No. 09-3029

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DENEENE D. ERVIN, et al.,
Plaintiffs-Appellants,

v.

OS RESTAURANT SERVICES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Honorable Ronald A. Guzman

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

DEBORAH GREENFIELD
Acting Deputy Solicitor

WILLIAM C. LESSER
Acting Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

DEAN A. ROMHILT
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Cases -- continued

Cases -- continued

Cases -- continued

Federal Statutes

State Statutes

Other Authorities

No. 09-3029

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DENEENE D. ERVIN, et al.,
Plaintiffs-Appellants,

v.

OS RESTAURANT SERVICES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Honorable Ronald A. Guzman

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the appellants, several employees who assert federal and state law wage claims on behalf of themselves and other employees. As set forth below, the district court wrongly interpreted the Fair Labor Standards Act ("FLSA" or "Act") and its "opt-in" process for collective actions to be incompatible with certification of the employees' state law wage claims as class actions under Federal Rule of Civil Procedure 23's "opt-out" process.

INTEREST OF THE SECRETARY

The Secretary has a strong interest in the federal courts' interpretation of the FLSA because she administers and enforces the Act. See 29 U.S.C. 204, 211(a), 216(c), 217. Specifically, the district court here, and some district courts elsewhere, have misinterpreted section 16(b) of the FLSA, 29 U.S.C. 216(b), and have wrongly utilized its requirement that employees affirmatively opt in to FLSA collective actions to bar state wage law class actions under Rule 23 in federal courts, contrary to the FLSA's text and purpose. In addition, the Secretary is concerned that, in light of the district court's decision and others like it, employees who bring state wage claims in federal court are choosing not to pursue FLSA collective actions out of fear that doing so will trigger dismissal of their state wage law class claims.[1] Enforcement of the FLSA by private litigants is a vital complement to the Secretary's enforcement of the Act and should not be undermined by a misinterpretation of the Act itself.

[1] For example, in Barragan v. Evanger's Dog & Cat Food Co., 259 F.R.D. 330, 335-36 (N.D. Ill. 2009), a Northern District of Illinois case, the employees sought to certify a Rule 23 class of state wage law claims and expressly stated in their motion that they would not pursue an FLSA collective action; the court rejected the employer's incompatibility argument and certified the Rule 23 class action because, in part, the employees did not seek certification of an FLSA collective action.

STATEMENT OF THE ISSUE

Whether the opt-in process for collective actions under section 16(b) of the FLSA, 29 U.S.C. 216(b), is incompatible with, and precludes certification in the same federal lawsuit of, an opt-out class action under Federal Rule of Civil Procedure 23 involving state law claims analogous to FLSA claims.

STATEMENT OF THE CASE

1. The appellants sued appellee OS Restaurant Services, Inc. ("Outback") on behalf of themselves and other employees for violations of the FLSA, the Illinois Minimum Wage Law ("IMWL"), and the Illinois Wage Payment and Collection Act ("IWPCA"). See Appellants' Brief, 2. They sought to represent a class of employees who were treated by Outback as "tipped employees" for purposes of applicable wage laws. See id. at 2-3. Specifically, the employees allege that they do not qualify as tipped employees and that Outback's wage payments to them therefore violated the minimum wage and overtime provisions of the FLSA and the IMWL. See id. They also allege that Outback altered tipped employees' time entries, resulting in the employees not being paid for all hours worked in violation of the IWPCA. See id. at 2-5. The employees moved for certification of an FLSA collective action pursuant to section

16(b) and for certification of their IMWL and IWPCA claims as class actions pursuant to Rule 23. See id. at 3.

2. The employees' motion was referred to a magistrate judge, who recommended that the FLSA collective action be conditionally certified but that the state law claims not be certified as class actions. See Ervin v. OS Restaurant Servs., Inc., No. 08 C 1091, 2009 WL 1904544, at *1 (N.D. Ill. July 1, 2009). The district court, adopting the magistrate's recommendation, held that the employees failed to show that a class action was "superior" to other available methods for fairly and efficiently adjudicating the case, as required by Rule 23(b). See id. at *2-3.[2] It specifically compared section 16(b)'s opt-in collective action process to the opt-out nature of Rule 23 class actions, and concluded that the difference between the opt-in and opt-out requirements "would create a scenario in which 'the Rule 23 class would likely dwarf the FLSA class, making the state law claims dominate the federal suit.'" Id. at *2 (quoting Riddle v. Nat'l Sec. Agency, Inc., No. 05 C

[2] The magistrate judge's report and recommendation, which the district court adopted in its entirety, held that four out of five of the employees' class claims satisfied Rule 23's other requirements. See Report and Recommendation of Magistrate Judge Morton Denlow ("Magistrate's Report"), at 8-25 (Appellants' Short Appendix, at 17-34). In other words, most of the class claims would have been certified under Rule 23 but for their perceived incompatibility with section 16(b).

