No. 06-1259

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LONG JOHN SILVER'S RESTAURANTS, INC., et al.,
Plaintiffs-Appellants
v.
ERIN COLE, et al.,
Defendants-Appellees

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases -- continued: Page

Cases -- continued: Page

Statutes:

Statutes -- continued: Page

Miscellaneous: Page

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE SECRETARY OF LABOR

The issue the Secretary will address in this case is whether an arbitrator may refuse to apply the Fair Labor Standards Act's (FLSA's) written consent requirement, which provides that an employee must "consent in writing" before being made a party to an FLSA action brought by other employees, 29 U.S.C. 216(b), and also governs the tolling of the applicable statute of limitations, 29 U.S.C. 255, 256. The Secretary of Labor has a strong interest in ensuring that statutory federal rights established by the FLSA are applied in arbitration because the Secretary administers the FLSA, see 29 U.S.C. 204, 211, and protects the rights of employees by, among other things, suing in court to recover the payment of unpaid

minimum wage and overtime compensation, 29 U.S.C. 216(c), and to restrain violations of the statute, 29 U.S.C. 217.

STATEMENT OF THE ISSUES

The Secretary will address only the following question: Whether an arbitrator may refuse to apply the FLSA's written consent requirement.

STATEMENT OF THE CASE

The appellees in this case are former employees of appellant Long John Silver's Restaurants. In December 2003, they initiated a collective arbitration proceeding before the American Arbitration Association (AAA) in which they alleged that Long John Silver's had violated the FLSA by failing to pay them overtime wages. On June 15, 2004, an arbitrator decided, in a Clause Construction Award, that the parties' arbitration agreement permitted the former employees to bring a class or collective action on behalf of themselves and similarly situated employees. Long John Silver's filed a motion in district court to vacate that award. On September 15, 2005, the district court dismissed Long John Silver's action for lack of subject matter jurisdiction. *Cole v. Long John Silver's Rests., Inc.*, 388 F. Supp. 2d 644 (D. S.C. 2005). Long John Silver's appeal from the district court's decision is pending in No. 06-1050 (4th Cir.).

On September 19, 2005, the arbitrator decided, in a Class Determination Partial Final Award, to certify an "opt-out" class

pursuant to Rule 4 of the AAA's Supplementary Rules for Class Arbitrations. Long John Silver's filed a motion in district court to vacate that award. On January 20, 2006, the district court denied Long John Silver's motion. *Long John Silver's Rests., Inc. v. Cole*, 409 F. Supp. 2d 682 (D. S.C. 2006). The instant case is Long John Silver's appeal from the district court's certification of an "opt-out" class.

STATEMENT OF FACTS

A. The FLSA's requirements

The FLSA, 29 U.S.C. 201-219, generally requires employers to pay covered employees a minimum wage and one and one-half times their regular rate of pay for overtime work. 29 U.S.C. 206, 207. Employees may enforce those requirements through private lawsuits, but the right of an employee to do so terminates if the Department of Labor brings a suit to recover the payment of unpaid minimum wages and overtime compensation or a suit to restrain violations of the statute. 29 U.S.C. 216(b), (c), 217. An employee action may be maintained

> 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.

29 U.S.C. 216(b) (emphasis added). Courts of appeals have construed this "consent in writing" requirement to be

irreconcilable with the "opt-out" rules for class actions under Fed. R. Civ. P. 23. *See, e.g., Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004); *King v. General Elec. Co.*, 960 F.2d 617, 620 (7th Cir. 1992); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975); *Lachapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975).

The written consent requirement also affects the tolling of the FLSA's statute of limitations. An action to recover unpaid minimum wages or overtime, whether brought by the Secretary or by an employee, must be commenced within two years after the cause of action accrues, except that a cause of action arising out of a willful violation may be commenced within three years. 29 U.S.C. 255(a). An action is "commenced" when the complaint is filed, except that in a collective action under 29 U.S.C. 216(b), the action is commenced with respect to a particular employee when the employee is either named as a plaintiff or has filed his or her written consent. 29 U.S.C. 256. Accordingly, filing a collective action under 29 U.S.C. 216(b) does not toll the applicable statute of limitations for employees until they either join the action as named plaintiffs or consent in writing to become a party. *See Lee v. Vance Executive Prot., Inc.*, 7 Fed. Appx. 160, 167 (4th Cir. 2001) ("consents not filed with the complaint do not relate back") (copy attached). In contrast, the filing of a class complaint

under Fed. R. Civ. P. 23 tolls the applicable statute of limitations for unnamed class members.[1] *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-553 (1974).

B. The Arbitrator's award

In his Class Determination Partial Final Award (Award), the arbitrator certified an "opt-out" class that included all employees who worked for Long John Silver's in the job classifications of salaried restaurant managers from December 17, 1998 through August 22, 2004. Award at 1, 24. The arbitrator reached this conclusion despite recognizing that an "opt-out" class was "irreconcilable" with the "opt-in" procedures of the FLSA. *Id.* at 15.

