

CLIENT ALERT

Supreme Court Holds that FLSA Collective Action Must be Dismissed Because Named Plaintiff's Claims Became Moot After Her Rejection of Offer of Judgment

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For those hoping the Supreme Court would bless the "pick off" strategy used by some employers in response to Fair Labor Standards Act (FLSA) collective actions, last week's decision in *Genesis Healthcare Corp. et al. v. Symczyk* offers cold comfort. The ultimate question – whether an employer's unaccepted Rule 68 offer of judgment to a named plaintiff moots a collective action – was left for another day. The majority opinion relied on Symczyk's concession that her individual claim was moot in holding that this admission required dismissal of the putative FLSA collective action in this particular case. In so doing, the Court failed to address the split among the lower courts regarding the viability of the "pick off" strategy in the context of unaccepted offers of judgment. The Court's 5-4 opinion did offer a glimmer of hope for employers, in holding that if the named plaintiff's claim is in fact moot and no other individuals have opted into the case, a putative FLSA collective action cannot go forward. But the word "glimmer" is used advisedly, in light of Justice Kagan's pointed dissent.

Background

In 2009, Symczyk filed a complaint on behalf of herself and "all other persons similarly situated" alleging that Genesis' "auto-deduct" meal break practice violated the FLSA. After serving Symczyk with an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure (FRCP), to which she failed to respond, Genesis filed a motion to dismiss for lack of subject matter jurisdiction. Genesis argued that because it had offered Symczyk complete relief on her individual damages claim, she no longer had a personal stake in the outcome of the litigation, thereby rendering the collective action moot. In granting the motion to dismiss, the United States District Court for the Eastern District of Pennsylvania concluded that the offer of judgment mooted Symczyk's suit, emphasizing that no other individuals had yet joined the lawsuit and that the offer of judgment fully satisfied her individual claim.

The Third Circuit reversed. While the Court of Appeals recognized that no other potential plaintiff had opted into the lawsuit, that the offer of judgment fully satisfied Symczyk's individual claim, and that an offer of judgment providing for complete relief generally moots a plaintiff's claim, it nevertheless held that the collective action was not moot. The court explained that the practice of "picking off" named plaintiffs through Rule 68 offers of judgment could result in frustrating the policy goals underlying FLSA collective actions.

The Supreme Court's Decision

In reversing the Court of Appeals, the Supreme Court failed to squarely resolve the question of whether an unaccepted offer of judgment that fully satisfies a named plaintiff's claim is sufficient to render a collective action moot. Noting a split of authority on this question, the Court held that the issue was not properly before it, reasoning that the Third Circuit "clearly held in this case that respondent's individual claim was moot," and concluding that Symczyk had waived the issue in the district court proceedings.

Relying on what it described as "[a] straightforward application of well-settled mootness principles," Justice Thomas' majority opinion explained that "[i]n the absence of any claimant's opting in," the collective action became moot when Symczyk's individual claim became moot, as "she lacked any personal interest in representing others in this action." The Court held, moreover, that "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied."

The Court rejected Symczyk's argument that, notwithstanding Genesis' offer of judgment, she retained a personal stake in the litigation pursuant to the "statutorily created collective-action interest in representing other similarly situated employees under the [FLSA]." In support of this contention, she relied on case law interpreting class actions brought under FRCP 23, including *United States Parole Comm'n v. Geraghty* and *Sosna v. Iowa*. The majority concluded these cases were inapposite "because Rule 23 actions are fundamentally different from collective actions under the FLSA." Underlying this fundamental difference, the Court explained, is the fact that "a putative class acquires an independent legal status once it is certified under Rule 23," while conditional certification under the FLSA "does not produce a class with an independent legal status, or join additional parties to the action."

Symczyk also argued that a defendant's strategic use of a Rule 68 offer of judgment makes FLSA collective actions "inherently transitory" so that such lawsuits are not necessarily rendered moot when the named plaintiff's claims are terminated. According to the Court, the "inherently transitory" doctrine was developed to "address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course," such as in the case of a class action challenging temporary pretrial detention. The Court rejected Symczyk's reliance on this principle, reasoning that "[u]nlike claims for injunctive relief challenging ongoing conduct," claims for damages "cannot evade review," as they remain viable until they are "settled, judicially resolved, or barred by the statute of limitations." The Court further noted that the "putative plaintiffs remain free to vindicate their rights in their own suits . . . [and] are no less able to have their claims settled following [Symczyk's] suit than if her suit had never been filed at all."

The Court also rejected Symczyk's claim that the purpose underlying FLSA's collective action provisions would be frustrated by defendants' use of Rule 68 offers of judgment to "pick off" named plaintiffs before the FLSA's conditional certification process could be initiated. Distinguishing the FRCP 23 case law cited by Symczyk, the Court noted that Genesis' offer of judgment "provided complete relief on her individual claims . . . and she failed to assert any continuing economic interest" in the lawsuit.