5880, 2007 WL 2746597, at *3 (N.D. Ill. Sept. 13, 2007)).[3] The district court further asserted that "[t]his result would undermine Congress' intent in enacting the FLSA's opt-in requirement by letting plaintiffs into federal court through the state law wage claims, even when plaintiffs did not take action to get there." Id. (citing Riddle, 2007 WL 2746597, at *3). The district court thus concluded that the "clear incompatibility" between section 16(b) and Rule 23 precluded certification of the state law wage claims because Rule 23(b)(3)'s superiority requirement could not be met. See id. at *2-3.[4]

[3] The same district court presided in Ervin and Riddle.

[4] The district court acknowledged that there was a split among the judges within the Northern District of Illinois on the issue whether FLSA collective actions are incompatible with Rule 23 class actions. See Ervin, 2009 WL 1904544, at *2. Indeed, there is a split on this issue among the district court judges throughout this Circuit. Compare, e.g., Musch v. Domtar Indus., Inc., 252 F.R.D. 456, 458-62 (W.D. Wis. 2008) (certifying FLSA collective action and Rule 23 class of state wage claims); Jonites v. Exelon Corp., No. 05 C 4234, 2006 WL 2873198, at *2-6 (N.D. Ill. Oct. 4, 2006) (certifying FLSA collective action and Rule 23 class of IMWL and IWPCA claims); and Ladegaard v. Hard Rock Concrete Cutters, Inc., No. 00 C 5755, 2000 WL 1774091, at *7 (N.D. Ill. Dec. 1, 2000) (certifying Rule 23 class of IMWL and IWPCA claims and stating that the "presence of both FLSA and state claims has not prevented courts from certifying the state claims under Rule 23(b)") with Ervin, supra; Riddle, 2007 WL 2746597, at *1-4 (certifying FLSA collective action but denying class certification of IWPCA and other Illinois law claims); and McClain v. Leona's Pizzeria, Inc., 222 F.R.D. 574, 576-78 (N.D. Ill. 2004) (denying class certification of Illinois law claims after already certifying FLSA collective action).

SUMMARY OF ARGUMENT

Private actions by employees under the FLSA and analogous state wage laws brought in the same federal district court -- known as "dual actions" or "hybrid actions" -- are an essential complement to the Secretary's enforcement of the FLSA. Such dual actions are envisioned by Congress and are permissible under the FLSA. The plain text of 28 U.S.C. 1367, providing for federal courts' exercise of supplemental jurisdiction over state law claims, indicates that Congress intended state law claims to go forward with federal law claims when the claims involved are sufficiently related, unless a specified exception applies. Moreover, in enacting the FLSA, Congress did not attempt to fully regulate the payment of employees' wages to the exclusion of state law remedies. In fact, the FLSA makes clear that states and localities may enact wage laws that are broader and more protective than the FLSA. See 29 U.S.C. 218(a).

Neither the text of section 16(b) nor the relevant legislative history precludes certification of state wage law claims as class actions under Rule 23 in the same federal lawsuit as an FLSA collective action. It is true that section 16(b)'s opt-in collective action process is different from Rule

23's opt-out process,[5] but that difference does not lead to the result that they are incompatible. Congress enacted section 16(b)'s opt-in process to limit lawsuits under the FLSA in response to a wave of particular FLSA lawsuits over 60 years ago, and not with any intent to affect or prohibit class certification of state law wage claims under Rule 23. The district court here and the other district courts that have found incompatibility between section 16(b) and Rule 23, which is the minority view, have failed to articulate a persuasive basis for that conclusion. Indeed, as one court aptly stated, the assertion of incompatibility between section 16(b) and Rule 23 is "an imaginary legal doctrine." Westerfield v. Washington Mut. Bank, No. 06-CV-2817, 2007 WL 2162989, at *2 (E.D.N.Y. July 26, 2007). There is "no rule of law that provides that [the court] must dismiss state class allegations based on 'incompatibility' with parallel federal claims." Perkins v. Southern New England Tel. Co., No. 3:07-cv-967, 2009 WL 350604, at *3 (D. Conn. Feb. 12, 2009).

Although the Secretary does not take a position on the ultimate issue whether the classes in this case should be certified under Rule 23, it is imperative that the district court here, and federal courts elsewhere, properly interpret the

[5] Rule 23 provides that all class members are bound by any judgment affecting the class unless they "opt out." See Fed. R. Civ. P. 23(c)(2)(B).

