12-304-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEPHANIE SUTHERLAND, on behalf of herself and
all others similarly situated,
Plaintiff-Appellee,
v.
ERNST & YOUNG, LLP,
Defendant-Appellant

_____

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

_____

BRIEF FOR THE SECRETARY OF LABOR AND
THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE SUPPORTING APPELLEE
AND REQUESTING AFFIRMANCE

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STATEMENT OF INTEREST

The Secretary of Labor administers and enforces the Fair Labor Standards Act (FLSA). *See* 29 U.S.C. 204, 211(a), 216(c), 217. The Equal Employment Opportunity Commission administers and enforces the Equal Pay Act, 29 U.S.C. 206(d), which is part of the FLSA, and the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq*. Employees assist the Secretary's and the Commission's enforcement of these Acts by bringing individual or collective actions authorized by section 16(b) of the FLSA, 29 U.S.C. 216(b). The employer in this case seeks to enforce an arbitration agreement that waives an employee's right to sue collectively. The district court denied enforcement based on findings that the collective-action waiver prevents the employee from effectively vindicating her FLSA rights. The Secretary and the Commission have authority to file this brief pursuant to Fed. R. App. P. 29.

STATEMENT OF THE ISSUE

The employer in this case conditioned employment on an employee's agreement to arbitrate FLSA disputes and waive her right under section 16(b) of the FLSA to bring or join a collective action. The Secretary and the Commission will address whether the collective-action waiver is unenforceable because enforcement would prevent the employee here from effectively vindicating her FLSA rights.

STATEMENT OF THE CASE

1. Stephanie Sutherland started working for Ernst & Young as a low-level accountant in September 2008. Joint Appendix (JA) 234. As a condition of her employment, she consented to a dispute resolution program that called for binding arbitration on an individual rather than class-wide basis of disputes with Ernst & Young. Those disputes included claims under applicable wage laws such as the FLSA. JA 47, 57. During her employment, she was paid a $55,000 per year salary for all hours worked, and was not paid additional compensation when she worked more than 40 hours in a week. JA 66, 234. In December 2009, her employment was terminated, allegedly because she missed work due to illness. JA 66.

In April 2010, Sutherland filed a lawsuit against Ernst & Young under the FLSA and New York labor laws. JA 20-21. She brought her FLSA claims as a collective action under 29 U.S.C. 216(b), a provision that allows an employee to sue on behalf of other similarly situated employees who "opt in" to the action by consenting in writing to be a party, and brought her state law claims as an "opt out" class action under Fed. R. Civ. P. 23. JA 233; *see Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 243-245 (2d Cir. 2011) (permitting plaintiffs to bring "opt in" FLSA and "opt out" state law claims in the same federal court action). She sought to represent low-level Ernst & Young accountants nationwide, asserting that the court had jurisdiction over all claims pursuant to

the Class Action Fairness Act of 2005 because the amount of controversy exceeded $5,000,000. JA 22; *see* 28 U.S.C. 1332(d)(2). Her own claim amounted to $1,867 for 151.5 unpaid overtime hours, plus possible extra hours she worked but did not document and a potential equal amount of liquidated damages. JA 70, 234.

Ernst & Young filed a motion to compel arbitration of Sutherland's claims on an individual basis pursuant to the company's dispute resolution program. JA 234. Sutherland opposed the motion, asserting that she could not afford to bring her claims on an individual basis because she was currently unemployed, taking courses, and had $35,000 in student loans and no savings. JA 66-67. Through her attorneys, she also presented evidence that whether accountants such as Sutherland were exempt from the FLSA was newly addressed by case law, and required more analysis and explanation of an employee's duties. JA 68-69. The attorneys asserted that they would need expert testimony, which would cost more than $33,500, and over 257 hours of attorney time, costing more than $160,000, plus more than $6,000 in costs. JA 65, 73-74. They also asserted that they would not advance costs in an individual arbitration where expert fees are uncompensated, attorney's fees are left to the discretion of the arbitrator, and there is a risk of adverse cost shifting in the event of a loss. JA 74. They further asserted that they did not believe that any other attorney could be found to

represent a client under such circumstances. JA 75. Ernst & Young did not dispute this evidence.

2. The district court denied Ernst & Young's motion to compel individual arbitration "because, relative to [Sutherland's] potential recovery, the enormous costs and fees attendant to prosecuting her claim on an individual basis would effectively prohibit her from bringing suit at all." JA 235. The court relied on *In re American Express Merchs.' Litig. (AmEx I)*, 554 F.3d 300 (2d Cir. 2009), *vacated*, 130 S. Ct. 2401 (2010), *adhered to*, 634 F.3d 187 (2d Cir. 2011) (*AmEx II*), *adhered to*, 667 F.3d 204 (2d Cir. 2012) (*AmEx III*), *reh'g in banc denied*, ___ F.3d ___, 2012 WL 1918412 (2d Cir. May 29, 2012), where this Court invalidated an agreement requiring arbitration of antitrust claims on an individual basis. JA 235-37.