The Dissenting Opinion

Justice Kagan saw the case in starkly different terms. In a dissent characterized by her lively, informal writing style (*i.e.*, an acerbic tone that is perhaps intended to make her a foil for Justice Scalia), Justice Kagan flatly rejected the notion that employers should be able to dispose of collective actions by "picking off" the named plaintiff with a Rule 68 offer of judgment: "So a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home."

In Justice Kagan's view, the majority started from the "bogus" premise that the plaintiff's individual claim was mooted by the offer of judgment. She characterized the majority's opinion as the "most one-off of one-offs" and instructed readers of the opinion to relegate it "to the furthest reaches of [their] mind." Justice Kagan argued that the majority's assumption that Symczyk's claim was moot, based on the finding that she waived that argument, was untenable. Justice Kagan explained that

"[w]hen a plaintiff rejects [an offer of judgment]—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief." According to Justice Kagan, "[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect." She then observed, "[a]s every first-year law student learns, the recipient's rejection of an offer leaves the matter as if no offer had ever been made." Justice Kagan concluded that "Symczyk's individual stake in the lawsuit thus remained what it had always been."

Justice Kagan's dissent makes clear that the four liberal members of the Court strongly disapprove of the majority's seeming endorsement of the "pick off" strategy summarized above. Justice Kagan's opinion is thus yet another example of the ongoing ideological battle on the Court over the proper role of class action litigation in federal courts. As with other cases in which the Court is sharply-divided, implicit in the minority's position is a pro-plaintiff policy judgment. The dissent fails to acknowledge the fact, well known to employers and their counsel, that some plaintiffs' lawyers routinely file boilerplate complaints asserting collective claims in circumstances where systemic problems are greatly exaggerated, if not altogether non-existent. Such complaints are often filed to force capitulation by employers eager to avoid the distraction, defense costs and potential reputational risk connected with defending such claims. While being highly critical of efforts by employers to use Rule 68 to "pick off" named plaintiffs to resolve potentially expensive collective action litigation, Justice Kagan's opinion ignores the reality that a lot of FLSA complaints are little more than "get rich schemes" benefiting plaintiffs' lawyers. The dissent fails to suggest a sound legal or policy-based rationale for criticizing only one side's attempts at furthering its self-interest.

The dissent's policy judgment leads to an unsatisfactory response to another important consideration presented by offers of judgment. The majority opinion noted with approval decisions from a number of lower courts, in circumstances like Symczyk's, which have entered judgment in favor of the plaintiff in accordance with the defendant's Rule 68 offer. Justice Thomas concluded that there is nothing special in the FLSA's collective action provisions that support an exception to the rule that it is appropriate to enter judgment where the named plaintiff's claim can be fully satisfied by accepting the defendant's offer. Justice Kagan's opinion does not fully address the concern underlying the majority's observation that it is bad policy to allow plaintiffs' lawyers to continue to pursue expensive litigation in circumstances where their original client no longer has a dog in the fight.

Practical Implications for Employers

The Supreme Court's decision in *Genesis* fails to provide any significant guidance for lower courts in addressing unaccepted Rule 68 offers of judgment. Until the Court decides to address this issue, lower courts are likely to issue divergent opinions about whether unaccepted offers of judgment will render collective actions under the FLSA moot. What the decision does make clear, however, is that the offer of judgment strategy remains a tactic that employers should consider at the outset of certain types of putative collective action litigation. The key take-away from *Genesis* is that employers considering using Rule 68 offers of judgment to "pick off" named plaintiffs in putative collective actions should act quickly before the named plaintiff moves for conditional certification and/or others opt into the suit.

Employers who attempt the "pick-off" strategy should be mindful of the fact that once individuals opt into a putative FLSA collective action, they become parties. As a result, the issue of whether the named plaintiff's claims have been rendered moot is no longer relevant in that scenario, as the lawsuit will continue with the opt-ins becoming plaintiffs. One of the unresolved issues in *Genesis* is whether cases following that pattern are proper vehicles for conditional certification, or whether they should proceed strictly as individual plaintiff cases.

Another important consequence of *Genesis* is language in the majority opinion emphasizing the "fundamental" differences between Rule 23 class actions and FLSA collective actions. The Court's recent opinion in *Comcast Corp. v. Behrend*, hailed as a victory for employers in the class action certification wars, will thus have little direct bearing on FLSA collective actions. And the Court's discussion of the differences between the two types of actions may make it more difficult for employers, in a motion to decertify a collective action, to argue that Rule 23 principles support their position. In other words, the unique procedural issues presented by the FLSA's collective action provisions will remain challenging for employers.

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