FLSA as they conduct their Rule 23 analysis, and not misuse the FLSA to bar certification of otherwise valid classes of state law wage claims.[6]

ARGUMENT

THE DISTRICT COURT ERRED BY DENYING CLASS CERTIFICATION OF THE EMPLOYEES' ILLINOIS WAGE CLAIMS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23 ON THE GROUND THAT THE FLSA'S OPT-IN PROCEDURE FOR COLLECTIVE ACTIONS UNDER SECTION 16(b) IS INCOMPATIBLE WITH CERTIFICATION IN THE SAME FEDERAL LAWSUIT OF A RULE 23 OPT-OUT CLASS ACTION OF ANALOGOUS STATE LAW CLAIMS

1. As a threshold matter, 28 U.S.C. 1367 reflects a strong presumption by Congress in favor of having related federal and state law claims proceed together in one federal court lawsuit. Specifically, a federal court "shall have supplemental jurisdiction" over all state law claims that are "so related" to the federal claims over which the court has original jurisdiction "that they form part of the same case or controversy under Article III of the U.S. Constitution," unless an enumerated exception applies. 28 U.S.C. 1367(a).[7]

---

[6] Although the district court here addressed the issue of incompatibility between section 16(b) and Rule 23 in the context of deciding a motion for class certification, many other federal courts have addressed this issue in the context of deciding whether to exercise supplemental jurisdiction over state wage law class claims pursuant to 28 U.S.C. 1367. State wage law class claims are not incompatible with an FLSA collective action, whether analyzed under Rule 23 or 28 U.S.C. 1367.

[7] These few exceptions to supplemental jurisdiction are unlikely to apply in actions asserting FLSA and state law wage claims. The exception at 28 U.S.C. 1367(a) states that a court shall not have supplemental jurisdiction if a federal statute expressly so

Federal and state law claims are sufficiently related when they "derive from a common nucleus of operative facts." Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995). A "loose factual connection between the claims is generally sufficient." Id. This Court has recognized that the sweep of supplemental jurisdiction is expansive, stating that 28 U.S.C. 1367 "confers supplemental jurisdiction to the limits Article III of the Constitution permits." Id.; see Baer v. First Options of Chicago, Inc., 72 F.3d 1294, 1299 (7th Cir. 1995) (28 U.S.C 1367's language clearly authorizes supplemental jurisdiction to full constitutional limit).

By denying Rule 23 class certification of the state law wage claims, the district court ignored Congress's clear presumption in 28 U.S.C. 1367 for related federal and state law claims to proceed in one federal court action. This presumption in favor of dual actions generally belies the assertion that the FLSA and state wage laws are incompatible.

2. The FLSA was enacted to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of

---

provides; the FLSA, however, contains no such provision, express or otherwise. See 29 U.S.C. 201, et seq. The exceptions in 28 U.S.C. 1367(b) apply only in actions based solely on diversity jurisdiction, which is not the case in FLSA actions. The discretionary exceptions in 28 U.S.C. 1367(c) are fact-specific and are addressed infra.

workers." 29 U.S.C. 202(a). Among other protections, it requires covered employers to pay non-exempt employees a minimum wage for each hour worked and a wage at least one and one-half times the regular rate for each hour worked over 40 in a workweek. See 29 U.S.C. 206, 207. Enactment of the FLSA, however, was not an attempt by Congress to fully regulate the payment of employees' wages. Indeed, the FLSA's "savings clause" makes clear that states and localities may enact wage laws that are broader and more protective than the FLSA. See 29 U.S.C. 218(a) (reprinted in Addendum 1 to this Brief); see also Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1151 (9th Cir. 2000) (savings clause demonstrates that FLSA is not exclusive remedy for wage payment and Congress did not intend to occupy the entire field); Barragan, 259 F.R.D. at 335-36 (FLSA does not preempt field of wage and hour regulation and does not prohibit IMWL claims). "The intent of § 218(a) is to leave undisturbed 'the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards.'" Lehman v. Legg Mason, Inc., 532 F. Supp.2d 726, 731 (M.D. Pa. 2007) (quoting Pac. Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1421 (9th Cir. 1990)).[8] The district court

[8] Consistent with section 18(a), the IMWL, for example, contains minimum wage and overtime protections similar to those in the FLSA, but also imposes a higher minimum wage. See 820 Ill. Comp. Stat. 105/4, 105/4a. The IWPCA defines wages and requires

failed to take proper account of the "savings clause" in its analysis, thereby denying the employees possible additional remedies under state wage laws.

3. Section 16(b) provides that one or more employees may bring an action under the FLSA's minimum wage, overtime, or anti-retaliation provisions "in behalf of himself or themselves and other employees similarly situated," and that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party." 29 U.S.C. 216(b) (reprinted in Addendum 2 to this Brief). This Court has recognized that section 16(b) –- not Rule 23 –- governs FLSA collective actions. See, e.g., Vanskike v. Peters, 974 F.2d 806, 812-13 (7th Cir. 1992).

