secretary's regulatory interpretations of the "companionship services" exemption. Congress's inaction in this regard is persuasive evidence that the Secretary's interpretations are reasonable.

ARGUMENT

THE DEPARTMENT'S LONGSTANDING REGULATIONS AT 29 C.F.R. 552.6 AND 552.109(a), WHICH WERE PROMULGATED PURSUANT TO SPECIFIC CONGRESSIONAL AUTHORIZATION AND AFTER NOTICE AND COMMENT RULEMAKING, SHOULD BE UPHELD BECAUSE THEY REPRESENT A REASONABLE CONSTRUCTION OF THE FLSA'S SECTION 13(a)(15) "COMPANIONSHIP SERVICES" EXEMPTION.

A. Both Section 552.6 And 552.109(a) Are Entitled To *Chevron* Deference.

"When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." United States v. Mead Corp., 533 U.S. 218, 227 (2001) (quoting Chevron, 467 U.S. at 843-44). To accord an agency interpretation Chevron deference means that "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the

agency's chosen resolutions seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." Id. at 229 (citations omitted).

Following Mead Corp., this Court has stated that an agency interpretation "'qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 226 (2nd Cir. 2002) (quoting Mead Corp. 533 U.S. at 226-27) (emphasis supplied by this Court). If the agency interpretation represents "'the fruits of notice-and-comment rulemaking or formal adjudication,'" this Court will generally give it full Chevron deference. Id. (quoting Mead Corp., 533 U.S. at 230). See also Madison v. Resources for Human Development, Inc., 233 F.3d 175, 181 n.8 (3rd Cir. 2000) ("afford[ing] deference" to the Secretary's "companionship services" regulations at 29 C.F.R. 552.3 and 552.101 because they are the product of "notice and comment rule making"). See generally National Mining Ass'n v. Department of Labor, 292 F.3d 849, 868-69 (D.C. Cir. 2002).

In this case, Congress explicitly delegated authority to the Secretary to define and delimit the terms of the "companionship services" exemption contained in section 13(a)(15) of the Act. Coke concedes on appeal that section 552.6 was indeed promulgated in response to this express congressional delegation of authority and is therefore entitled to Chevron deference. Coke argues, however, that the district court erred in giving section 552.109(a) Chevron deference because it is an "interpretive" regulation. Coke notes that section 552.109(a) is contained in "Subpart B-Interpretations," whereas section 552.6 is located in "Subpart A-General Regulations." This formulaic distinction does not provide a meaningful basis for according section 552.109(a) a lower degree of deference. Like section 552.6, section 552.109(a) serves to "define and delimit" the terms of the "companionship services" exemption under Congress' express delegation of authority. Similarly, section 552.109(a) is the product of the notice and comment rulemaking that took place shortly after the section 13(a)(15) "companionship services" exemption was enacted in 1974. See 40 Fed. Reg. 7405 (Feb. 20, 1975). Therefore, like section 552.6, section 552.109(a) is entitled to Chevron deference.[3] See Madison, 233 F.3d at 181 n.8 (giving Chevron

deference to the Secretary's "interpretive" regulation at 29 C.F.R. 552.101).[4]

B. Section 552.6 Is A Reasonable Interpretation Of The Statute.

The district court correctly concluded that the definition of "companionship services" contained in section 552.6 -- which includes both "household work related to the care of the aged or infirm" as well as "general household work" that is "incidental" -- is reasonable and in accordance with the statute. To support its holding in this regard, the court referred to legislative history quoted by the Ninth Circuit in McCune:

> The fact that persons performing casual services as baby-sitters or services as companions do some incident of household work does not keep them from being casual baby-sitters or companions for purposes of this exclusion.

