Michigan Law Review

Volume 39 | Issue 8

1941

LABOR LAW- FAIR LABOR STANDARDS ACT- RIGHT OF EMPLOYEES TO WAIVE PAYMENT OF AWARD OF BACK WAGES

Spencer E. Irons
University of Michigan Law School

LABOR LAW — FAIR LABOR STANDARDS ACT — RIGHT OF EMPLOYEES TO WAIVE PAYMENT OF AWARD OF BACK WAGES — In July, 1940, the Wage-Hour Administrator obtained a consent decree restraining defendant from violating the Fair Labor Standards Act, and a stipulation was filed which provided, among other things, that defendant should restore to its employees the difference between wages actually paid and the minimum wages which should have been paid under the act. Twelve of the fifteen employees in whose favor the award was made endorsed over the checks which they received with-

out obtaining any actual cash, and executed releases for the amounts due to them. In the present proceeding, the administrator sought a rule to show cause why defendant should not be adjudged guilty of contempt for violation of the decree. *Held*, for defendant, rule discharged, and petition for adjudication in contempt dismissed because (1) the decree was unenforceable for uncertainty since no list of the employees affected by the decree was included in the court files; (2) an execution at law, rather than a contempt proceeding, would have been the proper remedy; (3) the employer and the employees had the legal right, in the absence of coercion or fraud on the part of the employer, to settle the award by waiver; and (4) even if a contempt proceeding were proper, the decree had not been violated. *Fleming v. Warshawsky & Co.*, (D. C. Ill. 1940) 36 F. Supp. 138.

The use of consent decrees has come to be an important means of enforcing the FLSA.[1] While the Wage-Hour Division has power to restrain future violations of the act,[2] it has no direct power to compel restitution of back wages. This fact has made very valuable the consent decree, which can accomplish both objectives at the same time. As in the case of the enforcement of the Sherman Act, the terms of the consent decree are offered by the defendant, and if satisfactory, are signed by the equity court with the consent of the Wage-Hour Division.[3] A large proportion of the cases started against violators of the act are thus terminated, with the defendant agreeing to make certain concessions in the public interest.[4] By this procedure the public benefits both from the agreement made by the defendant and from the savings in court costs realized by the expeditious termination of the suit.[5] Writers have looked on the consent decree as indistinguishable from a contested decree,[6] and the Supreme Court has upheld

[1] Fair Labor Standards Act of 1938, 52 Stat. L. 1060 (1938), 29 U. S. C. (Supp. 1939), § 201.

[2] Section 17 of the act gives jurisdiction to the district courts of the United States and the United States courts of the Territories and possessions to restrain violations. 52 Stat. L. 1089 (1938), 29 U. S. C. (Supp. 1939), § 217.

[3] For studies of the use of the consent decree in cases under the Sherman Act, see Isenbergh and Rubin, "Antitrust Enforcement Through Consent Decrees," 53 HARV. L. REV. 386 (1940); Katz, "The Consent Decree in Antitrust Administration," 53 HARV. L. REV. 415 (1940); Donovan and McAllister, "Consent Decrees in the Enforcement of Federal Anti-trust Laws," 46 HARV. L. REV. 885 (1933).

[4] See cases listed in 1940 WAGE AND HOUR MANUAL 299. "The terms of settlement of almost every enforcement case included an agreement by the employer to make full restitution of back wages due his employees. Although restitutions are not provided for by law except through suits by the employees themselves, employers have been willing to make them rather than face one or more of the following alternatives: an injunction which would prevent the shipment in interstate commerce of all goods on hand; fines much heavier than would otherwise be imposed; suits by employees to recover not only the back wages but an equal amount as liquidated damages." Id. 298.

[5] Katz, "The Consent Decree in Antitrust Administration," 53 HARV. L. REV. 415 at 418 (1940).

