UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEPHANIE G. KLINGLER, individually and on behalf of other persons similarly situated,

Plaintiff,

v.

PHIL MOOK ENTERPRISES, INC. d/b/a KFC, a Florida corporation, and CHRISTOPHER MOOK, Individually,

Defendants.

CASE NO. 8:11-cv-01586-JDW-TGW

PLAINTIFF'S RESPONSE TO DEFENDANTS' REVISED TENDER OF FULL PAYMENT AND MOTION TO DISMISS COMPLAINT WITH PREJUDICE

Plaintiff, STEPHANIE KLINGLER, responds as follows to Defendants' Revised Tender of Full Payment and Motion to Dismiss Complaint With Prejudice ("Motion to Dismiss"), and states as follows:

Background

In an effort to circumvent the mandates of Lynn's Food Stores, Inc. v. U.S. Dep't of Labor, 679 F.2d 1350 (11th Cir. 1982), and to avoid liability for attorneys' fees, which pursuant to 29 U.S.C. 216(b), is an element of Plaintiff's FLSA claims, Defendants contend they have issued a check to Plaintiff in the amount of $3,415.66. Defendants contend this provides Plaintiff full relief for her overtime and liquidated damages, as well as prejudgment interest. Defendants have now moved to dismiss this action on the basis that the alleged tender moots this action, and there is no case or controversy to be adjudicated.

To the contrary, a mere offer of "full relief" alone, without entry of judgment, does not moot Plaintiff's claim for damages. Instead, Defendants have simply made an offer to resolve

Plaintiff's claim, exclusive of attorneys' fees and costs, which Plaintiff now presents to the Court for approval and entry of a judgment in her favor, with the Court reserving jurisdiction to determine the amount of prevailing party attorney's fees and costs. Moreover, any alleged tender by Defendants is ineffective because as of the filing of this response, no payment has been received by Plaintiff or her counsel, although Defendants' check was allegedly issued and "tendered" on August 24, 2011, i.e., almost 3 weeks ago.

WHEREFORE, Plaintiff prays that this Court enter an Order (a) approving the settlement offer to Plaintiff; (b) entering judgment in her favor and reserving jurisdiction to determine an award of reasonable attorneys' fees and costs to Plaintiff, and (c) granting any other relief the Court deems just.

Memorandum of Law

A. Plaintiff is Entitled to Entry of Judgment in Her Favor.

Although not stated explicitly, Defendants have essentially, improperly relied on Dionne v. Floormasters Enterprises, Inc., 2011 WL 3189770 (11th Cir. 2011) to suggest that Plaintiff is not the prevailing party (and therefore not entitled to attorney's fees and costs) because she has not obtained a judgment, while at the same time urging the Court to deny Plaintiff a judgment based upon the tender. In considering a defendant's similar maneuver in a case arising under the Fair Debt Collection Practices Act ("FDCPA"), the Honorable Judge Cohn of the Southern District of Florida concluded that defendants simply cannot have it both ways, and argue that a non-Rule 68 settlement offer cannot be construed to be a Rule 68 offer for purposes of mooting the plaintiff's claims, but then be distinguished from a Rule 68 offer in order to protect defendant from having a judgment entered against it. Balthazor v. ARS National Services Inc., 2011 U.S. Dist. Lexis 92128 at *2 (S.D. Fla. Aug. 18, 2011) citing Manfred v. Focus Receivables Management LLC, Case No. 10-60597-CIV-ZLOCH, D.E. 29. The court then went on to hold

that the action was **not moot** because Plaintiff ha[d] not been afforded the full relief of an **enforceable judgment**." Balthazor, 2011 U.S. Dist. Lexis 92128 at *2. In coming to this conclusion, the Court reasoned on Brown v. Kopolow, in which the defendant moved to dismiss the action on the basis an offer of "full relief" mooted Plaintiff's claim under the FDCPA. 2011 U.S. Dist. LEXIS 6864 at * 1 (S.D. Fla. Jan. 25, 2011). In that case, the court sua sponte entered judgment in plaintiff's favor in the amount of the offer, and reserved jurisdiction to determine the amount of attorneys' fees and costs the plaintiff would be awarded. Id. at *5.

Further, Dionne is distinguishable from the instant action because:

- unlike Plaintiff in the instant case, in Dionne, in response to the defendant's tender, the plaintiff did **not** seek judgment;
- Unlike Plaintiff in the instant case, in Dionne, in response to the defendant's tender, the plaintiff did **not** seek court approval; and
- Unlike Plaintiff in the instant case, in Dionne, the plaintiff **agreed** that the tender mooted the case.

Here, Plaintiff is seeking approval of the settlement offer made to her, as well as entry of judgment in her favor. Defendants cannot circumvent Rule Fed. Civ. P. 68 to avoid its obligation to pay attorneys' fees. Doing so would render Rule 68 and the FLSA's attorneys' fee provision meaningless.