894 F.2d at 1111 (quoting H.R. Rep. No. 913, 1974 U.S.C.C.A.N. at 2845). The district court further stated that the 20 percent limitation on the amount of general household work that can be performed "keep[s] the exemption limited to those who

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[3] Moreover, to the extent that the regulation at 29 C.F.R. 552.109(a) may be characterized as the Secretary's interpretation of her own regulation at 29 C.F.R. 552.6, it is entitled to a high degree of deference. See Christensen v. Harris County, 529 U.S. 576, 578 (2000); Auer v. Robbins, 519 U.S. 452, 461 (1997).

[4] Since no facts are in dispute and the district court's decision turns upon a question of statutory construction, this Court's review should be de novo. See United States v. Si Lu Tian, 339 F.3d 143, 156 (2nd Cir. 2003).

predominately provide companionship, which is consistent with the legislative history." 267 F. Supp.2d at 340. Congress clearly intended that the performance of some general, incidental household work, as well as household work related to the care of the aged or infirm, would not disqualify an employee from the section 13(a)(15) exemption. Because the statute refers to "companionship services" for individuals who "are unable to care for themselves," 29 U.S.C. 213(a)(15) (emphasis added), it is manifestly reasonable for the regulatory definition of "companionship services" to include a significant "care" component that allows for the performance of some associated household work (be it household work directly related to the care of the individual or general household work that is incidental to such care).

Although this Court has not addressed the validity of section 552.6, both the Sixth and Ninth Circuits have upheld the validity of the regulation's definition of "companionship services." In Salyer, the Sixth Circuit affirmed the regulation's inclusion within "companionship services" of "'household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services.'" 83 F.3d at 787 (quoting 29 C.F.R. 552.6). As the Sixth Circuit stated, "[W]e cannot say that this

regulatory definition of 'companionship services' is either 'arbitrary, capricious, or manifestly contrary to the statute' that it elucidates." Id. (quoting Chevron, 467 U.S. at 844). In McCune, the Ninth Circuit held that the 20 percent limit on general household work was reasonable, and upheld the district court's conclusion that any household work "related" to the care of the individual would not be counted towards the 20 percent threshold.

The only contrary authority may be easily discounted. In Harris, the plaintiffs were "homemakers" who were employed by an agency that instructed them "to go to clients' homes and work a set number of hours for the clients." The plaintiffs were required to perform a certain amount of housework, as well as "prepare meals, wash laundry, and run errands for clients." In determining that section 552.6 was invalid to the extent it covers "homemakers," such as the plaintiffs in that case, the court relied heavily upon the Department's 2001 proposed amendments. See 2001 WL 78448, at *4, 5 ("The evidence most damaging to Sims' contention that Congress intended to exempt homemakers from coverage is the DOL's recent proposal to amend the regulations pertaining to the companionship exemption. . . . It is obvious from the proposed amendments that the DOL agrees the current definition of 'companionship services' under § 552.6

is unreasonable. This alone is sufficient reason to disregard the current version of § 552.6."). But, subsequent to the decision in Harris, the Secretary withdrew this regulatory proposal. By doing so, the Department, in effect, reaffirmed the "companionship services" regulations as they currently stand. Thus, because the court relied upon a proposed regulatory interpretation that was subsequently withdrawn by the Department, and given the reasonableness of the regulation as it stands, the Harris decision is unpersuasive authority.[5]

Coke's primary argument against the validity of section 552.6 is that its definition of "companionship services" is contrary to the plain language of the statute, under a Chevron "step one" analysis. See Chevron, 467 U.S. at 842-43. Here, however, Congress did not expressly define "companionship services," as indicated by its injunction to the Secretary to "define[] and delimit[] [such term and others in section 13(a)(15)] by regulations." 29 U.S.C. 213(a)(15).

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[5] The court in Harris clearly erred, of course, in relying on proposed regulations in the first place. See Greenhalgh v. Putnam Savings Bank, 140 F.3d 427, 429 n.4 (2nd Cir. 1998) ("[P]roposed regulations are not authoritative until finalized."); Oakley v. City of Longmont, 890 F.2d 1128, 1133 (10th Cir. 1989) (stating that a proposed regulation has no force or effect until "the agency completes formal rule-making and promulgates final regulations"), cert. denied, 494 U.S. 1082 (1990).