Section 16(b) applies only to three specific FLSA actions: minimum wage, overtime, and anti-retaliation claims; no state or other claims are mentioned at all. See 29 U.S.C. 216(b). Further, section 16(b) plainly authorizes employees to bring claims on behalf of themselves and others who are similarly situated for violations of those FLSA provisions specifically identified in section 16(b). See id. Likewise, its opt-in requirement applies only to "any such action" –- in other words, again, only to actions brought for violations of those FLSA

---

them to be paid periodically within certain time periods. See 820 Ill. Comp. Stat. 115/2, 115/3, 115/4.

provisions specifically identified in section 16(b). See id. There is nothing in the text of section 16(b) regarding state wage law claims -- whether they may be brought in federal court, whether federal courts may exercise supplemental jurisdiction over them, or whether federal courts may certify them as class actions. See id. Thus, by its plain terms, section 16(b)'s opt-in provision does not apply to state wage law claims.

Numerous federal courts have acknowledged the plain meaning of section 16(b)'s text. For example, in McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 304, 308 (D. Mass. 2004), the district court stated that "[b]y enacting an opt-in regime for the FLSA, Congress sought to limit the scope of collective actions under federal law. I should not, however, infer from that restriction on federal remedies a concomitant restriction on state remedies. Nothing in the statute limits available remedies under state law." (Emphases in original; internal citations omitted.) Further, in Klein v. Ryan Beck Holdings, Inc., No. 06 Civ. 3460, 2007 WL 2059828, at *5-6 (S.D.N.Y. July 20, 2007), the district court stated that "the FLSA's collective action mandate applies only to actions brought pursuant to the FLSA –- not to employment law actions generally. The FLSA contains no provision preempting other methods of prosecuting state law employment litigation. . . . The FLSA guarantees merely that all collective actions brought pursuant to it be affirmatively

opted into. It does not guarantee that employers will never face traditional class actions pursuant to state employment law." (Emphases in original; internal citations omitted.) And, in Lehman, 532 F. Supp.2d at 731, the district court stated that "Congress acted only with respect to federal claims, however, and did not preempt or limit the remedies available through state law. . . . This court is persuaded that nothing in the plain text of the FLSA reflects Congressional intent to limit the substantive remedies available to an employee under state law, nor to limit the procedural mechanism by which such a remedy may be pursued." (Emphasis in original.)

4. Moreover, the legislative history of section 16(b)'s opt-in provision provides no support for arguing that it was intended to preclude state wage law class actions in federal court. Section 16(b) originally permitted an employee to bring a collective action on behalf of similarly situated employees, or to "designate an agent or representative" to bring a representative action on behalf of similarly situated employees. See 52 Stat. 1060, 1069 (1938). It was silent on whether employees who were not named plaintiffs were required to affirmatively opt in to a collective or representative action. See id.

The opt-in provision was added in 1947 by the Portal-to-Portal Act. The impetus for the Portal-to-Portal Act was the

Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), in which it ruled that time spent by employees performing certain preliminary activities was time worked and thus compensable under the FLSA. See id. at 690-93. Influenced by what it perceived as a wave of employee lawsuits following Mt. Clemens and its concern that these lawsuits were a threat to the financial well-being of U.S. industry, Congress enacted the Portal-to-Portal Act to restrict FLSA lawsuits. See Portal-to-Portal Act, § 1, 61 Stat. 84, 84-85 (1947). The Portal-to-Portal Act eliminated representative actions (actions by non-employees designated by the employees); collective actions (actions by employees on behalf of themselves and other employees) remained permissible, although they were thereafter subject to an express opt-in requirement. See id., § 5, 61 Stat. at 87 (reprinted in Addendum 3 to this Brief). The plain text of the Portal-to-Portal Act makes clear that the opt-in requirement "shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938." Id. Moreover, the reports issued by Congress in connection with its enactment of the Portal-to-Portal Act contain no suggestion of any intent to prevent class certification of, or the exercise of supplemental jurisdiction over, state wage law claims. See Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes, H.R. Rep. 80-71 (1947); Exempting Employers from

Liability for Portal-to-Portal Wages in Certain Cases, S. Rep. No. 80-49 (1947); Portal-to-Portal Act of 1947, H.R. Conf. Rep. No. 80-326 (1947).

