

FILED

FEB 15 2018

No. 353931

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

WASHINGTON STATE COURT OF APPEALS
DIVISION III

KIMBERLY KITTLE, LEAH WESTBY, and ERIKA MALITZKY, on
behalf of themselves and all others similarly situated,

Plaintiffs/Respondents,

vs.

RIVERVIEW LUTHERAN CARE CENTER, a Washington Corporation
d/b/a Riverview Care Center; and RIVERVIEW LUTHERAN HOME OF
SPOKANE, WASHINGTON, a Washington state corporation d/b/a
Riverview Lutheran Home / Riverview Terrace,

Defendants/Appellants.

RESPONDENTS' RESPONSE BRIEF

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1. Introduction.

Plaintiffs Kittle, Westby, and Malitzky represent a class of employees at Riverview Lutheran Care Center and Riverview Lutheran Home of Spokane, Washington (collectively "Riverview") that sued for wage and hour violations under Washington law. The class allegations are that Riverview unlawfully denied class members rest breaks and meal periods, and in addition failed to pay class members overtime under Washington's standard 40-hour per week scheme without reaching a meaningful agreement or understanding with class members.

Riverview moved for partial summary judgment seeking dismissal of plaintiffs' claim that Riverview's overtime policy did not comport with RCW 49.46.130, which requires overtime to be paid to employees who work in excess of 40 hours in a single week. Riverview claimed that it was entitled to pay employees overtime only for hours worked in excess of an eight-hour day or 80 hours in a two-week period (the "8/80" rule), under Washington's adoption of a federal statute applicable to nursing care facilities. However, that statute applies only when the employer and employees have reached "an agreement or understanding" as to the overtime policy prior to the performance of the work.

The trial court denied the partial summary judgment, finding that genuine issues of fact existed as to whether there was an "agreement or

understanding," since the only evidence proffered by Riverview was the employee's acknowledgment of a 98-page personnel manual which specified it was a "guideline," which "may or may not be" followed, in Riverview's sole discretion.

Riverview appealed the denial of partial summary judgment as a matter of right and in the alternative requested discretionary review. This court determined that Riverview could not appeal the issue as a matter of right, but granted Riverview's request for discretionary review.

Riverview's briefing and argument on the issue before the court has evolved greatly from those arguments it presented to the trial court on its original motion for partial summary judgment. Specifically, the trial court was never presented with Riverview's arguments about the interpretation of other statutes under the Fair Labor Standards Act ("FLSA"). CP at 4-13; 140-146; 174-181.

2. Summary of Argument.

Riverview concedes there is a "dearth" of law interpreting the 8/80 rule under these circumstances in Washington state. Necessarily, this should preclude any assertion that the trial court incorrectly applied the statute as a matter of law. In fact, the trial court properly found that issues remained for trial because of the specific terms of Riverview's employee

manual, and the lack of any notification or discussion on Riverview's 8/80 policy with employees.

Riverview's argument boils down to the assertion that an employer can satisfy the requirements of 29 U.S.C. 207(j), which states that the 8/80 scheme may be adopted only "if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work," simply by placing the 8/80 policy in a lengthy employee handbook while simultaneously reserving the right to follow or disregard the policy in Riverview's sole discretion. CP at 46; 167-168.

Plaintiff class members assert here, consistent with the trial court's determination, that a genuine issue of fact exists as to whether an "agreement or understanding" was truly reached between Riverview and class members regarding the substitution of the 8/80 scheme for Washington's traditional 40-hour workweek overtime policy.

Riverview's argument is not focused at all on the specific circumstances existing in this matter, but is instead focused strictly on the application of the federal statute. Plaintiffs believe that Riverview's unilateral adoption of the 8/80 scheme, assertion that Riverview can choose to follow or disregard the policy at any time of its choosing, and lack of evidence that Riverview engaged in any meaningful discussion with class members about which overtime policy would apply all support

the contention that a genuine issue of fact exists in this matter. This is consistent with the trial court's determination and the ruling should not be disturbed on interlocutory appeal.

3. Statement of the Case.

Employees Kittle, Westby, and Malitzky brought a class action suit based on Riverview's policies and practices which violated Washington's wage and hour laws. In their Complaint,¹ plaintiffs alleged that Riverview employees were regularly denied meal and rest breaks, and that Riverview failed to pay them overtime compensation for that time actually worked, as well as failing to pay overtime compensation for those missed meal and rest breaks. CP at 246-255. Plaintiffs' causes of action included: Failure to Pay for All Hours Worked (Id., ¶ III); Failure to Provide Meal Periods (Id., ¶ IV); Failure to Provide Rest Periods (Id., ¶ V); Failure to Pay Overtime Compensation (Id., ¶ VI); and Breach of Good Faith and Fair Dealing (Id. at ¶ VII).