Coke also appears to argue that section 552.6 is unreasonable because its definition of "companionship services" would include "employees whose sole function is to perform 'household work' as companions even if they provide no supervision or fellowship." Appellant's Brief, p. 22. This argument is based on a misreading of the regulation. Under section 552.6, an employee must "provide fellowship, care, and protection" for a person unable to care for himself in order to meet the requirements of the "companionship services" exemption. While the regulation allows for the performance of some household work, it must be either "related to" or "incidental" to the "care of the aged or infirm person." See 29 C.F.R. 552.6. See discussion supra supporting the "care" component. Thus, contrary to Cokes' suggestion, an employee hired only to perform household work or as a "full-time cook" would not meet the requirements of the regulation. See Appellant's Brief, p. 16. An employee who has not been hired primarily to provide "fellowship, care, and protection" will not be considered exempt under the Act or the regulations. See 29 C.F.R. 552.6.

C. Section 552.109(a) Is A Reasonable Interpretation Of The Statute.

The district court properly upheld section 552.109(a) because it promotes "the reasoning behind the companionship services exemption" -- "to allow those in need of such services

to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA." 267 F. Supp.2d at 340.

This rationale for upholding section 552.109(a) is consistent with that provided by the Ninth Circuit in McCune. As the Ninth Circuit stated,

> [T]hese critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. We also note that many private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization.

894 F.2d at 1110. See also Lott v. Rigby, 746 F. Supp. 1084, 1087 (N.D. Ga. 1990) (noting, after reviewing a Department of Labor administrative opinion, that "Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them"); Salyer, 83 F.2d at 788 (same). In this case, the district court correctly noted that this underlying congressional policy is served regardless of "[w]hether that service is provided by the direct hiring of an

employee or through the use of an agency." 267 F. Supp.2d at 340.

Coke argues that section 552.109(a) is entitled to no deference because it is inconsistent with other regulatory interpretations of the "companionship services" exemption. Specifically, Coke argues that the inclusion of employees of third parties within the exemption under section 552.109(a) is inconsistent with the Department's definition of "domestic service employment," i.e., "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3 (emphasis added).

While this argument may have some superficial appeal, federal courts have nonetheless given deference to the Secretary's interpretation in section 552.109(a). Thus, in denying a challenge to the validity of section 552.109(a), the Tenth Circuit expressly held that "the fact that domestic service employees are not employed by the individual receiving care does not alone exclude them from the exemption." Johnston, 213 F.3d at 562. In reaching this conclusion, the court noted that all other courts that have been confronted with the question have rejected challenges to the validity of section 552.109(a). See, e.g., Madison v. Resources for Human

Development, Inc., 39 F. Supp.2d 542, 545 n.3 (E.D. Pa. 1999) (holding that, under section 552.109(a), "[a]lthough the plaintiffs are employed by RHD rather than the individuals they serve, that by itself does not exclude them from the exemption."), vacated and remanded on other grounds, 233 F.3d 175 (3rd Cir. 2000); Terwilliger v. Home of Hope, Inc., 21 F. Supp.2d 1294, 1299 n.2 (N.D. Okla. 1998) (rejecting, as inconsistent with section 552.109(a), the plaintiffs' argument that they were not engaged in "domestic service employment," as defined in 29 C.F.R. 552.3, because they were employed by an agency and not the individual clients).[6]

The Administrator of the Wage and Hour Division also has, in effect, rejected this argument in a recent opinion letter dated August 16, 2002 (copy attached). The Administrator noted that, in an attempt to reconcile section 552.109(a) with section 552.3, two previous opinion letters "appear to indicate that employees of a third party employer working as domestic service employees in private homes may not qualify for the Section 13(a)(15) exemption unless they are jointly employed by the third party employer and the household where they are employed."

[6] In Terwilliger, the court stated that it "is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." 21 F. Supp.2d at 1299 n.2.