The arbitrator also recognized that "'by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum.'" Award at 7 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). The arbitrator did not apply that principle, however, despite recognizing that applying the FLSA's "opt-in" provision and more

[1] Applying Fed. R. Civ. P. 23 to an FLSA class complaint would therefore mean that the relevant two- or three-year period of alleged unpaid wages would be the period immediately preceding the bringing of the suit by the original plaintiffs and would be the same for all class members, including those absentee class members who have not affirmatively consented to be in the class. Under the FLSA's written consent (or "opt in") requirement, however, the two- or three-year period is the period immediately preceding the date written consent is filed, which may be later than the date the complaint is filed.

restrictive statute of limitations would substantially limit the size of the class subject to arbitration. Award at 6. In the arbitrator's view, "there is no evidence of any congressional intent which would impose an opt-in provision upon a class action being privately arbitrated, where the consequence would be to limit the population of intended beneficiaries of the statute." *Id.* at 7. In support of his decision, the arbitrator described opt-in provisions as "disfavored" and stated that "[t]he salutary objective[s] of the FLSA are advanced by the opt-out procedure" -- even though Congress deliberately amended the FLSA in 1947 to insert an opt-in procedure. *Id.* at 8.[2]

C. The district court's decision

The district court recognized its "clearly established" authority to vacate actions by an arbitrator that are in manifest disregard of the law, but nevertheless denied Long John Silver's motion to vacate the arbitrator's class certification award. *Long John Silver's*, 409 F. Supp. 2d at 685. The district court stated that it had to exercise its authority "cautiously," because "a 'court's belief that an arbitrator misapplied the law will not

[2] The arbitrator also decided that the parties' agreement to arbitrate incorporated the AAA's Supplementary Rules for Class Arbitration, which include an "opt-out" procedure similar to that of Fed. R. Civ. P. 23, that the class should not be limited to restaurant managers in South Carolina, and that the prerequisites for a class certification were satisfied. Award at 4, 10-24. The Secretary does not address those issues in this brief.

justify vacation of an arbitral award.' * * * Instead, a court may vacate an award only where a party has shown 'that the arbitrator[] [was] aware of the law, understood it correctly, found it applicable to the case before [him], and yet chose to ignore it in propounding [his] decision.'" *Ibid.* (alteration in original) (quoting *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994)). The district court further stated that the law allegedly ignored by the arbitrator must bear "the status of a clearly established governing principle." *Ibid.*

Applying those standards, the district court concluded that the written consent requirement in 29 U.S.C. 216(b) does not qualify as a clearly-established governing principle because the language of the statute requires an employee's written consent to be filed in "court," which, in the district court's view, creates "uncertainty" as to whether the written consent requirement applies in arbitration. *Long John Silver's*, 409 F. Supp. 2d at 686. The district court also noted "the lack of interpretative authority" on that point. *Ibid.*

The district court further concluded that the arbitrator had not disregarded the FLSA. *Long John Silver's*, 409 F. Supp. 2d at 686. Instead, in the court's view, the arbitrator "rendered a reasoned award" that "thoroughly analyzed" the relationship between 29 U.S.C. 216(b) and the arbitration agreement. 409 F. Supp. 2d at 686. "That the Court may have reached a different conclusion -- or

even that the arbitrator may have made a serious error of law -- is of no consequence," the court concluded. *Ibid.* The court found that the arbitrator had not ignored the law because he was faced with substantial conflicting interpretations of the FLSA that could support a decision for either of the parties. *Id.* at 687.

SUMMARY OF ARGUMENT

The arbitrator's certification of an "opt-out" class is irreconcilable with the Fair Labor Standards Act's (FLSA's) written consent requirement. An "opt-out" certification includes employees in a class unless they affirmatively opt out of it, while the written consent requirement provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing." 29 U.S.C. 216(b). An "opt-out" class also tolls the applicable statute of limitations for unnamed potential class members, whereas the written consent requirement prohibits such tolling until prospective plaintiffs in a collective action consent in writing. 29 U.S.C. 255, 256; *Lee v. Vance Executive Prot., Inc.*, 7 Fed. Appx. 160, 167 (4th Cir. 2001).

One of the questions before this Court is whether the written consent requirement is a substantive right that applies in arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (parties do not forgo substantive statutory rights in arbitration). This Court should hold that the written consent requirement is substantive under the "outcome determinative" test

that the Supreme Court uses to distinguish substantive from procedural rights in similar contexts, and so should apply in an arbitration of FLSA claims. Congress's purposes in enacting the written consent requirement also establish that it provides substantive rights. Congress phrased the requirement as a right of employees not to be made parties to actions to which they have not consented in writing, and an employee who did not so consent to an arbitration would have a strong argument that he or she could not be bound by an unfavorable outcome.

The district court erred by finding "uncertainty" as to whether the written consent requirement applies in arbitration. The court found that 29 U.S.C. 216(b) is ambiguous because it requires that written consent forms be filed "in court." The statute's instruction that the written consent be filed in court does not create "uncertainty" about whether the statute's separately stated requirement that written consent must be secured before an employee may be made a party to an FLSA action applies in arbitration. The same section of the FLSA also provides, for example, that a "court" may award attorney's fees to a prevailing employee, and this Court and other courts have treated the right to attorney's fees as a substantive right that applies in arbitration. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 n.1 (4th Cir. 2002); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 299 n.1 (5th Cir. 2004).

ARGUMENT

AN ARBITRATOR CANNOT REFUSE TO APPLY THE FLSA'S WRITTEN CONSENT REQUIREMENT BECAUSE IT IS A SUBSTANTIVE STATUTORY RIGHT THAT APPLIES IN ARBITRATION

The Secretary's primary concern in this case is to establish that the Fair Labor Standards Act's (FLSA's) written consent requirement gives parties substantive rights that, under *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991), an arbitrator must apply in arbitration. See Appellants' Br. 13-15, 28, 30, 37-38 (discussing Department's district court briefs). The district court's decision upholds an arbitrator's explicit refusal to treat the written consent requirement as a substantive right and undercuts the usefulness of arbitration as a forum for resolving FLSA disputes. Accordingly, in resolving this case, this Court should hold that the FLSA's written consent requirement embodies substantive rights that apply in arbitration. This court's review is de novo. *See, e.g., Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 145 (4th Cir. 1993) ("The district court's decision confirming the arbitration award is reviewed *de novo*"); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000) (district court's application of "manifest disregard" standard is reviewed de novo).