In fact, the absence of any basis for concluding that Congress's enactment of the opt-in provision for FLSA collective actions was somehow a choice against, or a relegation of, the opt-out process of Rule 23 is further demonstrated by the fact that, at the time, Rule 23 did not even contain an opt-out provision; the modern opt-out version of Rule 23 was not enacted until 1966 -- almost 20 years after the passage of the Portal-to-Portal Act. See Marc Linder, Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947, 39 Buff. L. Rev. 53, 174-75 (1991).[9] Significantly, the Advisory Committee Notes accompanying the 1966 amendments to Rule 23 state that "[t]he present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Fed. R. Civ. Proc. 23 advisory committee notes (1966). The fact that the Rule 23 amendments specifically considered the FLSA's opt-in process and made no effort to reconcile it and Rule 23's opt-out process further confirms that FLSA collective actions and Rule 23 class

[9] "Addition of the opt-in rule brought FLSA section 216(b) into conformity with the Rule 23 opt-in requirement in effect at the time, and made explicit what courts at the time had already [inferred] from the statute." Andrew C. Brunsden, Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts, 29 Berkeley J. Emp. & Lab. L. 269, 280 (2008).

actions are compatible. Thus, the district court's conclusion that certifying the state law wage claims as class actions "would undermine Congress' intent in enacting the FLSA's opt-in requirement by letting plaintiffs into federal court through the state law wage claims, even when plaintiffs did not take action to get there," Ervin, 2009 WL 1904544, at *2, was in error.

To conclude that there is "clear incompatibility" between section 16(b) and Rule 23, the district court cited the Supreme Court's observation in Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165 (1989), that after the addition of the opt-in requirement, "claims were limited to plaintiffs who 'asserted claims in their own right,' thereby 'freeing employers of the burden of representative actions.'" Ervin, 2009 WL 1904544, at *2 (quoting Hoffman-La Roche, 493 U.S. at 173). But this case does not support the district court's conclusion. In Hoffman-La Roche, the Supreme Court held that courts have the discretion to facilitate notice to potential plaintiffs in FLSA collective actions; state law claims were not at issue. See 493 U.S. at 170-74. The Supreme Court's full discussion of the addition of the opt-in provision to section 16(b) is instructive:

> In 1938, Congress gave employees and their "representatives" the right to bring actions to recover amounts due under the FLSA. No written consent requirement of joinder was specified by the statute. In enacting the Portal-to-Portal Act of 1947, Congress made certain changes in these procedures. In part responding to excessive

> litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added. The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions. Congress left intact the "similarly situated" language providing for collective actions, such as this one. The broad remedial goal of the statute should be enforced to the full extent of its terms.

Id. at 173 (internal citations omitted). The Supreme Court thus reaffirmed the "broad remedial" purpose of the FLSA and made clear that the opt-in requirement applies only to "private FLSA plaintiffs." Id.

The decision in Riddle (which formed the basis of the decision in Ervin) also failed to provide any compelling support for the conclusion that Congress intended the opt-in provision to bar state wage law class actions from federal court. The district court in Riddle stated that "Congress designed section 216(b)'s opt-in language to 'prohibit what precisely is advanced under Rule 23 -- a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members.'" 2007 WL 2746597, at *8 (quoting Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1248 (11th Cir. 2003)).[10] As discussed supra, however, Rule 23 did not contain

[10] Cameron-Grant did not involve state wage laws in any way; instead, the court held that a district court's denial of a

an opt-out provision in 1947 (when the Portal-to-Portal Act with its opt-in provision was enacted), and in any event, enactment of the opt-in provision had nothing to do with Rule 23.

5. The district court did not articulate why the procedural difference between section 16(b) and Rule 23 necessarily leads to the conclusion that they are incompatible. Its suggestion that the two provisions are incompatible when brought together in a lawsuit initiated in federal court, but not in a lawsuit initiated in state court and then removed to federal court (see Ervin, 2009 WL 1904544, at *2), undermines its conclusion of incompatibility. If the two provisions are truly incompatible, then it should make no difference whether the dual action was commenced in federal or state court. Moreover, in addition to ignoring 28 U.S.C. 1367's strong presumption in favor of dual actions generally, the district court also did not consider the judicial economy of having similar federal and state claims litigated in one forum. See, e.g., O'Brien v. Encotech Constr. Servs., Inc., 203 F.R.D. 346, 352 (N.D. Ill. 2001) (lawsuits in separate courts would be "inefficient" and "precious judicial resources would be wasted on duplicative lawsuits"); Ansoumana v. Gristede's Operating

---

motion for certification of an FLSA collective action, once the named plaintiffs had settled and dismissed their cases, may not be reviewed on appeal in light of section 16(b)'s opt-in requirement and the fact that the named plaintiffs' claims were moot. See 347 F.3d at 1247-48.

Corp., 201 F.R.D. 81, 89 (S.D.N.Y. 2001) (these common questions are best litigated in single forum and separate actions would be wasteful and inefficient given existing proceeding); Ladegaard, 2000 WL 1774091, at *7 (to further judicial economy, it is desirable to avoid companion lawsuits in federal and state courts and to instead concentrate litigation in one forum).