Based on federal case law upholding the validity of 29 C.F.R. 552.109(a) as written, however, the Administrator clarified that "under 29 C.F.R. 552.109(a), an employee who is engaged in providing companionship services in private homes and who is employed by a third party employer other than the family or household receiving the worker's services is exempt from the minimum wage and overtime requirements under Section 13(a)(15) of the Fair Labor Standards Act." (Emphasis added.) The Administrator rescinded and withdrew all prior opinions expressing a contrary view.

This 2002 opinion letter is consistent with the case law and the policy reasons underlying the "companionship services" exemption, and is therefore entitled to deference. See Reich v. Miss Paula's Day Care Center, Inc., 37 F.3d 1191, 1194 (6th Cir. 1994) ("Because DOL's Wage and Hour Administrator is the primary federal authority entrusted with determining the FLSA's scope, these interpretations [set forth in a Wage-Hour opinion letter and Wage-Hour's Field Operations Handbook], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.") (internal quotation marks omitted). See also Christensen v. Harris County, 529 U.S. 576, 587 (2000); Skidmore v. Swift &

Co., 323 U.S. 134, 140 (1944); Freeman v. National Broadcasting Company, Inc., 80 F.3d 78, 84 (2nd Cir. 1996).

Coke also argues that section 552.109(a) is invalid because it excludes from coverage home healthcare workers who had been subject to "enterprise coverage" prior to the 1974 Amendments.[7] A review of the history of the "companionship services" regulations demonstrates that the Secretary has already considered and resolved this question under her rulemaking authority. Section 552.109, as originally proposed, stated that employees providing companionship services, who are employed by third party employers meeting the Act's "enterprise coverage" requirements, are not exempt under section 13(a)(15) because "their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." See 39 Fed. Reg. 35382, 35385 (September 25, 1974). The Department ultimately determined, however, that the specific

[7] Before the district court, Coke relied upon Homemakers Home and Health Care Services, Inc. v. Carden, 538 F.2d 98 (6th Cir. 1976), to support this argument. In that case, the court upheld a stipulated finding of fact that the defendant, a home health care services company, was subject to FLSA enterprise coverage. Homemakers Home, however, involved employment prior to the 1974 Amendments, and thus did not address the section 13(a)(15) exemption. It provides no guidance as to whether Congress intended to exempt employees of third parties when it exempted "companionship services" from FLSA coverage under the 1974 Amendments.

language of the statute that exempts, without qualification, "any employee employed in domestic service employment to provide companionship services" outweighed any concern for the continuation of coverage of some employees under an "enterprise coverage" theory. See 40 Fed. Reg. 7404, 7505-06 (February 20, 1975) ("This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions."); cf. Mitchell v. Gammill, 245 F.2d 207, 208-09, 211 (5th Cir. 1957) (holding that the section 13(a)(2) "retail and service establishment" exemption (since repealed) applied without qualification to "any employee" of such an establishment, including those who did no retail or service work); McComb v. Union Stock Yards, 168 F.2d 375, 377 (7th Cir. 1948) (applying the section 13(b)(2) "rail carrier" exemption to "any employee" of a rail carrier regardless of the type of work performed by that employee). Thus, the Secretary provided a reasonable explanation for including those employees hired by third-party agencies within the section 13(a)(15) exemption.

Coke further argues that the 1975 promulgation of section 552.109(a) violated the notice and comment requirements of the Administrative Procedure Act ("APA") because "the final regulation was the exact opposite of the proposed regulation."