A. Arbitrators must apply substantive statutory rights in arbitration

In *Gilmer*, the Supreme Court stated that by agreeing to arbitrate a statutory claim, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." 500 U.S. at 26 (citation and internal quotation marks omitted). Accordingly, courts have concluded that statutory rights cannot be overridden by an arbitration agreement. *See, e.g., Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (Roberts, J.) (parties concede unenforceability of agreement's ban on punitive damages that would be available for racial discrimination under District of Columbia's Human Rights Act); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (agreement banning punitive damages "is unenforceable in a Title VII case"); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (en banc) (various limits on Title VII make-whole remedies are unenforceable).

Those principles apply to the FLSA. As the Eighth Circuit recognized, "the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply." *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824 (2003). An arbitration decision involving an FLSA claim that

manifestly disregards the FLSA should be reversed. *See Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461-1464 (11th Cir. 1997).

B. An "outcome-determinative" test applies in determining when a statutory right is "substantive"

Under the well-established *Erie* doctrine, the Supreme Court has enunciated principles for determining when a right is "substantive" in the context of determining when federal courts exercising diversity jurisdiction must apply substantive state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Those principles can equally be used to determine when a federal statutory right is one of substance that must be applied in arbitration proceedings because an agreement to arbitrate is "a kind of forum selection clause." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 36 (1988) (internal quotation marks and citation omitted). By permitting enforcement of such agreements, the Federal Arbitration Act (FAA) operates like a statute permitting a federal court forum for adjudication of state-law rights.

In *Erie* cases, the Court has developed an "outcome determinative" test under which a controlling state law is considered substantive if disregarding that law would lead to a significantly different outcome in federal court than in a state-court suit between the same parties. *See, e.g., Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). The Court

does not apply the test "mechanically to sweep in all manner of variations," but instead is guided by "'the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" *Id.* at 428 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)); *see also Davison v. Sinai Hosp., Inc.*, 462 F. Supp. 778, 780 (D. Md. 1978), aff'd on district court's opinion, 617 F.2d 361 (4th Cir. 1980).

The Supreme Court has applied similar outcome-determinative principles in determining whether a state court may apply its own rules of procedure in adjudicating a case brought under a federal statute that authorizes suits in either state or federal court. *See Brown v. Western Ry.*, 338 U.S. 294, 299 (1949) ("desirable uniformity in adjudication of federally created rights" under Federal Employees Liability Act prohibits use of state rule of practice that construes a pleading against the pleader, contrary to federal rule of construing a complaint more broadly); *Engel v. Davenport*, 271 U.S. 33, 38 (1926) (Jones Act statute of limitations is a provision "of substantive right, setting a limit to the existence of the obligation which the Act creates").

The outcome-determinative test has been held to encompass different outcomes regarding remedies as well as different outcomes regarding the underlying issue of liability. *See Gasparini*, 518 U.S. at 428-429 ("not debate[d]" that a statutory cap on damages supplies substantive law for *Erie* purposes); *id.* at 426 (state law

allowing judge to review a jury award of damages to see if it "deviates materially" from other awards is substantive because it "controls how much a plaintiff can be awarded"). Thus, consistent with this principle, cases like *Booker*, *Hadnot*, and *Morrison*, cited *supra*, have held that provisions in arbitration agreements that prohibit punitive damages or other remedies allowable under civil rights statutes are invalid. Accordingly, as a general rule, the Supreme Court's "outcome determinative" test, which helps to ensure uniformity and protect party expectations, should apply in determining when a federal statutory provision affords a substantive right that a party does not forgo by agreeing to arbitrate.[3]

C. The written consent requirement is substantive under the outcome determinative test

As discussed above, Section 16(b) of the FLSA allows an employee to sue on behalf of other employees similarly situated but provides 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 and such consent is filed in the court in which such action is brought." 29 U.S.C. 216(b). An employee's written consent is

[3] Aside from the outcome-determinative test, the Supreme Court has also sometimes more broadly prohibited state laws that conflict with federal purposes. *See Felder v. Casey*, 487 U.S. 131, 138 (1988) (state notice-of-claim statute does not apply to bar state-court suit under 42 U.S.C. 1983). Because the FLSA's written consent requirement is substantive under an outcome-determinative test, this Court need not apply the broader conflict test.

also necessary to toll the applicable statute of limitations. 29 U.S.C. 255, 256; *Lee v. Vance Executive Prot., Inc.*, 7 Fed. Appx. 160, 167 (4th Cir. 2001) (for statute of limitation purposes, "consents not filed with the complaint do not relate back"); see note 1, *supra*. This written consent requirement is substantive because (1) a failure to apply it in arbitration will lead to significantly different outcomes in the arbitration forum than in a court forum involving the same claim and the same parties, (2) it is integral to the purposes of the FLSA, and (3) this treatment is consistent with the purposes of the Federal Arbitration Act.

(1) As the arbitrator recognized, certifying an "opt-out" class rather than requiring an employee's written consent to join the class will significantly affect the number of probable class members. Award at 6. That in turn affects the outcome of the litigation, not only by changing the number of individuals who are subject to a final judgment, but by profoundly affecting the substantive rights of the parties in the litigation. As the Third Circuit explained:

> Generally, the distinction between opt-in and opt-out classes is crucial. Under most circumstances, the opt-out class will be greater in number, perhaps even exponentially greater. * * * The aggregation of claims, particularly as class actions, *profoundly affects the substantive rights of the parties to the litigation.* Notably, aggregation affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants.

De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 310 (3d Cir. 2003) (emphasis added).

The written consent requirement also affects the outcome of litigation because, as discussed above, an employee's written consent is necessary to toll the applicable statute of limitations. *Cf. American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551-553 (1974) (limitations period is tolled for absent class members under Fed. R. Civ. P. 23); see note 1, *supra*. This affect on the limitations period alone makes the written consent requirement substantive. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 107-112 (1945) (state statute of limitations is substantive for *Erie* purposes); *see also Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 531 (1949) (federal court exercising diversity jurisdiction must apply state law that says a statute of limitations is not tolled until service of a summons, rather than Fed. R. Civ. P. 3, which says an action is commenced by filing a complaint); *Rowland v. Patterson*, 882 F.2d 97, 99 (4th Cir. 1989) (en banc) ("settled principle that such state tolling provisions are effectively substantive for *Erie* purposes").