Further, the magistrate judge in Ervin, as well as several courts, have asserted that allowing a dual action creates the possibility for confusion when notice is provided to potential class members. See, e.g., Magistrate's Report, at 28 (Appellants' Short Appendix, at 37); Riddle, 2007 WL 2746597, at *4 (notice simultaneously detailing opt-in and opt-out procedures creates substantial risk of confusion among class members, although risk alone would not preclude Rule 23 class certification); De La Fuente v. FPM Ipsen Heat Treating, Inc., No. 02 C 50188, 2002 WL 31819226, at *2 (N.D. Ill. Dec. 16, 2002) ("it seems an inherently difficult task" to provide notice to class members describing opt-in and opt-out choices). This potential for "risk," however, has been soundly rejected by district courts in the Seventh Circuit and elsewhere that have actually certified dual actions. Thus, for example, the district court in O'Brien, 203 F.R.D. at 352, concluded that such joint notices have been drafted in the past in other courts in the district, and there is "no reason for the drafting of

such notice to be a barrier to class certification." And, in Ladegaard, 2000 WL 1774091, at *7, the district court stated that any suggestion of confusion was not a major obstacle because joint notices have been drafted under the supervision of other courts in the district in the past. See Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 373-74 (S.D.N.Y. 2007) (court "has had no difficulty administering such cases in the past"); Cryer v. InterSolutions, Inc., No. 06-2032, 2007 WL 1191928, at *3 (D.D.C. Apr. 20, 2007) (rejecting "confusion" argument, and stating that "there is even greater cause for concern about confusion of class members if the state law claims proceed in a separate court and class members thereby receive class action notices from two different courts").

6. The weight of the caselaw supports the conclusion that there is no incompatibility between a section 16(b) opt-in collective action and a Rule 23 opt-out state wage law class action. The only federal appellate decision ruling directly on this issue is Lindsay v. Gov't Employees Ins. Co., 448 F.3d 416, 421-25 (D.C. Cir. 2006), in which the D.C. Circuit reversed the district court's decision that supplemental jurisdiction should not be exercised over the state wage law class claims. The D.C. Circuit stated in Lindsay stated that, under 28 U.S.C. 1367(a), supplemental jurisdiction over state law claims that are sufficiently related to the underlying federal claims is

mandatory unless a federal statute expressly provides otherwise or the exceptions in 28 U.S.C. 1367(b) or (c) apply. See id. at 421. According to the court, neither the text of section 16(b) nor the intent of the opt-in provision prohibited the exercise of supplemental jurisdiction over state law wage claims. See id. at 421-22. While acknowledging the difference between section 16(b) and Rule 23, the court rejected the argument that the difference precluded the exercise of supplemental jurisdiction over state law class allegations -- "[W]e doubt that a mere procedural difference can curtail section 1367's jurisdictional sweep." Id. at 424 (emphases in original).

The court of appeals in Lindsay then analyzed the four bases on which a court may decline supplemental jurisdiction. See 448 F.3d at 424-25 (citing 28 U.S.C. 1367(c) (reprinted in Addendum 4 to this Brief)). It concluded that the first three factors in 28 U.S.C. 1367(c) -- claim raises a novel or complex issue of state law, claim substantially predominates over claim over which the district court has original jurisdiction, the district court has dismissed all claims over which it has original jurisdiction -- were not present and specifically noted that "[p]redominance under [28 U.S.C.] 1367(c)(2) relates to the type of claim and here the state law claims essentially replicate the FLSA claims – they plainly do not predominate." Id. The D.C. Circuit permitted the district court to consider

on remand whether to decline to exercise supplemental jurisdiction under 28 U.S.C. 1367(c)(4), which provides that such jurisdiction may be declined in exceptional circumstances, when there are compelling reasons for doing so; the court, however, expressly prohibited the district court from relying on the difference between section 16(b)'s opt-in provision and Rule 23's opt-out provision to conclude that there is a compelling reason to decline jurisdiction. See id. at 425.[11]

One other federal appellate decision -- De Asencio v. Tyson Foods, Inc., 342 F.3d 301 (3d Cir. 2003) -- addresses the incompatibility issue, but does not base its decision on it. The Third Circuit in De Asencio discussed the history of section 16(b)'s opt-in provision, described the distinction between opt-in and opt-out classes as "crucial," and concluded that "Congress chose to limit the scope of representative actions for overtime pay and minimum wage violations." 342 F.3d at 310-11. The court failed to explain, however, its basis for concluding that Congress made that "choice" for anything other than FLSA actions. As explained supra, Rule 23 did not contain an opt-out provision when the Portal-to-Portal Act added the opt-in

[11] On remand, the district court exercised supplemental jurisdiction over the state wage law claims and certified them as a class under Rule 23. See Lindsay v. Gov't Employees Ins. Co., 251 F.R.D. 51, 54-57 (D.D.C. 2008).

provision to section 16(b), so there was no opt-out provision for Congress to choose against.