B. Plaintiff is Entitled to Attorneys' Fees and Costs As the Prevailing Party.

To encourage employees to enforce their FLSA rights in court, and thus to further the public policies underlying the FLSA, Congress has permitted individual employees to sue for back wages and liquidated damages and to receive reasonable attorney's fees and costs. See, Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 709 (1945); 29 U. S. C. §§ 216 (b). The purpose of the FLSA attorney fees provision is "to insure effective access to the judicial process

by providing attorney fees for prevailing plaintiffs with wage and hour grievances." Fegley v. Higgins, 19 F.3d 1126, 1134 (6th Cir. 1999) (quoting United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Ass'n, Local 307 v. G & M Roofing and Sheet Metal Co., 732 F.2d 495, 502 (6th Cir. 1984)), cert. denied, 513 U.S. 875 (1994); see also, Fisher v. Stolaruk Corp. 648 F. 2d 486, 487 (E.D. Mich. 1986) ("The purpose of allowing an award of attorney's fees under FLSA cases is to encourage employees to vindicate what Congress considers an important right to receive wages designed to ensure a minimum standard of living"). Further, an award of attorney fees "encourages the vindication of congressionally identified policies and rights." Grochowski v. Ajet Construction Corp., 2002 U.S. Dist. Lexis 5031, *5 (S.D. N.Y. 2002).

Unquestionably, attorney's fees are part of the damages to which Plaintiff is entitled under FLSA. 29 U.S.C. §216(b). Thus, by tendering an amount to Plaintiff for back wages and liquidated damages, Defendants are **not** making the Plaintiff whole. If Plaintiff were not to receive her attorney's fees and costs **in addition to** back wages and liquidated damages, then she would be liable for her own attorney's fees. Defendants' suggestion that Plaintiff, not Defendants, should be liable for her own attorney's fees is in direct contravention to the requirements of the FLSA, which prescribes that attorney's fees are mandatory for prevailing plaintiffs. 29 U.S.C. § 216(b).

Essentially, if Defendants' position were accepted, then a defendant could effectively reduce a Plaintiff's recovery by its delay because the longer the defendant waited to tender back wages and liquidated damages, the more attorney's fees and costs the plaintiff would incur. Therefore, tendering an amount of money to Plaintiff for back wages is not "making Plaintiff whole." Such tactics would allow "defendants to bar the courtroom door" in FLSA cases, which

is antithetical to the purpose of the FLSA. See, Reed v. TJX Cos., 2004 U.S. Dist. LEXIS 21605 at * 8-9 (N.D. Ill. 2004).

C. The Parties' Settlement Should Be Approved Pursuant to *Lynn's Food Stores, Inc. v. United States.*

Pursuant to the FLSA, claims for back wages and other damages arising under the FLSA may **only** be settled or compromised with the approval of the district court or the Secretary of Labor. See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946); see also Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982) (claims for back wages arising under the FLSA may be settled or compromised **only** with the approval of the Court or the Secretary of Labor). The Eleventh Circuit "has long recognized that attorney's fees are an integral part of the merits of FLSA cases, and part of the relief sought therein." Shelton v. Ervin, 830 F. 2d 182 (11th Cir. 1987). A plaintiff who receives at least some relief on the merits of her claim is said to have prevailed. Buckhannon Board and Care Home Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598, 603-04 (2001) (citations omitted). Prevailing plaintiffs, which may include plaintiffs who favorably settle their cases, are entitled to attorney's fees under the FLSA." Small v. Richard Wolf Medical Instruments Corp., 264 F. 3d 702, 707 (7th Cir. 2001) (citing, 29 U.S.C. § 216(b)) (emphasis added) (other citations omitted); see also, The Ocean Conservancy, Inc. v. National Marine Fisheries Order Service, 2004 U. S. App. Lexis 16737, *8 (9th Cir. 2004) (a party still prevails when it enters into a legally enforceable agreement with defendant).

To approve the settlement, the Court should determine that the compromise is a fair and reasonable resolution of a bona fide dispute over FLSA provisions. Id. If the settlement reflects a reasonable compromise over issues that are actually in dispute, the Court may approve the settlement "in order to promote the policy of encouraging settlement of litigation." Id. at 1354.

Defendants failed to present the settlement to the Court, and thus, Plaintiff's counsel is presenting the amount tendered to the Court for review and approval, such that Plaintiff may be deemed the prevailing party and tax her attorney's fees and costs. To not award a reasonable fee and cost to Plaintiff, as Defendant is trying to circumvent, would force Plaintiff to have to pay fees and costs out of her own pocket, which is inconsistent with the statutory fee to which a prevailing FLSA plaintiff is entitled.

WHEREFORE, Plaintiff prays that this Court enter an Order (a) approving the settlement offer to Plaintiff; (b) entering judgment in her favor and reserving jurisdiction to determine an award of reasonable attorneys' fees and costs to Plaintiff, and (c) granting any other relief the Court deems just.

Dated: September 12, 2011
Boca Raton, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **September 12, 2011**, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Filing.

s/ CAMAR R. JONES
Camar R. Jones

SERVICE LIST

Klingler v. Phil Mook Enterprises, Inc. et al

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United States District Court for the Middle District of Florida

(CM/ECF)

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