(2)(a) The purposes of the FLSA's written consent requirement reinforce the view that it must be treated as substantive. Before the Portal-to-Portal Act of 1947, the FLSA had no written consent requirement and permitted an action "by any one or more employees for and in behalf of himself or themselves and other employees

similarly situated, *or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.*" Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (emphasis added). The Portal-to-Portal Act removed the italicized language, thereby prohibiting representative actions, and added 29 U.S.C. 216(b)'s written consent provision as a limitation on an employee's ability to sue on behalf of other similarly situated employees. Portal-to-Portal Act of 1947, Pub. L. No. 80-49, §§ 5(a), 7, 61 Stat. 84, 87-88.

The purpose of those Portal-to-Portal Act changes was to "limit[] private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). Congress's particular goal in adding the written consent provision to 29 U.S.C. 216(b) was to "prevent[] large group actions, with their vast allegations of liability, from being brought on behalf of employees with no real involvement in, or knowledge of, the lawsuit." *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004) (citations and internal quotation marks omitted). As Senator Donnell, the Chairman of the Senate Judiciary Committee, explained:

> [I]t is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit.

93 Cong. Rec. 2182 (1947) (statement of Sen. Donnell). The written consent requirement "clearly enures to the benefit of employers by making them aware of what allegations they face and from whom the allegations originate." *Lee*, 7 Fed. Appx. at 167.

Written consent also protects employees in a fundamental way. *See* 93 Cong. Rec. at 1560 (statement of Rep. Hobbs) (discussing case where a group sued on behalf of alleged claimants without their permission or knowledge and many of the claimants "repudiated the pretense of authority to act for them"); *Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941) (some kind of written consent is "necessary in order to show knowledge [by the consenting employees] of the litigation in their behalf, their willingness to participate therein and to be so represented, and to bind them by the final judgment"). Thus, the legislative history makes it clear that Congress, intending an employee's FLSA claims to be litigated as part of a collective action only with his or her express written consent and believing that such consent served the interests of both employers and employees, made such consent integral to the right to bring suit on an employee's behalf.

(b) As a consequence, the written consent requirement eliminated the asymmetry that pertained before the Portal-to-Portal Act, under which some courts had treated a judgment favorable to a named plaintiff as res judicata for the entire class, while treating a judgment unfavorable to the named plaintiff as binding only that individual. *See Deley v. Atlantic Box & Lumber Corp.*, 119 F. Supp. 727, 728 (D. N.J. 1954). Res judicata requires, among other things, that before a person can be bound by a prior judgment, the person must have been a party or privy to that judgment. *See, e.g., Pension Benefit Guaranty Corp. v. Beverley*, 404 F.3d 243, 248-249 (4th Cir. 2005). Relying on the express language of the FLSA that "[n]o employee shall be a party plaintiff" in another employee's action without written consent, 29 U.S.C. 216(b), an employee could make a strong argument that, without written consent, the employee cannot be bound by an unfavorable arbitration award. Certainly, there is nothing in the arbitration agreement at issue in this case that would signal to an employee that by entering into it he or she was giving up his or her statutory right not to be made a party to an FLSA action without first giving consent in writing. The arbitrator's decision making unconsented employees parties to the instant action thus contravenes Congress's intent to make a collective FLSA action binding on all consenting employees regardless of the outcome and

threatens to upset the litigation balance delicately but expressly set by Congress.

(3) Treating the written consent requirement as substantive is also consistent with the FAA. The primary purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements" and to place them "upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24. At the same time, however, a contract -- including an arbitration contract -- will not be enforced if it violates a specific public policy set out in another statute. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987). Not requiring written consent in a class arbitration violates the public policy expressed in the FLSA, and accordingly should not be enforced. *Cf. Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704-709 (1945) (employee cannot agree to waive employee rights to FLSA wages). Requiring written consent in arbitration, by contrast, will give effect to the rule that a party who agrees to arbitrate "does not forgo the substantive rights afforded by the statute." *Gilmer*, 500 U.S. at 26 (citation and internal quotation marks omitted).

Moreover, allowing an opt-out class action, as the arbitrator did, will add delays and expenses. Requiring written consent helps to ensure that parties receive the benefits they sought in arbitration, *i.e.*, a quick and relatively inexpensive alternative

to court resolution of disputes. *See Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir. 1998).

D. The district court erred in finding "uncertainty" on whether the written consent requirement applies in arbitration

As discussed above, the district court found "uncertainty" on whether the FLSA's written consent requirement clearly applies in arbitration because the FLSA requires a written consent to be "'filed in the court in which [a collective] action is brought.'" *Long John Silver's*, 409 F. Supp. 2d at 685 (quoting 29 U.S.C. 216(b)). The reference to a "court" as the place where the written consent should be filed does not mean that the requirement that the written consent be secured is inapplicable in arbitration. The statute also provides, for example, that in an employee's action "[t]he court" shall award prevailing plaintiffs a reasonable attorney's fee. 29 U.S.C. 216(b). That reference to a "court" does not imply that attorney's fees cannot be awarded to a prevailing plaintiff in arbitration. Instead, this Court and other courts have held that the right to attorney's fees is a substantive right that applies in arbitration. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 n.1 (4th Cir. 2002); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 299 n.1 (5th Cir. 2004). By similar reasoning, the reference to a "court" as the place for filing a written consent does not preclude the consent requirement from applying in arbitration.