[6] Isenbergh and Rubin, "Antitrust Enforcement Through Consent Decrees," 53 HARV. L. REV. 386 (1940).

its force as a binding judgment.[7] In the principal case, the court threatened the effectiveness of this kind of action when it failed to treat it as an ordinary equity decree. The court's requirement that the names of the employees be included in the decree is perhaps technically correct, but the principle that a decree for the payment of money can be enforced only by execution process at law should be restricted to cases where the beneficiary of the award is suing on the decree.[8] In the situation in the present case, the employees would hardly seek to have execution issued on awards which they had released.[9] In any event, there is a public interest in the enforcement of these awards which demands that the administrator be allowed to enforce them whether the recipients take the trouble to do so or not.[10] Finally the most objectionable feature of the decision from the standpoint of sound administration of the FLSA is the holding that an employer and an employee have the right to settle an award of back wages with a waiver of payment by the employee. A court should look through such a device and prevent an employer from thus violating the spirit of both the act and the court's decree. In a federal district court in Georgia the judge did look through a similar ruse, and held that the recovery from employees, under the guise of free-will offerings, of the amounts of restitution paid under the decree of the court, was a pretense "too transparent to deceive anyone." The em-

[7] In Swift & Co. v. United States, 276 U. S. 311, 48 S. Ct. 311 (1928), the Court held that as long as the district court had jurisdiction over the parties and the subject matter, provisions could be put in a consent decree which could not be put in an ordinary equity decree. In United States v. Swift & Co., 286 U. S. 106 at 115, 52 S. Ct. 406 (1932), the Court said, "We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act."

[8] Rule 70 of the Federal Rules of Civil Procedure, which provides, among other things, for contempt proceedings in aid of a decree, "is intended primarily to preclude recalcitrant parties from frustrating court orders for the performance of specific acts." 3 MOORE, FEDERAL PRACTICE 3373 (1938). Rule 69, providing that "Process to enforce a judgment for the payment of money shall be a writ of execution," should hardly be applied, in the light of the purpose of Rule 70. It is not clear whether the court relied on the federal rules, or on an Illinois rule that compulsory process cannot be had against the person of the party in default if the decree is for the payment of money, and can be enforced by common-law process of execution. See 31 MICH. L. REV. 731 (1933). Perhaps the court was influenced by the provisions of the Constitution of Illinois (1870), Art. 2, § 12, and the federal statute, 5 Stat. L. 321 (1839), 5 Stat. L. 410 (1841), 14 Stat. L. 543 (1867), 28 U. S. C. (1934), § 843, which prohibit imprisonment for debt.

[9] Under § 16 (b) of the act, an employer who violates the minimum wage or maximum hours provisions of the act becomes liable to the employee or employees affected, in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. 52 Stat. L. 1069 (1938), 29 U. S. C. (Supp. 1939), § 216(b). This liability exists independently of the award under the decree.

[10] The policy of Congress, as declared in § 2 of the act, is to correct and to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . . ." 52 Stat. L. 1060 (1938), 29 U. S. C. (Supp. 1939), § 202.

ployer was punished for thus wilfully violating the restitution decree.[11] In the present case, the judge apparently relied on the finding that the money awards were waived by the employees "voluntarily and without coercion." Actually, this finding means nothing more than that the employee was willing, because of economic necessity, to work for less than the legal minimum wage under the act. The repayment device thus defeats one of the main purposes of an act designed to prevent employees with weak bargaining power from working for small wages.[12]

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[11] Fleming v. North Georgia Mfg. Co., (D. C. Ga. 1940) 33 F. Supp. 1005. See also Fleming v. McAdoo, (D. C. Tenn. 1941) 4 WAGE HOUR REP. 158, where an employer was held guilty of contempt of court for disregarding a consent judgment for restitution of wages due under the act, and was given a suspended sentence of imprisonment on condition that he comply within a stipulated time. In a district court of the United States in New York two New York employers, Edward H. Rogers, Inc., and Ramon-Robert, Inc., were required to rehire employees who were discharged because they refused to "kick back" restitution of wages which had been paid them after the intervention of the Wage and Hour Division. 2 C. C. H., LABOR LAW SERVICE, ¶ 33,253 (1940). In § 15 (a) (3) of the act, which prohibits employers from discriminating against employees who have proceeded for relief under the act, is clearly indicated the policy of the act to give full protection to the worker. 52 Stat. L. 1068 (1938), 29 U. S. C. (Supp. 1939), § 215 (a) (3).

[12] This case has also been noted in 8 UNIV. CHI. L. REV. 589 (1941).