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2nd Circ. Tells FLSA Plaintiffs To 'Put Up The Goods'

By **Jon Steingart**

Law360 (May 12, 2021, 6:45 PM EDT) -- A new Second Circuit precedent outlining the standard for claiming an employer willfully violated the Fair Labor Standards Act will help ensure that litigation proceeds only when there is a plausible allegation, attorneys who represent employers told Law360.

The bar that the Second Circuit adopted in addressing an issue of first impression is so high that it will be impossible to meet in many cases, according to an attorney for the worker whose dismissal the court upheld.

In Whiteside v. Hover-Davis Inc., the court held in a 2-1 decision on April 27 that a manufacturing employee who was reassigned from an overtime-exempt position didn't plausibly back up his claim that the company knew it should have begun paying him time and a half when he worked more than 40 hours a week in his new role. The dissent found that the majority asked too much of the plaintiff upfront and would have let the case proceed.

The Fair Labor Standards Act ordinarily has a two-year statute of limitations. If an employee can demonstrate that an employer willfully violated the law's requirements, the look-back period extends to three years.

The statute of limitations issue was essential to Mark Whiteside's suit against Hover-Davis, a subsidiary of Universal Instruments Corp., because the alleged violation occurred a little over two years before he filed his complaint. Subjecting it to a two-year window would bar his FLSA claims, but they would be allowed under a three-year period.

Pleading Standard Could Stymie Plaintiffs

Writing for the majority, Chief Judge Debra Ann Livingston said the fact that a three-year statute of limitations is the exception rather than the rule means a plaintiff needs to present evidence upfront to justify the unusual approach.

"When a plaintiff relies on a theory of willfulness to save an FLSA claim that otherwise appears untimely on its face, it should similarly be incumbent on the plaintiff to plead facts that make entitlement to the willfulness exception plausible," Judge Livingston wrote. U.S. District Judge Paul A. Engelmayer of the Southern District of New York, sitting by designation, joined the opinion.

Christopher Davis, an attorney with the Law Office of Christopher Q. Davis. who represents Whiteside, told Law360 that this approach requires a plaintiff to support his or her claims early in litigation with evidence that might not be obtained before discovery.

"To me, it seems like it establishes a threshold that's going to be impossible in many circumstances to meet," Davis said. He added that he respected the court's decision and would file state law claims in state court.

The Second Circuit's standard for alleging a willful FLSA violation seems difficult to meet because there rarely is direct evidence, such as something a manager said aloud or wrote in an email, that clearly shows the employer knew the law's requirements and chose to disregard them, Davis said.

Instead, plaintiffs often take an alternate approach to show willfulness, he said. Known as reckless

disregard, this path suggests an employer broke the rules as a result of failing to undertake due diligence to learn what they are.

"The reason that the decision is problematic for plaintiffs' lawyers is, from our perspective, it would require a direct demonstration of an awareness of [employers'] obligation," Davis said. "We think that the statute and precedent permit circumstantial evidence to plausibly allege reckless disregard of a violation."

Circuit Judge Denny Chin, the panel's dissenting jurist, agreed with that position.

"While Whiteside's allegations may fall short of alleging actual knowledge of a violation, they are sufficient in my view to plausibly allege reckless disregard," Judge Chin wrote.

Plausibility Upfront Is Required

Michael Billok, a Bond Schoeneck & King PLLC attorney who represents Hover-Davis and Universal Instruments, said the ruling means plaintiffs won't be able to simply allege a violation was willful without saying more.

"Going forward, at the pleading stage, the mere use of the word 'willful' in a complaint will not be sufficient to plead an allegation of willfulness," Billok said. "The plaintiff must allege enough facts to make the allegation of willfulness plausible."

Robert Whitman, a partner at management-side firm Seyfarth Shaw LLP, said the takeaway is not what plaintiffs must allege to claim a violation, but how they support a contention that an employer acted willfully.

"You've got to have some facts to back up an allegation that the violation is willful," he said. "Not just that the violation occurred."

"All that does is get you two years," he said. "If you want that extra year, you've got to have some proof behind it right from the beginning."

Before a judge will let a case move along, examining whether the plaintiff satisfied the pleading standard ensures there is some basis to believe that the complaint's allegations could be true.

"It says to plaintiffs, 'You can't just make a simple allegation of willfulness and have that be enough,'" Whitman said. "They've got to put up the goods from day one."

Supreme Court Could Weigh In

The Second Circuit's ruling adds to a split among federal appeals courts that have weighed in, Judge Livingston noted in the court's opinion.

The Second Circuit's position puts it most directly at odds with the Tenth. In March 2018, **a three-judge panel held** in Fernandez v. Clean House, LLC that a district judge in Colorado should not have dismissed the willfulness component of a suit filed by house cleaners who claimed they'd been underpaid.

Rather than require the workers to support their willfulness claim upfront, the district court should have scrutinized the contention only if the company defended itself by arguing that its conduct was not willful, the panel said.

Litigation procedure rules let a defendant challenge a complaint on statute of limitations grounds, the Tenth Circuit noted. But the rules don't require a plaintiff to anticipate and preemptively address a potential defense on statute of limitations grounds, the court said.

The Second Circuit noted that its holding was more in line with the Sixth Circuit, which held in a Family and Medical Leave Act case that a "conclusory assertion" of willfulness wasn't enough to invoke that law's three-year statute of limitations.

But the Second Circuit's decision may not be the last word, Whitman said.

"It is one on which the circuits disagree, and that is often a strong predictor of whether the Supreme Court will take the case," he said.

--Editing by Robert Rudinger.