Moreover, whether or not the filing requirement applies in arbitration, the requirement that an employee must "consent in writing" to be made a party to another employee's action would still apply because under the text of the statute the limitation on an employee's right to sue on behalf of other employees is separate from the requirement that the written consent be "filed in the court in which such action is brought." *See* 29 U.S.C. 216(b) (requiring both conditions before an employee can be a party to such an action). As discussed above, failing to require written consent in arbitration would not only lead to different results in arbitration than in court actions, but would also call into question the enforceability of an adverse arbitration decision against employees who are included in a class without giving written consent.

Accordingly, for reasons discussed above, this Court should hold that the FLSA's written consent requirement is a substantive right that an arbitrator must apply in the arbitration of an employee's FLSA claim.[4]

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[4] Treating the written consent requirement as a substantive right is also consistent with the principle that parties, through an arbitration agreement, can give up the right to a collective action. *See Gilmer*, 500 U.S. at 32; *Adkins*, 303 F.3d at 503. The FLSA allows employees to decide whether to bring a collective action without requiring them to do so. *See* 29 U.S.C. 216(b) (collective action "may be maintained"). Thus, an employee gives up no substantive right by deciding to enforce the employee's FLSA rights through an individual arbitration. In contrast, the written

(continued . . .)

CONCLUSION

The Court should hold that the FLSA's written consent requirement applies in arbitration.

Respectfully submitted.

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JUNE 2006

(. . . continued)
consent requirement is mandatory in the two provisions where it appears. *See* 29 U.S.C. 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing"); 29 U.S.C. 256 (date action is commenced, for purposes of the applicable statute of limitations, "shall be" the date written consent is filed). Accordingly, when an employee brings a collective action on behalf of other employees, the FLSA prohibits the employee from deciding on behalf of other employees to disregard the written consent requirement.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that the Brief for the Secretary of Labor as Amicus Curiae Supporting Appellants is monospaced, has 10.5 or fewer characters per inch and contains 5,318 words as determined by the Microsoft Word software system used to prepare the brief.

EDWARD D. SIEGER
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief for the Secretary of Labor as Amicus Curiae Supporting Appellants were mailed first class, postage prepaid, on this 21st day of June 2006, to the following counsel of record:

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ATTACHMENT

7 Fed.Appx. 160, 2001 WL 108760 (C.A.4 (Va.))
(Cite as: 7 Fed.Appx. 160)

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.UNPUBLISHED Please use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,Fourth Circuit.

Robert J. LEE; David P. Brady; C. Brian Diggs; Mark E. Fair; Martin D. Hare; Douglas O. Henderson; Rich A. Lopez; John V. O'Hara; Dominic A. Sabruno; Gary A. Thorn, Jr.; William A. Tinsley; Charles L. Breeden; Vance E. Morris; Todd K. Molter, Plaintiffs-Appellants,
andTerrance M. Hinton, Plaintiff,
v.
VANCE EXECUTIVE PROTECTION, INCORPORATED, Defendant-Appellee.
No. 00-1330.

Argued Dec. 6, 2000.
Decided Feb. 8, 2001.

The United States District Court for the Eastern District of Virginia, James C. Cacheris, Senior Judge, granted summary judgment in favor of employer on bodyguards' Fair Labor Standards Act (FLSA) claim seeking overtime compensation, and bodyguards appealed. The Court of Appeals held that bodyguards were paid a day rate and therefore did not come within FLSA exclusion permitting employers to exclude "extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of the employee's normal working hours or regular working hours."

Affirmed in part, reversed in part, and remanded with instructions.

West Headnotes

[1] Labor and Employment 231H ⚿2306

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2306 k. Computation of Wage and Overtime Rates in General. Most Cited Cases
(Formerly 232Ak1272.1 Labor Relations)

Labor and Employment 231H ⚿2307

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2307 k. Regular Rate. Most Cited Cases
(Formerly 232Ak1272.1 Labor Relations)

Bodyguards were paid a day rate and therefore did not come within Fair Labor Standards Act (FLSA) exclusion permitting employers to exclude "extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of the employee's normal working hours or regular working hours;" bodyguards were paid a flat sum for a day's work without regard to the number of hours worked in the day pursuant to a split-day compensation scheme in which the normal workday is artificially divided into a "straight time" period to which one rate was assigned, followed by a so-called "overtime" period for which a higher rate was specified. Fair Labor Standards Act of 1938, § 7(e)(5), 29 U.S.C.A. § 207(e)(5); 29 C.F.R. § 778.202(c); 29 C.F.R. § 788.112.

[2] Federal Civil Procedure 170A ⚿2498

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2498 k. Fair Labor Standards Act Cases. Most Cited Cases
Genuine issue of material fact existed as to the amount and extent of hours worked in excess of forty per week, precluding summary judgment in favor of employees on their Fair Labor Standards Act (FLSA) claims for compensation for hours worked in excess of forty per week that are not reflected in employer's records. 29 C.F.R. § 516.2(a)(7).

[3] Limitation of Actions 241 ⚿118(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k118 In General
241k118(1) k. In General. Most Cited Cases
(Formerly 232Ak1478.1 Labor Relations)
Consents to become a party which are not filed with the Fair Labor Standards Act (FLSA) complaint do not relate back. Portal-to-Portal Act of 1947, § 7(b), 29 U.S.C.A. § 256(b).

[4] Labor and Employment 231H ⚿2375

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)6 Actions
231Hk2373 Actions on Behalf of Others in General
231Hk2375 k. Employees Similarly Situated. Most Cited Cases
(Formerly 232Ak1492.1 Labor Relations)
Suit against employer under Fair Labor Standards Act (FLSA) was a collective action; paragraph in complaint and amended complaint stated that " [p]laintiffs bring this action on behalf of themselves and all other employees similarly situated." Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

***161** Appeal from the United States District Court for the Eastern District of Virginia, ***162** at Alexandria. James C. Cacheris, Senior District Judge. (CA-99-887-A).