Appellant's Brief, p. 34. The district court declined to consider this argument because it was not properly raised. See 267 F. Supp.2d at 336 n.3. Because this issue was not raised in the district court, it is waived. See, e.g., Local 538 United Brotherhood of Carpenters and Joiners of America v. United States Fidelity and Guaranty Co., 70 F.3d 741, 743 (2d Cir. 1995). See also Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.") (quoted in Christensen v. Kiewit-Murdock Investment Corp., 815 F.2d 206, 215 (2nd Cir.), cert. denied, 484 U.S. 908 (1987)). However, even if this Court were to consider this argument, it has no merit.[8]

In support of her APA argument, Coke cites National Black Media Coalition v. FCC, 791 F.2d 1016, 1022 (2nd Cir. 1986), and AFL-CIO v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1985), which stand for the proposition that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." These cases also state that "the final rule must be a 'logical outgrowth' of the rule proposed," and "[t]he test that has been

[8] It also stands to reason that the appropriate time for a challenge to the adequacy of the notice and opportunity to comment on the substance of section 552.109(a) would have been soon after the regulation was promulgated, not 28 years later.

set forth is whether the agency's notice would 'fairly apprise interested persons of the subjects and issues' [of the rulemaking]." National Black Media, 791 F.2d at 1022 (quoting AFL-CIO, 757 F.2d at 338). The Department's promulgation of section 552.109(a) meets these standards.

In National Black Media, the court concluded that agency notice was inadequate because the agency's final rule, abandoning a policy set forth in the proposed rule, was based on "critical, yet unpublished, data" that had not been disclosed to the public for review and comment. 791 F.2d at 1023-24. In AFL-CIO, the court concluded that notice and comment requirements were violated because the agency had provided no notice that any change was proposed, or even contemplated, with respect to the existing regulation that was substantially modified by the final rule.

This case is unlike either National Black Media or AFL-CIO. The Department, by proposing to amend 29 C.F.R. Part 552, was exercising its authority to "define and delimit" the terms of the "companionship services" exemption. The notice of proposed rulemaking and requests for comments expressly stated that "the current regulation [at 29 C.F.R. 552.109] impermissibly extends the exemption for companionship services and for live-in workers to employees who do not qualify as domestic service employees,

because they are not working in the home of their employer, i.e., the third party employer." 66 Fed. Reg. 5481, 5485 (Jan. 19, 2001). This was subject to public comment. The Department's ultimate conclusion, that including employees of third-party employers within the exemption is "more consistent" with the statutory language and past practices, is a "logical outgrowth" of the proposed rule. In fact, the process here illustrates effective use of notice and comment, i.e., the agency made a considered judgment after reviewing the comments on a clearly identified proposed regulatory provision. See City of Waukesha v. Environmental Protection Agency, 320 F.3d 228, 245 (D.C. Cir. 2003) ("As we noted in *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973), '[a] contrary rule [than that giving the agency the authority to promulgate a final rule different in some particulars from the proposed rule] would lead to the absurdity that . . . the agency can learn from the comments on its proposal only at the peril of starting a new procedural round of commentary.'") (ellipsis in original).

D. The Longstanding Nature Of The Department's Regulations Weighs In Favor Of Upholding Them.

The regulations in question were promulgated in the year following the 1974 statutory amendments, and have now been in effect for over 28 years. The Supreme Court has stated that "a

long-standing, contemporaneous construction of a statute by the administering agencies is entitled to great weight." Leary v. United States, 395 U.S. 6, 25 (1969) (internal quotation marks omitted). The Supreme Court has also held that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" CFTC v. Schor, 478 U.S. 833, 846 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974)). Despite numerous opportunities to do so, Congress has not acted to "correct" the Department's regulatory interpretations of the "companionship services" exemption, which have been in effect since 1975. Furthermore, the Department's withdrawal of the amendments proposed in January 2001 demonstrates that the Department "still believes that these long-standing regulations are appropriate in the current home healthcare environment." 267 F. Supp.2d at 341.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's determination that sections 552.6 and 552.109(a) represent reasonable, permissible interpretations of the statute and, therefore, are not arbitrary, capricious, or manifestly contrary to the FLSA.

