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SECOND CIRCUIT REVIEW

Expert Analysis

Baseball Festival Exempt From FLSA Minimum Wage Requirements

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Our first "Second Circuit Review" column ap-peared in the New York Law Journal on Nov. 20, 1985, so this year marks 30 years of monthly columns. So much has changed in the Second Circuit over the past three decades, though three judges continue to sit on the court: Amalya L. Kearse, Jon O. Newman and Ralph K. Winter. We look forward to our fourth decade of covering developments in the U.S. Court of Appeals for the Second Circuit.

This month, we discuss *Chen v. Major League Baseball Properties*,[1] in which the Second Circuit considered the definition of "establishment" as it is used under an exemption in the Fair Labor Standards Act (FLSA), which exempts seasonal amusement and recreational establishments from the act's minimum wage requirements. In its decision, written by Judge Rosemary S. Pooler and joined by Judges Susan L. Carney and John Gleeson of the U.S. District Court for the Eastern District of New York sitting by designation, the court concluded, in a matter of first impression in this circuit that Congress intended the term "establishment" for purposes of the exemption to mean "a distinct, physical place of business as opposed to an integrated multiunit business or enterprise." In so ruling, the court affirmed the district court's judgment dismissing the complaint for failure to state a claim.

Background

Congress enacted the FLSA to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[2] The FLSA requires employers to pay employees a specified minimum wage.[3] Congress also created a litany of exemptions to the minimum wage requirements, including an exemption for employees of seasonal amusement or recreational establishments. Under Section 13(a)(3) of the FLSA, the minimum wage requirements "shall not apply with respect to…any employee employed by an establishment which is an amusement or recreational establishment…if (A) it does not operate for more than seven months in any calendar year."[4]

> The plaintiff In 'Chen' alleged that MLB failed to pay the minimum wage as required under the FLSA and the New York Labor Law.

The FLSA does not define "establishment," and courts have generally concluded that the language of the Section 13(a)(3) exemption is ambiguous. However, the Department of Labor's currently applicable regulations define "establishment" for the purposes of the FLSA, including Section 13(a), as "a distinct physical place of business."[5] The Labor Department's regulations also distinguish establishment from a business enterprise: "The term establishment means a distinct physical place of business rather than an entire business or enterprise."[6]

The Second Circuit had not ad-dressed how to define "establishment" as it is used in Section 13(a)(3).

Prior Proceedings

The plaintiff in this case worked as an unpaid volunteer during the week of the July 2013 Baseball All Star Game. Defendants Major League Baseball Properties and the Office of the Commissioner of Baseball (together, MLB) organized several events for the week, including FanFest, a five-day "interactive baseball theme park" held at the Jacob K. Javits Center in New York City. Other All Star Week events held throughout New York City included a race, a concert, a fantasy camp, and a parade. FanFest activities included baseball-themed video games, photo booths, a simulated baseball dugout and fields, baseball clinics, batting cages, music offerings, autograph signings, and a green-carpeted replica baseball diamond. FanFest also had on display memorabilia collections, a historical presentation on the Negro leagues, and the world's largest baseball.

FanFest was staffed primarily with volunteers, whose duties included greeting customers, answering questions and providing directions, taking tickets, checking credentials, staffing activities, and distributing gifts. Volunteers received compensation in the form of free admission to events and in-kind benefits such as T-shirts, caps, drawstring backpacks, fanny packs, water bottles, baseballs, lanyards, free admission to FanFest for each volunteer and a guest (admission cost $35), and a chance to win a pair of tickets to the All-Star Game.

The plaintiff worked three shifts at FanFest, totaling 14 hours. Before FanFest, he also attended three hours of mandatory training sessions at Citi Field. Plaintiff received no wages, but was given a T-shirt, cap, drawstring backpack, water bottle, and a baseball.

The plaintiff filed a lawsuit on Aug. 7, 2013, alleging that MLB failed to pay the minimum wage as required under the FLSA and the New York Labor Law (NYLL). On Aug. 15, 2013, the plaintiff moved the court to certify a collective

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action on behalf of himself and similarly situated volunteers who worked without pay at various All-Star Week events since 2010. The plaintiff filed a first amended class action complaint on Nov. 25, 2013.

MLB moved to dismiss on the grounds that the plaintiff was not an "employee" as that term is defined in the FLSA, and that, even if he were an "employee," he was still not entitled to minimum wages because FanFest was a seasonal amusement or recreational establishment covered by the Section 13(a)(3) exemption. In response, the plaintiff argued that MLB, not FanFest, employed him and that MLB is a single integrated enterprise; thus, the exemption did not apply. The plaintiff also argued that the court could not dismiss his FLSA claims under Rule 12(b)(6) on the basis of a Section 13 exemption because he is not required to plead the absence of an affirmative defense and he had not had the opportunity to take discovery.

On March 25, 2014, district court Judge John Koeltl concluded that the FLSA's amusement or recreational establishment exemption applied to FanFest and granted MLB's motion to dismiss on the basis that the complaint contained facts establishing MLB's affirmative defense. In so deciding, Koeltl applied the Labor Department's definition of establishment and found that the affirmative defense was established by the plaintiff's own pleadings. He did not reach the issue of whether the plaintiff was an "employee" as defined in the FLSA, and declined to exercise supplemental jurisdiction over the state law claims.

