EMPLOYMENT & LABOR RELATIONS LAW
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Supreme Court to Decide Whether FLSA Collective Action Is Mooted

The U.S. Supreme Court has granted certiorari in a case of great significance, *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189 (3d Cir. 2011), *cert. granted*, 2012 WL 609478 (June 25, 2012), and will hear arguments on December 3, 2012. The sole issue before the court is "[w]hether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims." In other words, if an employee files a lawsuit against his or her employer on his or her own behalf and on behalf of a potential class of other employees, and the employer offers to pay him or her the most the employee could possibly expect should the case go forward, can the employee insist on having the class action proceed forward?

The defense tactic taken in *Symczyk* is a common one, with the employer making an offer of judgment in the full amount of the plaintiff's claim plus reasonable attorney fees. The tactic is common because the costs to defend a class action can easily dwarf the actual amount the employee could ever hope to obtain individually. Because the offer provided for all of the relief that the plaintiff could have received had she pursued the claim through trial, the offer in *Symczyk* constituted "full relief" of her claims. The employee did not accept the offer, and the employer later moved to dismiss the action as moot.

The list of amici curiae who have filed briefs with the Court shows the importance of these issues. Included among them are the Chamber of Commerce of USA, American Health Care Association, and DRI.

The decision by the Third Circuit was rendered on an appeal from a district-court decision dismissing the action as moot. Addressing an issue of first impression in the Third Circuit, and following the lead of the Ninth Circuit, the Third Circuit in *Symczyk* held that an offer of full relief made pursuant to Rule 68 of the Federal Rules of Civil Procedure does not automatically moot the claim of an FLSA plaintiff who has not yet moved for conditional certification. The court acknowledged that an offer of complete relief will generally moot the plaintiff's claim, but then went on to state several policy-based reasons why this "general" rule limiting the jurisdiction of the federal courts should not be applied in the context of an FLSA collective action.

The court opined that, although Rule 68 was designed "to encourage settlement and avoid litigation," the rule can be manipulated in the class-action context to "frustrate rather than to serve those salutatory ends." The court observed that it was concerned that any other rule would permit a defendant to "pick off" the claims of the named plaintiff and avoid certification of the class. This, in turn, would require "multiple plaintiffs to bring separate actions, which effectively

could be picked off." This application of the rule "obviously would frustrate the objective of class actions and waste judicial resources."

The Supreme Court's decision to hear the appeal is welcome news and will hopefully bring certainty to this area for employers and employees alike.

— *Kevin O'Connor, Peckar & Abramson, River Edge, NJ*