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When Is An Employer's Violation Of The Fair Labor Standards Act "Willful?"

By Jay E. Grenig

Dennis E. Whitfield, Deputy Secretary of Labor
v.
Richland Shoe Co.
(Docket No. 86-1520)

Argued February 24, 1988

The Federal Fair Labor Standards Act (FLSA) requires the payment of one and one-half times an employee's regular rate of pay for overtime hours—generally for hours in excess of forty hours per week. The FLSA provides that a legal action for unpaid overtime compensation must be brought within two years, "except that a cause of action arising out of a willful violation may be commenced within three years after the action accrues." If an employer's conduct is found to be a "willful violation," this adds one year to the two-year statutory limitation period for filing suit and potentially renders an employer liable for an additional year's backpay.

ISSUE

The Court is asked to decide here what employer conduct constitutes a "willful violation" of the Federal Fair Labor Standards Act for determining the appropriate limitations period.

FACTS

The Richland Shoe Company employed eleven mechanics to repair and maintain equipment in its plant. The mechanics were paid a weekly salary on a base week of forty-eight hours, and only received one and one-half times regular pay for hours in excess of that base week.

The Secretary of Labor brought suit for an injunction to restrain future violations of the FLSA and to recover back wages for the mechanics. Richland defended its noncompliance with the FLSA's overtime requirements, invoking the statutory "Belo Plan" exception which covers certain situations where employees' work hours inescapably fluctuate both above and below forty hours per week.

The trial court in the Eastern District of Pennsylvania held for 1985 that Richland's compensation plan was not a valid Belo Plan, because the mechanics' hours did not fluctuate significantly below forty hours a week. The court also held that Richland's violation was "willful" so that the mechanics were entitled to three, rather than two, years of back wages because Richland's management was aware the FLSA governed overtime systems.

On appeal, the United States Court of Appeals for the Third Circuit agreed that the compensation plan had not met the Belo requirements, but ruled the lower court had applied an incorrect standard of willfulness (779 F.2d 80 (1986)). The court of appeals held the standard applied by the trial court was "wrong because it is contrary to the plain meaning of the FLSA." According to the Third Circuit, it is "clear that willfulness is akin to intentionality," which the court ruled at a minimum "requires reckless disregard" of consequences.

BACKGROUND AND SIGNIFICANCE

In *Trans World Airlines, Inc. v. Thurston* (469 U. S. 111 (1985); *Preview*, 1984-85 term, pp. 145-48), the Supreme Court construed the "willful violation" prerequisite to an award of liquidated damages under the Federal Age Discrimination in Employment Act, holding that the provision required a knowing violation of, or reckless disregard for, the requirements of that Act.

Since the Supreme Court's decision in *Thurston*, the Third, Fifth and Seventh Circuits have applied the *Thurston* standard in determining the appropriate statute of limitations under FLSA. Nine other circuits apply a standard that renders a wider range of employer conduct willful—finding a "willful violation" if the employer knew or suspected that actions might violate the FLSA. This is sometimes referred to as the "in the picture" standard. The District of Columbia Circuit adheres to a standard that falls somewhere in between the two—finding an employer's noncompliance willful "at the very least ... when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt."

The federal government has taken different positions on the proper interpretation of "willful violation." In prior cases, the Secretary of Labor has pressed the "in the picture" standard. However, in a 1986 case involving the federal government, the United States argued for adoption of the *Thurston* standard where the government is the employer. In its argument to the Supreme Court in this case, the federal government has now proposed a third standard: A "willful violation" under the FLSA occurs whenever an employer recognizes it may be covered by the FLSA and acts without a reasonable basis for believing it is complying with the statute.

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The Secretary of labor contends that the government's proposed standard provides an incentive to employers to seek advice to conform their practices to the law and thus makes violations less likely. It also places on employers rather than on employees the risk of legally uncertain conduct.

Opponents of the government's proposed standard assert it would improperly shift the burden of proof from plaintiffs to employers. They suggest that the Secretary of Labor's proposed standard would place an onerous burden on small employers to have house counsel or independent counsel pass on every aspect of their businesses.

ARGUMENTS

For Dennis E. Whitfield, Deputy Secretary of Labor *(Counsel, Richard G. Tranto, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)*

1. The meaning of "willful violation" depends on the statutory context and does not always include a requirement of knowing or reckless disregard of the law.
2. "Willful violation" in the FLSA should be construed to protect employers from liabilities they reasonably failed to anticipate, but not to shift to employees the risk an employer assumes in pursuing pay practices of uncertain legality.
3. A violation of the FLSA should be deemed willful within the meaning of the FLSA limitations provision whenever an employer recognizes it may be covered by the FLSA and acts without a reasonable basis for believing it is complying with the statute.

For the Richland Shoe Company *(Counsel of Record, Alfred W. Crump, Jr., P. O. Box 1496, Reading, PA 19603; telephone (215) 376-6794*

1. Having abandoned its position espoused in the lower courts, the Secretary of Labor is using this case as a vehicle to resolve general legal issues and is really seeking an advisory opinion.
2. The Secretary of Labor's lack of diligence should not be encouraged by broadening the definition of "willful."
3. Even under the test advanced by the Secretary of Labor, there is no basis for extending the limitation provision to three years.

AMICUS ARGUMENTS

In Support of the Richland Shoe Company

The Equal Employment Advisory Council has filed a brief arguing that the government's proposed "reasonable basis" standard would improperly convert the plaintiffs' burden to prove "willfulness" into a burden on employers to prove "non-willfulness," would create internal conflicts between different provisions of the FLSA, and would lead to impractical and unwarranted results for employers.