Charles W. Gilligan, O'Donoghue & O'Donoghue, Washington, DC, for appellants. Douglas Bennett Mishkin, Patton Boggs, L.L.P., McLean, VA, for appellee. ON BRIEF: Sally M. Tedrow, Dinah S. Leventhal, O'Donoghue & O'Donoghue, Washington, DC, for appellants.

Before TRAXLER and KING, Circuit Judges, and BOYLE, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

OPINION

PER CURIAM.
****1** Present and former executive protection agents ("Agents") appeal from a grant of summary judgment in favor of their employer Vance Executive Protection, Inc., ("Vance") on the Agents' Fair Labor Standards Act ("FLSA") claim seeking overtime compensation. We affirm in part, reverse in part, and remand with instructions.

I.

Agents employed by Vance serve as bodyguards for corporate officers and visiting dignitaries who contract with Vance for security services. The parties agree that the Agents typically work twelve-hour shifts, but on occasion are required to work more than twelve hours depending on the needs of the client. According to Vance's Operational Guidelines Manual, an Agent is paid a " Daily Rate" for working a shift. J.A. 734. The most junior Agents earn $145 per shift and the most senior Agents earn in excess of $200 per shift. If circumstances require that an Agent work, for example, thirteen or fourteen hours, the Agent will not receive more than the established shift rate.

The dispute between the parties centers on whether Vance's compensation plan violates the FLSA's requirement that an employee receive "one and one-half times the regular rate at which he is employed" for hours worked in excess of a forty-hour workweek. 29 U.S.C.A. § 207(a)(1) (West 1998). Vance contends that the FLSA's overtime requirement is already built into its compensation system. According to Vance, Agents are paid straight time for the first eight hours of a shift and double-time for the remaining four. The Agents, on the other hand, argue that the eight-four split is but an accounting mechanism used to avoid the FLSA's overtime requirements. The Agents assert that they are paid a day rate and that their regular hourly rate should be determined by totaling all sums received in a workweek and dividing by the total hours worked. *See* 29 C.F.R. § 778.112 (2000). Such a calculation yields a much higher regular hourly rate than does Vance's.

The following example illustrates the dispute between the parties. If an Agent earns $165 per shift and works six twelve-hour shifts in one workweek, the gross amount he receives from Vance is $990 for the seventy-two hours worked. Assuming this is a day rate, the Agent would calculate his regular hourly rate by dividing $990 by seventy-two hours, which yields an hourly rate of $13.75. Under the FLSA the first forty hours should be paid at $13.75 per hour for a total of $550, and the remaining thirty-two hours of overtime at time and a half ($20.625 per hour) for an overtime amount of $660. The overtime and non-overtime payments yield a total of $1,210, and hence the Agent argues he is due $220 from Vance ($1,210-$990).

Under Vance's more complicated calculation, which requires use of a multiplier of 1/16 , the Agent's hourly wage for the first eight hours is $10.3125 (1/16 of $165). ***163** Thus, the Agent earns $412.50 for the first forty hours worked and $577.50 for the remaining thirty-two. Dividing $577.50 by thirty-two hours yields an overtime rate in excess of $18, well above the time and a half required by law. Hence, Vance denies the Agent is owed any compensation.

****2** Hearing cross motions for summary judgment, the district court rejected the Agents' assertion that they are paid a day rate and concluded that Vance's division of the workday is not prohibited by the FLSA. However, the court held that Vance's compensation plan passes muster only if the Agents actually work twelve hours every shift, or a limited number of additional hours which are covered by Vance's double-time payments. Though the court recognized that it is possible for the Agents to have worked hours for which they were not compensated, the court found that the Agents had failed to offer sufficient proof of the number of uncompensated hours worked. The Agents appeal the district court's grant of summary judgment as well as issues relating to the statute of limitations.

II.

A summary judgment motion should be granted only if there is no genuine dispute as to an issue of material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court must consider the evidence in the light most favorable to the non-moving party and draw all reasonable inferences from the facts in the non-movant's favor. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). "When reviewing cross-motions for summary judgment, we may, if appropriate, direct entry of judgment in favor of the party whose motion was denied by the district court." *Bakery & Confectionery Union & Indus. Int'l Pension Fund v. Ralph's Grocery Co.*, 118 F.3d 1018, 1020 (4th Cir.1997); *see also Monahan v. County of Chesterfield*, 95 F.3d 1263, 1265 (4th Cir.1996).

As a general rule, the FLSA provides that an employer must pay an employee one and one-half times the employee's "regular rate" for all hours worked in excess of forty per week. *See* 29 U.S.C.A. § 207(a)(1). The "regular rate" is the hourly rate that the employer pays the employee " for the normal, non-overtime workweek." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424, 65 S.Ct. 1242, 89 L.Ed. 1705 (1945). Normally, the regular rate is arrived at by "dividing

[the] total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked." 29 C.F.R. § 778.109 (2000).

The exclusion central to the present case is found in 29 U.S.C.A. § 207(e)(5). This statutory provision permits employers to exclude "extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked ... in excess of the employee's normal working hours or regular working hours." 29 U.S.C.A. § 207(e)(5). For example,

[i]f an employee whose maximum hours standard is 40 hours is hired at the rate of $5.75 an hour and receives, as overtime compensation under his contract, $6.25 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the overtime rate from the employee's regular rate and credit the total of the extra 50 cent payments thus made for daily overtime hours against the overtime compensation***164** which is due under the statute for hours in excess of 40 in that workweek.

***3** 29 C.F.R. § 778.202(c) (2000). Exemptions must be narrowly construed and the burden is on Vance "to show that it is entitled to the benefits of th[e] exceptions." *Johnson v. City of Columbia,* 949 F.2d 127, 130 (4th Cir.1991) (en banc).