The portion of the cause of action at issue here was contained in Plaintiffs' Fourth Cause of Action: Failure to Pay Overtime Compensation, and included the following:

¹ Plaintiffs Amended Complaint filed after the partial summary judgment order added a party plaintiff, but did not substantively alter the claims made.

- 6.2 Plaintiffs frequently worked more than eight (8) hours in a work day, and/or 40 hours per week.
- 6.3 Failure to provide meal and rest periods provided additional work time to Riverview that was uncompensated.
- 6.4 The Riverview Personnel Policies Manual states that overtime will be paid for time worked in excess of eight (8) hours per day or eighty (80) hours per pay period. The policy manual does not comport with RCW 49.46.130 which requires overtime compensation for employees who work in excess of forty (40) hours in a single week.
- 6.5 Riverview did not pay plaintiffs overtime compensation for all of the time worked in excess of eight (8) hours in a day or forty (40) hours per week or eighty (80) hours in a pay period as required by statute and/or contract.

...

CP at 251-252.

Riverview moved for partial summary judgment on a single sentence in this cause of action: "The Court should grant Riverview's Motion for Partial Summary Judgment with respect to the assertion "...that Riverview's overtime policy does not comport with RCW 49.46.130." CP at 5.

Plaintiffs opposed the partial summary judgment because the 8/80 rule applies only if there exists "an agreement or understanding arrived at between the employer and employees before the performance of the work...". 29 U.S.C. §207(j). The only evidence proffered by

Riverview to establish such an "agreement or understanding" was its 98-page employment handbook, and the plaintiffs' signed acknowledgement of that handbook.² The handbook contained the 8/80 overtime provision, but there was no evidence it had been specifically pointed out or discussed with the employees; it also contained several admonitions that it was a "guideline" only, and not a contract, and contained the following specific provision:

...THIS MANUAL, THEREFORE, IS NOT INTENDED TO BE, SHOULD NOT BE CONSTRUED AS, NOR DOES IT CONSTITUTE AN EMPLOYMENT CONTRACT...AND IT IS NOT INTENDED TO BE PART OF THE EMPLOYMENT RELATIONSHIP. ... THIS MANUAL IS INTENDED AS A GUIDELINE FOR MANAGEMENT AND EMPLOYEES **WHICH RIVERVIEW MAY OR MAY NOT FOLLOW IN ITS SOLE DISCRETION.**

Riverview reserves the right to add, delete, interpret or otherwise modify any of the policies...and all other terms and conditions of employment at any time, **without prior notice and at its sole discretion...** (Emphasis added)

CP at 46.

² Riverview makes passing remarks that Ms. Kittle and Ms. Westby admitted their understanding of the 8/80 policy during deposition. Notably, the deposition testimony only proves that they were aware that Riverview was unilaterally imposing the 8/80 policy upon them, and that they were doing so *after* the work was performed. The deposition testimony does not support the proposition that an "agreement or understanding" was reached prior to performance of work as a matter of law.

The trial court found that there were genuine issues of fact for trial on whether an "agreement or understanding reached before performance of the work" existed based on this very specific provision in the handbook.

The trial court also certified the class action under CR 23 based on findings that typical and common questions of law and fact existed as to Riverview's policies, and whether the employees of Riverview received rest breaks, meal breaks and overtime pay as required by Washington law.

This court accepted discretionary review of the trial court's denial of summary judgment on the 8/80 overtime issue.

4. Law.

At the outset, plaintiffs/respondents assert that Riverview should be barred from presenting new arguments and theories that were never raised before the trial court. See, Westway Const., Inc. v. Benton County, 136 Wn. App. 859, 864-65, 151 P.3d 1005 (2006) (citing Sneed v. Barna, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996)). "A summary judgment argument not pleaded or argued to the trial court cannot be raised for the first time on appeal." Id.

The court below simply did not consider Riverview's arguments regarding the interpretation of other FLSA statutes when determining whether a triable issue of fact existed in this particular matter. This line of argument is raised for the first time on appeal. One need only compare

Riverview's filings with trial court with its opening appellate brief to see that Riverview's argument has "evolved" over time. CP at 4-13; 140-146; 174-181; 190-196. The trial court cannot commit error with respect to legal arguments never placed before it. Thus, Riverview should be barred from making these statutory comparison arguments on appeal.