Plaintiff appealed the district court's ruling on March 28, 2014.

The Second Circuit Decision

The Second Circuit reviewed de novo the district court's legal interpretation of the statute and its dismissal of the complaint for failure to state a claim.

Statutory Interpretation of 'Establishment.' The court began its discussion by setting forth the canon of statutory interpretation that, absent ambiguity, statutory language carries its plain meaning. However, if a statute is ambiguous, the court may look to the legislative history. Finding that the FLSA's language did not plainly convey the meaning of "establishment," the court turned to the legislative history. The seasonal amusement and recreational establishment exemption was originally enacted in 1961. The Senate committee report describing the exemption stated that establishments "are typically those operated by concessionaires at amusement parks and beaches and are in operation for six months or less than a year."[7] After examining the legislative history, the court found it gave little aid in interpreting "establishment."

Next, the court turned to the Supreme Court's 1945 decision in *A.H. Phillips v. Walling*.[8] In *Walling*, the court rejected the argument that a chain of grocery stores together with its separate warehouse and central office constituted a single retail establishment within the meaning of the exemption. The Walling court interpreted the meaning of "establishment" under a repealed version of FLSA Section 13(a)(2), finding that "Congress used the word 'establishment' as it is normally used in business and in government—as meaning a distinct physical place of business."[9] The Second Circuit found no basis to conclude that Congress intended a different meaning.

Following its review of *Walling*, the Second Circuit turned to the Labor Department's currently applicable regulations. In a footnote, the court stated that the relevant Labor Department regulations were not promulgated pursuant to an express delegation of rulemaking authority by Congress, and therefore were entitled to Skidmore deference—meaning essentially that they are accorded weight to the extent they are persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)

The ruling that FanFest was an "establishment" turned on the fact that FanFest was confined to the Javits Center and the volunteer worked at only that location during All Star Week. The court did not address whether the outcome would have been different had the plaintiff volunteered at multiple locations.

The Second Circuit agreed with the district court that the Labor Department's regulations were well-reasoned, internally logical and generally consistent with judicial interpretations of the exemption. Accordingly, the court concluded that "establishment" for purposes of the FLSA's Section 13(a)(3) seasonal amusement and recreational establishment exemption means "a distinct, physical place of business as opposed to an integrated multiunit business or enterprise."[10]

The court disposed of plaintiff's arguments that the Labor Department's definition of establishment applies only to retail establishments and that the Labor Department applies an alternative fact-intensive, multi-factor test for seasonal exemptions.

FanFest Is an Establishment. After addressing how to define "establishment" for purposes of the FLSA's seasonal amusement and recreational establishment exemption, the Second Circuit turned to whether FanFest was an establishment for purposes of the statute. The plaintiff argued that, although he physically worked at FanFest, he was employed by MLB. The court found that distinction to be irrelevant, finding dispositive the fact that FanFest took place at the Javits Center and not at MLB's Park Avenue office or any other All Star week event. Because FanFest was physically separate, it constituted a separate establishment.

Affirmative Defense Appeared on Face of Complaint. After the court found FanFest to be an establishment for purposes of the FLSA exemption, it stated that, to prevail, the defendants were required to establish that "FanFest is plainly and unmistakably (1) seasonal and (2) a recreational or amusement establishment under the FLSA."[11] Generally, the court noted, whether an FLSA exemption applies is a fact-bound inquiry that will not be ascertainable on the face of the complaint. However, the court pointed out that in this instance "the Complaint's numerous specific factual allegations, supplemented by its reference to dozens of related webpages, news items, and other documents, plainly establish the factors determinative of the exemption."[12]

Conclusion

In the past two years, numerous class-action lawsuits have been filed in this circuit seeking compensation for unpaid work. In *Glatt v. Fox Searchlight Pictures*,[13] just a month before its decision in *Chen*, the court revised the standard for determining when an intern qualifies as an employee under the FLSA, making it easier for employers to defend against class actions.

Chen does not sweep so broadly, but it does leave an open question. The ruling that FanFest was an "establishment" turned on the fact that FanFest was confined to the Javits Center and the volunteer worked at only that location during All Star Week. The court did not address whether the outcome would have been different had the plaintiff volunteered at multiple locations. Without an answer to that question, organizations holding similar events would be well advised to confine volunteers to single events.

1. *Chen v. Major League Baseball Properties*, 798 F.3d 72 (2d Cir. 2015).
2. See 29 U.S.C. §202.
3. See 29 U.S.C. §§206-07.
4. See 29 U.S.C. §213(a)(3).
5. 29 C.F.R. §779.23.
6. 29 C.F.R. §779.203.
7. S. Rep. No. 145, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin News at 1620, 1647–48.
8. 324 U.S. 490 (1945).
9. Id. at 496.
10. 798 F.3d at 79.
11. Id. at 82.
12. Id. at 83.
13. 791 F.3d 376 (2d Cir. 2015).

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