The district court also concluded that even if Sutherland was willing to incur about $200,000 in costs and attorney's fees to recover a few thousand dollars in back wages and liquidated damages, she would be unable to retain an attorney to prosecute her individual claim. JA 242. The court based its conclusion largely on "obstacles to reimbursement of fees and expenses" in the dispute resolution program that allowed arbitrators to decide whether and how much to award in attorney's fees and expenses. JA 242. The court also noted the uncontested affidavit from Sutherland's attorney that he would not prosecute her claim individually and she would find no other attorney willing to do so. JA 242.

Based on these considerations, the court concluded that enforcing the class waiver provision in this case would effectively preclude all proceedings by Sutherland against Ernst & Young, giving the company de facto immunity from liability for alleged violations of the labor laws. JA 243.

3. Ernst & Young filed a motion for reconsideration, based in relevant part on alleged "clear error" in the district court's decision. JA 245-46. The alleged clear error was that the district court had misread the arbitration agreement as an obstacle to reimbursement of fees and expenses and overlooked the company's stipulation that it would pay all attorney's fees as well as costs if Sutherland prevailed in individual arbitration. JA 246.

The district court denied the motion for reconsideration. JA 247. The court disputed the company's reading of the arbitration agreement, and stated that the company's stipulations about paying attorney's fees and costs did not address the issues discussed in the *AmEx* litigation. JA 249-50 n.1. In particular, the court stated that Sutherland demonstrated that the waiver of class arbitration effectively precluded her from bringing her statutory claims in either an individual or collective capacity. JA 253.

SUMMARY OF ARGUMENT

The district court correctly applied this Court's *AmEx* decisions in refusing to enforce the mandatory waiver of Sutherland's FLSA right to sue collectively. The *AmEx* decisions establish that a class-action waiver in a mandatory

arbitration agreement is unenforceable when a plaintiff shows that the waiver will prevent her from effectively vindicating a federal statutory right. Here, the district court found, consistent with *AmEx*, that Sutherland is precluded from vindicating her FLSA rights on an individual basis in arbitration because she could not afford the costs of arbitration or secure legal counsel, and that finding by the district court is not clearly erroneous. Accordingly, the judgment below should be affirmed.

ARGUMENT

THE ARBITRATION AGREEMENT'S COLLECTIVE-ACTION WAIVER IS UNENFORCEABLE BECAUSE IT PREVENTS THE EMPLOYEE IN THIS CASE FROM EFFECTIVELY VINDICATING HER FLSA RIGHTS

A. *This Court Has Held That A Class-Action Waiver Is Unenforceable If It Would Prevent A Plaintiff From Vindicating Her Federal Statutory Rights In Arbitration*

This Court concluded in the *AmEx* litigation that a class-action waiver in a mandatory arbitration agreement is unenforceable when a plaintiff cannot effectively vindicate a federal statutory right on an individual basis. *In re American Express Merchs.' Litig. (AmEx I)*, 554 F.3d 300, 319-20 (2d Cir. 2009), *vacated*, 130 S. Ct. 2401 (2010), *adhered to*, 634 F.3d 187, 199-200 (2d Cir. 2011) (*AmEx II*), *adhered to*, 667 F.3d 204, 218-19 (2d Cir. 2012) (*AmEx III*), *reh'g in banc denied*, ___ F.3d ___, 2012 WL 1918412 (2d Cir. May 29, 2012). The Court's decisions apply to class-action waivers the principle that mandatory

arbitration of a federal statutory claim is permissible only when a plaintiff can effectively vindicate the statutory right at issue in arbitration. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-274 (2009) (collectively-bargained arbitration agreement); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (Truth in Lending Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-30 (1991) (Age Discrimination in Employment Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 & n.19 (1985) (antitrust law).

In *AmEx I*, this Court held that the enforceability of a class-action waiver in an arbitration agreement "must be determined on a case-by-case basis, considering the totality of the facts and circumstances." 554 F.3d at 321 (quoting *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007)). The Court observed that among the relevant factors are "the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying legal claim, [and] the practical [e]ffect the waiver will have on a company's ability to engage in unchecked market behavior." *Ibid*. (quoting *Dale*, 498 F.3d at 1224).