4.1 Standard of Review is de novo.

The appellate court reviews de novo a lower court's denial of a motion for summary judgment and engages in the same inquiry as the court from which the appeal is taken. Generally, the party moving for summary judgment has the burden of showing that no genuine issue on a material fact exists. Summary judgment should only be granted if after considering all the pleadings, affidavits, depositions or admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said (1) that there is no genuine issue as to any material fact, (2) that all reasonable persons could reach only one conclusion, and (3) that the moving party is entitled to judgment as a matter of law.

Baker v. Schatz, 80 Wn. App. 775, 782, 912 P.2d 501 (1996).

"A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact." Preston v. Duncan, 55 Wash.2d 678, 681, 349 P.2d 605 (1960). "[I]n situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, et cetera, a summary judgment would not be warranted." Id.

4.2 The trial court did not err in finding genuine issues for trial as to an "agreement or understanding" reached between Riverview and the plaintiff class members based on the facts here, including the specific terms in Riverview's employment manual.

As stated by Riverview, Plaintiffs/Respondents do not contest whether or not Riverview is a residential care establishment for which the 8/80 overtime scheme can apply. The issue is whether, as a matter of law, an "agreement or understanding" has been reached between the employer and employee which satisfies the requirements of 29 U.S.C. § 207(j) and RCW 49.46.130(h). Riverview contends that any factual issues which pertain to the employees' agreement to the 8/80 policy, or pertain to Riverview's mandate that it can choose to follow or disregard the 8/80 policy at its whim, are simply not material. (Appellant's Opening Brief at 8)

Contrary to Riverview's argument, the facts surrounding Riverview's assertion that there was an agreement or understanding between it and its employees as to the 8/80 overtime policy are in dispute, and thus the trial court's ruling that genuine issues existed for trial was not in error.

The terms of the statute allowing an employer to have an 8/80 overtime policy provides that "an agreement or understanding" must be "arrived at between the employer and the employee before the

performance of the work." 29 U.S.C. §207(j). The fact that the 8/80 policy is contained in Riverview's employee manual, of which employees acknowledged receipt, does not end the factual inquiry.

Here, there is no indication that Riverview pointed out or discussed the 8/80 overtime rule with its prospective employees, sufficient to even establish the notification standard which Riverview asserts. And Riverview's manual not only is a typical employee manual which may be unilaterally altered, it specifically provides that at the outset, it "**may or may not**" follow the "guidelines" provided therein, in its discretion. CP at 46.

As a result, the facts at issue here are unlike those interpreting "agreements and understandings" in the federal cases Riverview cites which deal with exceptions to the pay regulations under the Fair Labor Standards Act ("FLSA") for "piecework", "comp time" or "fluctuating work week". None of those cases contain any terms of an employment manual similar to Riverview's, which essentially not only allows it to unilaterally alter it in accord with Washington law, see, Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984), but actually renders its application discretionary from the outset. The trial court did not err in finding issues of fact to be determined at trial when any notification of a policy contained in the manual was not only alterable in

the future, employees could not form an understanding of a policy that may or may not be consistently applied.³ The cases Riverview cites relating to other FLSA provisions have differing evidence to establish the existence of an "understanding or agreement", and thus do not establish any basis for this court to interject into the trial court's denial of a partial summary judgment and find error existed in simply requiring a trial on all issues to develop the necessary full record before appeal.

4.3 Cases relied upon by Riverview are based upon their own specific facts and cannot be used to find that an "understanding" occurred here.

The terms of 29 U.S.C. 207(j) are undisputed and require "an agreement or understanding" which is "arrived at" between the employer and employees.

The unreported Duff-Brown v. City and County of San Francisco, California, 2014 WL 2514555 (N.D. Cal. June 4, 2014) is distinguishable from the instant matter. In Duff-Brown, the court initially found that a material issue of fact existed as to whether an agreement or understanding was reached. Id. at *1. Thereafter, "the parties engaged in further discovery," and the court was able to grant the employer's motion for

³ Cases interpreting these distinct provisions of the FLSA find that issues for trial exist on an "agreement or understanding" requires "clear and consistent disclosure of the terms of the agreement" and proof that an employer "unequivocally notified" the employee,

summary judgment, finding that the Union and the City had reached an agreement on the overtime issue. Id. at *2, *5. Specifically, the court reviewed detailed deposition transcripts from the Union representatives involved in negotiations with the employer. Id. at *3-*4. Unlike here, those representatives were negotiating and discussing the very issue of 29 U.S.C. § 207(j), and thus, the court was able to find, based upon the substantial record before it, that an agreement or understanding had been reached. The facts are very dissimilar to this matter, where the employees were given a near-hundred page handbook without explanation, and instructed (via the handbook) that the overtime policy could change immediately at the whim of Riverview. Clearly, the Duff-Brown employee representatives had more involvement in reaching an "agreement or understanding" than the mere "notice" espoused for by Riverview