Though specifically permitting a premium for hours worked in excess of regular working hours, the regulations prohibit split-day compensation schemes in which "the normal workday is artificially divided into a 'straight time' period to which one rate is assigned, followed by a so-called ' overtime' period for which a higher 'rate' is specified." 29 C.F.R. § 778.202(c); *see also Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 38-39, 65 S.Ct. 11, 89 L.Ed. 29 (1944); 29 C.F.R. § 778.501 (2000). To permit such divisions would undermine the FLSA's objectives of spreading work and compensating employees for excessive hours worked. *See Helmerich & Payne, Inc.,* 323 U.S. at 40, 65 S.Ct. 11.

Of course, the Department of Labor through its interpretation of the FLSA recognizes that not all employees entitled to overtime compensation are paid by the hour. Some workers, for example, contract to be paid on a piece rate or a day rate basis and the regulations explain how to calculate the regular rate for these employees. *See* 29 C.F.R. §§ 778.111-.112 (2000). The Agents contend that they are paid a flat sum for a day's work and consequently their overtime rate should be calculated pursuant to 29 C.F.R. § 778.112, which provides:

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

29 C.F.R. § 778.112.

[1] The primary issue in this case is whether the Agents are paid a day rate. Resolution of this issue then dictates the proper result under the FLSA. Because this question is before us on cross motions for summary judgment and because there are no genuine issues of material fact, our decision becomes one of law. We believe, however, the law dictates a conclusion different from that of the district court.

Vance's Operational Guidelines Manual describes the Agents' pay structure as a "Daily Rate" which increases as an Agent gains seniority. J.A. 734. The Manual further provides that Agents normally work a minimum of twelve hours per day "with additional hours often arising from relief response, protectee's movements, advances, luggage details or other unforseen circumstances." J.A. 677. Vance officials testified that if an Agent is required to work, for instance, fourteen or fifteen hours in a day because of some exigency, the Agent receives no additional compensation. In the rare case that an Agent receives an assignment requiring him to work only eight hours, the Agent still earns the same

amount he normally receives for a twelve- or fourteen-hour day. Documents provided to detail leaders attending a Vance seminar listed the " average daily rate" paid to Agents as $153.93, and made no mention of hourly rates. When filling out employment verification forms for entities dealing with the Agents, Vance officials noted that the Agents were paid "per day" even though there was a "per hour" option on the forms. J.A. 650-51. In addition, the Agents testified that ***165** when they were hired Vance officials never mentioned anything about an hourly rate; the Agents' compensation was always explained to them in terms of a daily rate.

****4** Vance officials counter that they described the Agents' pay as a "daily rate" because it was "the simplest term we have been able to use to tell our employees how much they can expect to be paid for a 12 hour shift." J.A. 382. Vance officials also contended that the Agents did not "want to associate an hourly rate with the work that they do," and therefore Vance used the term "daily rate" to assuage the Agents' egos. J.A. 471. Other than payroll documents, Vance officials could point to no documents available to the Agents that specified an hourly rate of employment.

At appellate argument, Vance made much of the fact that the Agents' pay stubs split the gross amount earned into "regular" and "doubletime." *See* J.A. 779. However, the pay stubs never specified an hourly rate and testimony from Vance officials indicated that the actual calculation of the hourly rates was left to the human resources department and that such information was not readily available to the Agents.

In light of the foregoing, we can find no genuine issue of material fact regarding the Agents' rate of pay. Unquestionably, Vance Agents are "paid a flat sum for a day's work ... without regard to the number of hours worked in the day." 29 C.F.R. § 788.112; *see also Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 266 (5th Cir.) (describing employees who "were guaranteed a day's pay, regardless of the hours worked that day" as day-rate employees), *cert. denied,* 531 U.S. 825, 121 S.Ct. 72, 148 L.Ed.2d 36 (2000). Vance represented to its Agents and the world that the Agents were paid day rates. The pay stubs did reflect a regular and double-time component, but the stubs standing alone cannot compete with the plethora of evidence indicating that the Agents were paid a day rate. *See Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir.1975) (holding that pay stubs alone were not sufficient to establish an employee's regular rate); *see also Anderson,* 477 U.S. at 251, 106 S.Ct. 2505 (a scintilla of evidence is insufficient to bar summary judgment). The alleged hourly rate paid to the Agents is in reality but a form of mathematical legerdemain used by Vance to avoid the implications of the FLSA. Accordingly, the district court erred in awarding summary judgment to Vance on the grounds that the Agents were paid by the hour and that no overtime was owed in light of the premium paid to the Agents. [FN1] We reverse the district court on this matter and remand for the entry of summary judgment in favor of the Agents. *See Ralph's Grocery Co.*, 118 F.3d at 1020.

FN1. Because we conclude that the Agents were paid a day rate, we need not determine whether Vance's compensation scheme violates the FLSA's prohibition against split-day plans.

III.

The Agents also seek compensation for hours worked in excess of forty per week that are not reflected in Vance's records. As discussed in the previous section, the parties do not dispute that on occasion the Agents' shifts lasted longer than twelve hours. The regulations implementing the FLSA mandate that the employer keep records of the " [h]ours worked each workday" by all employees. 29 C.F.R. § 516.2(a)(7) (2000). Vance admits that it did not keep proper records, and the Supreme Court has held that in such a situation an employee should not be penalized "on the ground that he is unable to prove ***166** the precise extent of uncompensated work." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946).

**5 When an employer's records are inadequate or inaccurate, an employee carries his burden under the law by (1) "prov[ing] that he has in fact performed work for which he was improperly compensated," and (2) "produc[ing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* If the employee carries his burden, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88, 66 S.Ct. 1187. If the employer cannot "produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id.* at 688, 66 S.Ct. 1187.