More importantly, the Third Circuit in De Asencio ultimately held that the district court should have declined supplemental jurisdiction over the state wage law class claims on the ground that the state law claims would predominate over the FLSA claims, see id. at 309-12 (citing 28 U.S.C. 1367(c)(2)), not on incompatibility grounds. It based this holding on two findings specific to the case before it. First, the state law at issue was not a minimum wage and overtime statute analogous to the FLSA but, instead, was a wage payment and collection statute that provides a remedy when employers breach a contract to pay earned wages. See id. at 309-10. The employees asserted that the "contract" breached by the employer was an implied oral contract, and Pennsylvania courts had never addressed whether such a claim was permissible. See id. The state law claim therefore, according to the court in De Asencio, presented novel legal issues and would require more proof and testimony as compared to the "more straightforward" FLSA claim. See id.[12] Second, although the Third Circuit in De Asencio acknowledged that the "predominance" inquiry under 28 U.S.C. 1367(c)(2) goes to the types of claims involved as opposed to

[12] There is no indication that the IMWL or IWPCA claims in Ervin present novel legal issues.

the number of claimants,[13] it was concerned that the large size of the Rule 23 class as compared to the FLSA class would substantially transform the case "by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog." Id. at 311.[14]

Thus, although the court in De Asencio incorrectly described the intent behind section 16(b)'s enactment, it did not hold that FLSA collective actions are incompatible with Rule 23 class actions. Indeed, some district courts within the Third Circuit since De Asencio have rejected the incompatibility argument and have allowed dual actions to proceed. Thus, in Lehman, 532 F. Supp.2d at 731, the district court stated that "[t]his court is persuaded that nothing in the plain text of the FLSA reflects Congressional intent to limit the substantive remedies available to an employee under state law, nor to limit the procedural mechanism by which such a remedy may be pursued." See Di Nardo v. Ned Stevens Gutter Cleaning & Installation,

[13] 28 U.S.C. 1367(c)(2) plainly directs a court to analyze whether the state "claim substantially predominates" over the federal "claim" and not to compare the number of state claimants to the number of federal claimants. See Lindsay, 448 F.3d at 425 (predominance under 1367(c)(2) relates to type of claim).

[14] The FLSA collective action had already been certified, and 447 persons had opted in to it, while the proposed Rule 23 class was estimated to consist of approximately 4,100 persons. See De Asencio, 342 F.3d at 305. This concern, even if valid, does not seem to be present to the same degree in Ervin, where the Rule 23 class is estimated to consist of approximately only 180 persons, of whom approximately 30 (including the original plaintiffs) have opted in to the FLSA collective action to date.

Inc., No. 07-5529, 2008 WL 565765, at *1-2 (D.N.J. Feb. 28, 2008) (denying motion to dismiss state wage law class claims on inherent incompatibility grounds); Freeman v. Hoffman-La Roche, Inc., No. 07-1503, 2007 WL 4440875, at *2-3 (D.N.J. Dec. 18, 2007) (rejecting argument that inherent incompatibility requires dismissal of state wage law class claims and deferring supplemental jurisdiction analysis until class certification is sought).

Among the district courts in circuits other than the Seventh and the Third, the clear majority has rejected the incompatibility argument. Thus, in Esparza v. Two Jinn, Inc., No. SACV 09-0099, 2009 WL 2912657, at *3 (C.D. Cal. Sept. 9, 2009), the district court denied the employer's motion for judgment on the pleadings, concluding that an FLSA opt-in collective action and a state wage law class opt-out action can coexist. In Perkins, 2009 WL 350604, at *3, the district court denied the employer's motion to dismiss/strike state law class actions, stating that an FLSA collective action and a Rule 23 opt-out class action may coexist -- the court "knows of no rule of law that provides that it must dismiss state class allegations based on 'incompatibility' with parallel federal claims." Further, in Osby v. Citigroup, Inc., No. 07-cv-06085, 2008 WL 2074102, at *2-3 (W.D. Mo. May 14, 2008), the district court rejected an argument that a Rule 23 class action conflicts

with a section 16(b) collective action, stating that there is no reason that they cannot be fairly adjudicated together. Moreover, in Salazar v. Agriprocessors, Inc., 527 F. Supp.2d 873, 880-86 (N.D. Iowa 2007), the district court denied the employer's motion to dismiss the state law class allegations; rather, it exercised supplemental jurisdiction pursuant to 28 U.S.C. 1367 over the state law class allegations because the intent behind section 16(b)'s opt-in provision did not require the court to refuse to exercise supplemental jurisdiction over state law class allegations. And, in Westerfield, 2007 WL 2162989, at *2, the district court rejected the incompatibility argument, stating that there is no legal doctrine that would permit the court to dismiss state law claims on the ground that they are incompatible with federal claims. See Bamonte v. City of Mesa, No. CV 06-01860, 2007 WL 2022011, at *2-5 (D. Ariz. July 10, 2007) (exercising supplemental jurisdiction pursuant to 28 U.S.C. 1367 over state wage law class allegations notwithstanding incongruity between section 16(b)'s opt-in provision and Rule 23's opt-out provision); Iglesias-Mendoza, 239 F.R.D. at 367-75 (exercising supplemental jurisdiction pursuant to 28 U.S.C. 1367 over state law class claims and certifying both an FLSA collective action and a Rule 23 state law class action); Frank v. Gold'n Plump Poultry, Inc., No. Civ. 041018, 2005 WL 2240336, at *5 (D. Minn. Sept. 14, 2005)