Further, other published cases have held that a factual issue will preclude summary judgment under similar FLSA provisions. In Albanese v. Bergen County, N.J., 991 F.Supp. 410 (N.J. 1997), the court held that "plaintiffs and defendants had no agreement or understanding" regarding overtime pay and hours worked by K-9 police officers in care of their

who must know "the certainty of their imposition". Serrano III v. Republic Serv., Inc., 2017 WL 2531918 (Slip Op. S.D. Tex. 2017).

service animals. Id. at 422. There, the officers knew they had to care for the animals if they chose to bring them home, and knew that they would receive a stipend from their employer for this work. Id. at 413-414. Under Riverview's argument, this "notice" would be sufficient to create and "agreement or understanding" under the FLSA piece rate statute, 29 U.S.C. § 207(g). The District Court did not believe that the employer's mere imposition of these policies upon the workforce created the necessary "agreement or understanding," and held that the employer could not avail itself of § 207(g) of the FLSA. Albanese, 991 F.Supp at 422. See also, Treece v. City of Little Rock, Ark., 923 F.Supp. 1133 (E.D. Ark. 1996) (issue of fact existed as to whether agreement or understanding was reached under § 207(g) of FLSA).

Factually, the statements contained in the employee manual which specify that the provisions therein are "guidelines" that "may or may not" be followed, in the discretion of Riverview, and may be modified at Riverview's "sole discretion", creates an issue of fact on the existence of an agreement, and simply being aware of the existence of the application of the 8/80 rule by seeing pay stubs does not create an "agreement or understanding" as a matter of law. The cases cited by Riverview on differing sections of the FLSA had different facts to establish an "agreement" or an "understanding". See e.g., Amador v. Guardian

Installed Services, 575 F.Supp.2d 924 (N.D. Ill. 2008) (agreement or understanding on "piece work" reached when meetings were held with employees to discuss implementation, packets were given to each employee explaining the pay program, examples of pay scale were read aloud to employees, employees were asked if they understood piece work pay program, and employees were asked to sign a paper acknowledging the change in pay scale).

Such facts do not exist here, and controlling law remains the terms of the statute, which require an agreement or understanding; the trial court properly interpreted to create an issue of fact for trial under applicable Washington law, and no substantial difference exists to require certification to this Court.

4.4 Holding that an "agreement or understanding" requires more than mere notice from an employer of an illusory policy that can be changed at the employer's whim is consistent with Washington's status as a pioneer for protection of employee rights.

Washington has a long and proud history as "a pioneer for protection of employee rights." Hisle v. Todd Pacific Shipyards Corp., 151 Wash.2d 853, 861, 93 P.3d 108 (2004). It would be antithetical to this history to adopt Riverview's argument and find that, as a matter of law, plaintiff class members legally bargained away their right to a 40-hour overtime workweek.

First, unilateral notice does not equate to "understanding." A definition of "understanding" used by Black's Law Dictionary is "An agreement, especially of an implied or tacit nature." Black's Law Dictionary (10th ed. 2014) Here, there are no facts to suggest that the parties reached an agreement about the 8/80 policy. Further, there is no evidence that the plaintiff class members understood that they were effectively bargaining away their right to the standard overtime schedule. The trial court's denial of summary judgment reflected this, and allowed the parties to present their evidence on the issue at the time of trial.

Second, the agreement or understanding which Riverview claims to have been reached between it and the class members is utterly illusory. Riverview unequivocally reserved itself the ability to toss out the 8/80 policy at its sole discretion, without notice, and without any agreement or understanding reached. Thus, it cannot be said that the class members ever really reached an agreement or understanding about the overtime policy in effect at Riverview. Factually, the policy could have changed multiple times. Under Riverview's view, this would have been acceptable because the information would have appeared on a pay stub. This view is not respectful of the employee's rights and is not in line with Washington's policies and law.

5. Conclusion.

For the foregoing reasons, this court should find that genuine issues of material fact exist as to whether an "agreement or understanding" between Riverview and the class existed sufficient to disregard the normal 40-hour overtime week.

DATED this 15 day of February, 2018.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 15 day of February, 2018, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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