Applying that test to the facts at issue in *AmEx I*, the Court found that "the record abundantly support[ed] the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver." 554 F.3d at 315-316. As this Court explained, the record evidence in *AmEx I*

demonstrated that the plaintiffs there would incur significant expert fees, ranging into the hundreds of thousands of dollars. *Id*. at 316-317. Moreover, the Court noted, neither the applicable Federal Rules of Civil Procedure nor arbitral rules provided for the bulk of those expert fees to be shifted to the defendants in the event that the plaintiffs prevailed. *Id*. at 318. The Court further noted that although the defendants could be required to pay reasonable attorneys' fees, "the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of the suit's potential costs." *Ibid*. The Court concluded that because each individual plaintiff could only expect to recover thousands of dollars, see *id*. at 317, "enforcement of the class waiver" would "flatly ensure[] that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." *Id*. at 319 (internal quotation marks omitted).

Nothing in *AmEx I* depended on the particular underlying federal statutory right at issue, *i.e.*, a right under the antitrust laws. The rationale of *AmEx I* applies equally to class-action waivers in other contexts, such as a waiver of an employee's right to proceed collectively under the FLSA. *Cf. AmEx III*, 667 F.3d at 219 (citing with approval the district court decision in this case). The FLSA requires the payment of a minimum wage, 29 U.S.C. 206(a), in order "to secure for the lowest paid segment of the nation's workers a subsistence wage." *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946). The FLSA also requires premium pay for overtime hours, *see* 29 U.S.C. 207, "to remedy the 'evil of

overwork' by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008) (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-578 (1942)).

These rights to minimum wage and overtime compensation are not waivable. *D.A. Schulte*, 328 U.S. at 112-116; *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704-707 (1945); *Fleming v. Post*, 146 F.2d 441, 443 (2d Cir. 1944). The reason is that these rights are affected with a public interest, *Brooklyn Savings*, 324 U.S. at 704, and are intended "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Id.* at 706; *see* 29 U.S.C. 202(a) (payment of substandard wages burdens commerce and is an unfair method of competition). These groups need protection "due to the unequal bargaining power as between employer and employee." *Brooklyn Sav.*, 324 U.S. at 706-707. Thus, "to allow waiver of statutory wages by agreement would nullify the purposes of the Act." *Id*. at 707.

B. *The District Court Correctly Held Under This Court's Recent Decisions That Enforcing The Collective-Action Waiver Here Would Prevent Sutherland From Vindicating Her FLSA Rights In Arbitration*

Applying the factors identified by *AmEx I*, the district court correctly concluded that enforcing the collective-action waiver at issue here would prevent Sutherland from effectively vindicating her federal right to overtime

compensation. The district court found as a factual matter that Sutherland would be forced to bear costs well in excess of her potential recovery, and that factual finding is not clearly erroneous. *See AmEx I*, 554 F.3d at 316 n.11 (noting that factual questions are reviewed under a clear-error standard and the application of law to those facts is reviewed de novo). The district court therefore correctly recognized that Sutherland "would incur prohibitive costs if compelled to arbitrate" under the class-action waiver. *Id*. at 315-316.

1. There is no clear error in the district court's finding that Sutherland could not bear the costs of litigating her claim on an individual basis. She submitted undisputed evidence that she was unemployed, owed $35,000 in student loans, and had no savings. JA 66-67. Her attorneys submitted undisputed evidence that litigating whether accountants such as Sutherland are exempt from the FLSA would require over 257 hours of attorney time, costing more than $160,000, plus more than $6,000 in costs for arbitration itself, plus expert testimony that would cost more than $33,500. JA 65, 73-74. The district court reasonably concluded from this evidence, which is similar to the evidence submitted in *AmEx I*, that Sutherland could not afford to litigate her claim on an individual basis. *Cf. Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (terming it a "large understatement" to say that a plaintiff who could recover only a few hundred or a few thousand dollars would incur the costs of an expensive antitrust suit).

There is also no clear error in the district court's finding that even if Sutherland were willing to incur these costs, no attorney would represent her. Sutherland's attorneys presented evidence that whether entry-level accountants such as Sutherland are exempt from the FLSA was newly addressed by case law, and required more analysis and explanation of an employee's duties. JA 68-69. Sutherland's attorneys accordingly stated that they would not represent her on an individual basis and did not believe any other attorney could be found to represent a client under such circumstances. This evidence was uncontested, and under *AmEx I* the district court reasonably accepted it as showing "that arbitration would be prohibitively expensive" for Sutherland on an individual basis. *AmEx I*, 554 F.3d at 315 (quoting *Randolph*, 531 U.S. at 92).

2. Ernst & Young attempts to distinguish the *AmEx* cases on the ground that expert witness fees are necessary in antitrust cases (such as the *AmEx* cases) but not in FLSA cases where the issue is whether an employee is properly classified as exempt from the FLSA's minimum wage and overtime provisions. *See* E&Y Br. 30-33. As an initial matter, Ernst & Young's argument ignores the costs of accessing the arbitral forum itself, which the district court found to be $6,000. JA 239. That sum is more than three times the amount that the district court found Sutherland could expect to recover in back wages, JA 239, and Sutherland submitted evidence that she would not be able to pay the arbitration

costs up front because she was unemployed, owed $35,000 in student loans, and had no savings, JA 66-67.