[2] Though the Agents have easily satisfied the first prong of their burden by proving that they performed work for which they were not compensated, we agree with the district court that the Agents have not come forward with "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687, 66 S.Ct. 1187. The bulk of the Agents' proof on the second prong concerns work done for demanding clients such as Princess Sarah of the Saudi royal family. Princess Sarah, for example, often asked the Agents to run errands for her after their shifts were scheduled to end. There is much general testimony about picking up gifts for Princess Sarah's children and paying her bills, but the record is bereft of evidence showing the amount or extent of this extra work. While we acknowledge that the Agents need not "prove each hour of overtime work with unerring accuracy or certainty," *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 108 (4th Cir.1988), enough evidence must be offered so that the court as "a matter of just and reasonable inference" may estimate the unrecorded hours, *Mt. Clemens Pottery Co.*, 328 U.S. at 687, 66 S.Ct. 1187. Because there is insufficient evidence to estimate the amount and extent of hours worked in excess of forty per week, we affirm the grant of summary judgment as to the unrecorded hours.[FN2]

FN2. Where the hours worked in excess of forty per week were recorded by Vance, the Agents are, of course, able to prove them with specificity.

IV.

[3] The Agents also challenge the district court's ruling that the statute of limitations for Agents Vance E. Morris and Todd K. Molter would only run back from December 21, 1999, the day these two Agents filed their consents. Under the FLSA, an employee may bring an action on behalf of similarly situated employees who must opt-in to the suit by filing written consents with the district court. *See* 29 U.S.C.A. § 216(b) (West 1998) ("An action to recover [unpaid overtime] ... may be maintained against any employer ... 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."). An FLSA collective action is deemed commenced for an individual plaintiff "on the date when the complaint is filed, if he is specifically named as a party *167 plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court." 29 U.S.C.A. § 256(a) (West 1998). For plaintiffs not named in the original complaint, a collective action under the FLSA commences "on the subsequent date on which [the plaintiffs'] written consent is filed in the court." 29 U.S.C.A. § 256(b); *see also Songu Mbriwa v. Davis Memorial Goodwill Indus.*, 144 F.R.D. 1, 2 (D.D.C.1992) ("Until a plaintiff, even a named plaintiff, has filed a written consent, [ ]he has not joined in the class action, at least for statute of limitations purposes."). In other words, consents not filed with the complaint do not relate back.

**6 Though not named in the original complaint, Morris and Molter were named in the amended complaint filed in September 1999. However, the consent forms for these two agents were not filed with the court until December 21, 1999. Examining the statute of limitations as of the filing of the consents rather than the filing of the action, especially in the case of Morris, affects the amount

of damages, if any, these two Agents can recover. *See* 29 U.S.C.A. § 255(a) (1998) (stating that the statute of limitations for an action seeking overtime compensation is two years and in cases of willful violation of the FLSA it is three years).[FN3] The Agents argue that the suit against Vance was not a collective action and therefore no consent forms were required. The fact that Morris and Molter did not file consent forms until December 1999, so the argument goes, should in no way affect the period of time for which they are entitled to recover damages.

> FN3. Morris was terminated on July 27, 1997, and Molter was terminated on September 13, 1999. If on remand, the district court determines that the limitations period is two rather than three years, Morris would collect no damages. Molter's damages would also be affected, but not to the same degree.

[4] The complaint and amended complaint, however, make clear that the suit against Vance is a collective action. The seventh paragraph in both documents states that "[p]laintiffs bring this action on behalf of themselves and all other employees similarly situated." J.A. 11, 68. Yet, the Agents argue that a collective action was never pursued and that the suit against Vance was simply fifteen individual actions joined under Federal Rule of Civil Procedure 20(a). We disagree.

The purpose of the consent forms is "to make ... uncertain plaintiffs certain, and actual participants, so that defendants could know the parties and the charges with which they were to be faced." *Deley v. Atlantic Box & Lumber Corp.*, 119 F.Supp. 727, 728 (D.N.J.1954). Otherwise, one employee could sue on behalf of similarly situated employees " without the specific rights of the others ever being actually considered." *Id.* The consent form requirement clearly enures to the benefit of employers by making them aware of what allegations they face and from whom the allegations originate. We can find nothing in the record to indicate that the Agents ever considered their suit to be anything but a collective action or that the Agents represented to Vance or the district court that their action was not collective; therefore, we decline to inject uncertainty into the law by permitting plaintiffs to change the nature of their action in the middle of judicial proceedings without proper notice to the court and employer. If a group of plaintiffs decided to abandon a collective action and instead simply join their individual actions under Rule 20(a), they could, for example, move to amend the pleadings pursuant to Rule 15(a), ***168** which provides leave to freely amend pleadings " when justice so requires." But nothing indicates to us that the Agents so changed their action, and therefore we affirm the district court's decision regarding the necessity of consent forms for the present case.[FN4]

> FN4. Prior to appellate argument, Vance moved pursuant to Local Rule 28(b) for leave to attach various items to its brief. Because Vance has not shown good cause as required by the Rule, we deny the motion.

V.

For the foregoing reasons we reverse the district court's grant of summary judgment for Vance on the Agents' compensation scheme and remand with instructions for the entry of summary judgment in favor of the Agents. We affirm the district court's decision that the Agents cannot recover overtime compensation for unrecorded hours worked in excess of forty per week because the Agents did not come forward with sufficient evidence to show the amount and extent of the work. Finally, we affirm the district court's decision that the Agents pursued a collective action and therefore the statute of limitations for Morris and Molter runs back from the date their consent forms were filed with the district court.

****7** *AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.*

C.A.4 (Va.),2001.
Lee v. Vance Executive Protection, Inc.
7 Fed.Appx. 160, 2001 WL 108760 (C.A.4 (Va.))