(rejecting argument that class certification of state law wage claims would undermine Congress's intent behind section 16(b); "courts routinely certify FLSA opt-in classes and Rule 23 opt-out classes in the same action"); Chavez v. IBP, Inc., No. CT-01-5093, 2002 WL 31662302, at *1-2 (E.D. Wash. Oct. 28, 2002) (exercising supplemental jurisdiction pursuant to 28 U.S.C. 1367 over state law class claims, as state law claims do not predominate); Beltran-Benitez v. Sea Safari, Ltd., 180 F. Supp.2d 772, 774 (E.D.N.C. 2001) (rejecting argument that conflict between section 16(b) and Rule 23 mandates dismissal of state law claims).[15]

7. Therefore, this Court should join the D.C. Circuit in Lindsay and the numerous district courts in the Seventh Circuit and elsewhere that have concluded that there is no inherent incompatibility between section 16(b) and Rule 23. Neither the text of section 16(b) nor the relevant legislative history or caselaw supports a conclusion of incompatibility between a

[15] Notwithstanding the weight of authority, a minority of district courts in other circuits have accepted the incompatibility argument. See, e.g., In re Am. Family Mut. Ins. Co. Overtime Pay Litig., 638 F. Supp.2d 1290, 1298-99 (D. Colo. 2009) (dismissing state wage law class allegations; exercising supplemental jurisdiction over them would thwart Congress' intent behind section 16(b)'s opt-in provision); Williams v. Trendwest Resorts, Inc., No. 2:05-CV-0605, 2007 WL 2429149, at *2-4 (D. Nev. Aug. 20, 2007) (dismissing state law class action claims after already certifying FLSA collective action because "class action mechanisms of the FLSA and Rule 23 are incompatible").

section 16(b) opt-in collective action and a Rule 23 opt-out state wage law class action.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision denying class certification of the employees' state law wage claims.

Respectfully submitted,

DEBORAH GREENFIELD
Acting Deputy Solicitor

WILLIAM C. LESSER
Acting Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

_____/s/_____
DEAN A. ROMHILT
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants:

(1) complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because it contains 6,436 words, excluding the parts of the Brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because the Brief has been prepared in a monospaced typeface using Microsoft Office Word 2003 utilizing Courier New 12-point font containing no more than 10.5 characters per inch.

Date: December 23, 2009

_____/s/_____
DEAN A. ROMHILT
Attorney

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants was served this 23rd day of December, 2009:

Via e-mail and pre-paid overnight delivery on each of the following:

Douglas M. Werman
Werman Law Office, P.C.
77 West Washington Street
Suite 1402
Chicago, IL 60602
dwerman@flsalaw.com

Jane M. McFetridge
Jackson Lewis LLP
150 North Michigan Avenue
Suite 2500
Chicago, IL 60601
mcfetrij@jacksonlewis.com

Jamie G. Sypulski
Law Office of Jamie G. Sypulski
122 South Michigan Ave.
Suite 1720
Chicago, IL 60603
jsypulski@sbcglobal.net

Paul DeCamp
Jackson Lewis LLP
10701 Parkridge Blvd.
Suite 300
Reston, VA 20191
decampp@jacksonlewis.com

And via regular U.S. mail, postage pre-paid, on the following:

Kenneth J. Sugarman
Rudy, Exelrod, Zieff & Lowe, LLP
351 California Street
Suite 700
San Francisco, CA 94104

_____/s/_____
DEAN A. ROMHILT
Attorney

ADDENDUM

ADDENDUM 1

29 U.S.C. 218(a), FLSA's Savings Clause

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

(emphasis added)

ADDENDUM 2

29 U.S.C. 216(b), FLSA Right of Action, Collective Action, and Opt-In Process

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

(emphasis added)

ADDENDUM 3

Section 5 of the Portal-to-Portal Act, 61 Stat. 84, 87 (1947)

(a) The second sentence of section 16(b) of the Fair Labor Standards Act of 1938, as amended, is amended to read as follows: "Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

(b) The amendment made by subsection (a) of this section shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938, as amended, on or after the date of the enactment of this Act.

(emphasis added)

ADDENDUM 4

28 U.S.C. 1367(c), Supplemental Jurisdiction Exceptions

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(emphases added)