In any event, Ernst & Young's argument is incorrect. Expert testimony can be useful in some FLSA cases to determine whether a statutory exemption applies, and accordingly the Secretary and courts have relied on expert testimony in such cases. *See, e.g.*, *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1262, 1273 (11th Cir. 2008) (store managers); *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1072-1073 (1st Cir. 1995) (news editors); *Brock v. National Health Corp.*, 667 F. Supp. 557, 562 (M.D. Tenn. 1987) (staff accountants). Indeed, an employer has even relied on expert testimony in a case similar to this case. *See Pippins v. KPMG LLP*, No. 11 Civ. 0377, 2012 WL 19379, at *12 (S.D.N.Y. Jan. 3, 2012).

Ernst & Young also argues that its stipulations to pay costs and attorneys' fees in arbitration establish as a matter of law that individual arbitration would not be cost prohibitive for Sutherland. E&Y Br. 23-25. It is not at all clear, however, that Sutherland will recover her expert witness fees, because the arbitration agreement did not provide for such recovery, and the company's stipulations presented to the district court before reconsideration did not include expert fees. *See* JA 249-250 n.1; *see also AmEx I*, 554 F.3d at 318 (noting that the plaintiffs would not be entitled to recover the bulk of their expert witness fees). In addition, the company has stipulated to pay costs and attorneys' fees

only if Sutherland prevails, and under *AmEx I* Sutherland "must include the risk of losing, and thereby not recovering any fees, in [her] evaluation of [her] suit's potential costs." 554 F.3d at 318; *see also Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 184 (2d Cir. 2008) (in addressing reasonable hourly rate, district court must "ensure that the attorney does not recoup fees that the market would not otherwise bear"); *Jackson v. Estelle's Place, LLC*, 391 Fed. Appx. 239, 244, 2010 WL 3190697, at *5 (4th Cir. 2010) (recognizing that the amount of damages a plaintiff recovers is relevant to the amount of attorney's fees to be awarded and affirming reduced award); *Maldonado v. La Nueva Rampa, Inc.*, No. 10 Civ. 8195, 2012 WL 1669341, at *13 (S.D.N.Y. May 14, 2012) (critical inquiry in fee award is whether a reasonable attorney would have engaged in similar time expenditures).

Applying the *AmEx I* factors, Sutherland's inability to advance substantial costs, together with the unwillingness of her attorneys or other reasonable attorneys to invest large amounts of potentially uncompensated time in a case where the plaintiff has plausible claims and the law is developing, mean that Sutherland cannot effectively vindicate her FLSA rights by suing individually. [1]

[1] *AmEx I* does not hold that because a plaintiff has a risk that she will lose and her attorney will be uncompensated, a class or collective action is therefore necessary to garner the assistance of counsel. Rather, as *AmEx I* directs, district courts must look to the facts of each particular case. *See AmEx I*, 554 F.3d at 321 "[W]e hold that *each* case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own

None of the cases cited by Ernst & Young establishes a contrary rule. *See* E&Y Br. 25-26; E&Y Reply Br. 6-7. At most those cases show that on other facts, a class- or collective-action waiver may be enforceable because other plaintiffs are not precluded from effectively vindicating their federal statutory rights on an individual basis. Those cases do not demonstrate, however, any error by the district court – let alone clear error – in assessing the facts of this case.

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merits."); *AmEx III*, 667 F.3d at 219 (same); *see also LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308, 2012 WL 124590, at *7 (S.D.N.Y. Jan. 13, 2012) (enforcing class waiver where plaintiff sought between $127,000 to $132,000 in overtime); *D'Antuono v. Service Rd. Corp.*, 789 F. Supp. 2d 308, 343-44 (D. Conn. 2011) (enforcing waiver for two plaintiffs, each seeking at least $20,000, who failed to show high costs); *Reid v. Supershuttle Int'l, Inc.*, No. 08-cv-4854, 2010 WL 1049613, at *3-4 (E.D.N.Y. Mar. 22, 2010) (enforcing waiver where a plaintiff had a colorable claim for $300,000); *cf. Pomposi v. GameStop, Inc.*, No. 3:09-cv-340, 2010 WL 147196, at *7 (D. Conn. Jan. 11, 2010) (enforcing waiver where claims were "comparatively straight-forward").

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 3542 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface, using Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 2012, the Brief for the Secretary of Labor as Amicus Curiae Supporting Appellee and Requesting Affirmance was served on participating counsel of record through the Court's CM/ECF system.

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