Respectfully submitted,

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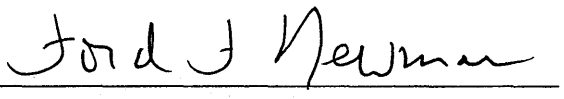

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29 (c)(5) and 32(a)(7)(C), I certify that this brief has been prepared using the following monospaced typeface - Microsoft Word, Courier New, 12 point. Exclusive of the table of contents, table of authorities, certificate of compliance, certificate of service, and addenda, this brief contains 5,716 words.

December 3, 2003
DATE

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CERTIFICATE OF SERVICE

I certify that on December 3, 2003, I sent true and correct copies of the Brief for the Secretary of Labor by Regular Mail to:

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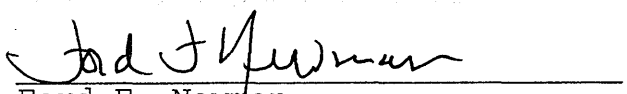

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ADDENDUM

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

AUG 16 2002

Michael F. O'Brien, Esq.
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Dear Mr. O'Brien:

This is in response to your inquiry regarding the "companionship services" exemption provided by Section 13(a)(15) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(15). You asked whether employees engaged in companionship services, as defined in 29 C.F.R. § 552.6, and who are employed by an employer or agency other than the household using their services, but who are not jointly employed by such household, are nevertheless considered exempt from minimum wage and overtime requirements under the FLSA's companionship services exemption.

Your inquiry is based on your review of two prior letters issued by the Wage and Hour Division's Office of Enforcement Policy, Fair Labor Standards Team, dated January 6, 1999, and May 20, 1999. These two letters appear to indicate that employees of a third party employer working as domestic service employees in private homes may not qualify for the Section 13(a)(15) exemption unless they are jointly employed by the third party employer and the household where they are employed. You stated that neither the statute, the interpretive regulations at 29 C.F.R. § 552.109, nor any of the interpretive case law you reviewed in published court decisions on the scope of the companionship services exemption, discuss a requirement for joint employment as a prerequisite for this exemption being available to a third party employer.

As you noted, Section 13(a)(15) of the FLSA provides an exemption from minimum wage and overtime requirements for:

> "[A]ny employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves ..."

29 U.S.C. § 213(a)(15). Our interpretation of this statutory provision is reflected in the Department of Labor's interpretive regulation at 29 C.F.R. § 552.109(a), which states:

> "Employees who are engaged in providing companionship services, as defined in §552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)."

The interpretation of the Section 13(a)(15) exemption reflected in 29 C.F.R. § 552.109(a) has been upheld by federal courts. See, e.g., Johnston v. Volunteers of America, Inc., 213 F.3d 559, 561-62 (10th Cir. 2000), and cases cited therein. In Johnston, the court rejected the argument that Section 552.109(a) is in any way limited by the language in 29 C.F.R. § 552.3, defining domestic service employment. 213 F.3d at 562 ("We hold that the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption.")

The Department of Labor proposed revising 29 C.F.R. § 552.109 to add a joint employment requirement in December 1993, and reopened and extended the public comment period on that proposal in September 1995. No final rule was ever issued in connection with that proposal. On January 19, 2001, the Department issued additional proposed revisions to these regulations (see 66 FR 5481 (Jan. 19, 2001) and 66 FR 20411 (Apr. 23, 2001)). However, the Department published a notice in the Federal Register on April 8, 2002, withdrawing the proposed regulations and terminating the rulemaking proceeding. Enclosed is a copy of the Federal Register notice.

Consequently, Section 552.109 of the regulations has not been revised to add a joint employment requirement as a condition for companionship services exemption. Thus, under 29 C.F.R. § 552.109(a), an employee who is engaged in providing companionship services in private homes and who is employed by a third party employer other than the family or household receiving the worker's services is exempt from the minimum wage and overtime requirements under Section 13(a)(15) of the Fair Labor Standards Act. All prior opinions issued by this agency expressing a contrary view, including those of January 6, 1999, and May 20, 1999, are hereby rescinded and withdrawn.

Sincerely,

Tammy D. McCutchen
Administrator

Enclosure