

CASE No. B178428

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

TOBY HARRIS, KEVIN O'CONNOR, MICHAEL SANDERCOCK, ALEX LANE
and MICHAEL BEY, on behalf of themselves, the general public, and all others
similarly situated,

Appellants,

vs.

INVESTOR'S BUSINESS DAILY, INC, DIRECT MARKETING SPECIALISTS,
INC (DMSI), DATA ANALYSIS INC., WILLIAM O'NEIL & CO., INC., and Does
2 through 10,

Respondent

APPELLANTS' ANSWER TO PETITION FOR REHEARING

Mark R. Thierman SBN 72913
THIERMAN LAW FIRM
7287 Lakeside Drive
Reno, Nevada 89511
Tele: (775) 284-1500

Eric M. Epstein, SBN 64055
**LAW OFFICES OF ERIC M.
EPSTEIN, APC**
1901 Avenue of the Stars, #1100
Los Angeles, CA 90067
Telephone (310) 552-5366

H. Tim Hoffman SBN 49141
Arthur Lazear SBN 83603
HOFFMAN & LAZEAR
180 Grand Avenue, Suite 1250
Oakland, CA 94612
Telephone (510) 763-5700

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

INTRODUCTION.....1

ARGUMENT.....1

 I. THE COURT CLEARLY RULED THAT A SINGLE CAUSE
 OF ACTION ALLEGING VIOLATIONS OF THE FLSA
 UNDER SECTION 17200 IS NOT PREEMPTED BY THE
 FLSA OPT IN REQUIREMENT.....1

 II. THE COURT CLEARLY RULED THAT TO SUSTAIN ITS
 BURDEN OF PROOF THAT A CHARGEBACK IS LAWFUL,
 THE EMPLOYER MUST SHOW THAT THE EMPLOYEE
 CLEARLY AGREED IN WRITING THAT THE PAYMENT
 WAS AN ADVANCE, RATHER THAN WAGES. THE “AT
 RISK” PERIOD WAS VERY SHORT, THE MONEY WAS
 CLEARLY NOT EARNED, AND THERE WAS NO
 ECONOMIC BENEFIT CONFERRED TO THE EMPLOYER
 AS A RESULT OF THE LABOR OF THE EMPLOYEE.....3

 III. THE COURT CLEARLY RULED THAT IBD’S
 COMPENSATION SYSTEM OF RANDOMLY
 ASSIGNING POINTS FOR VARIOUS TASKS DOES NOT
 CONSTITUTE A COMMISSION6

CONCLUSION.....8

CERTIFICATE OF COMPLIANCE UNDER RULE 14(c).....9

TABLE OF AUTHORITIES

Cases

Acosta v. Scott Labor LLC,
2006 U.S. Dist. LEXIS 153 (D. Ill. 2006)2

Ramirez v. Yosemite Water Co. (1999)
20 Cal 4th 785, 803-8047

Steinhebel v. Los Angeles Times Communications
(2005) 126 Cal.App.4th 6963, 6

Statutes

29 U.S.C. 218.....2

California Business and Professions Code Section 17200 1, 2

Labor Code Section 200(a).....5

Labor Code Section 200(b).....5

Labor Code Section 2035

Labor Code Section 219(a).....4

Labor Code Section 2214, 5

Labor Code Section 2044

INTRODUCTION

Although Respondents appear to be seeking direction from the Court of Appeals, in reality, Respondents are just arguing for a different outcome based upon no new facts or law. Appellants' view is that the decision is neither ambiguous nor unclear and therefore requires no rehearing or modification.

ARGUMENT

I. THE COURT CLEARLY RULED THAT A SINGLE CAUSE OF ACTION ALLEGING VIOLATIONS OF THE FLSA UNDER SECTION 17200 IS NOT PREEMPTED BY THE FLSA OPT IN REQUIREMENT

In the case before this court, there was only a single cause of action (i.e. the eighth cause of action to which the lower court erroneously granted the demurrer without leave to amend) which alleged a violation of FLSA as a predicate act for plaintiffs' 17200 claim. The Court of Appeal engaged in an extensive discussion of both federal and state law on this issue and came to its clear and unambiguous conclusion on page 8 of its written decision wherein it held:

“In light of the federal authority discussed above, we hold that a single cause of action alleging violations of the FLSA under section 17200 is not preempted by the FLSA opt in requirement. Therefore, we shall reverse the order dismissing this cause of action.”

The ruling is clear on its face. The Court correctly held that the FLSA “opt in” requirement does not preclude a 17200 claim based on a violation of the FLSA

as a predicate act. The decision is not limited only to the 5 individually named plaintiffs and no such limiting language is found anywhere in the decision. The term “single” as used in the Court’s opinion refers to the “cause of action”, not a specific individual plaintiff.

The Court correctly reasoned that because of the anti-preemption language at 29 U.S.C. 218, California Business and Professions Code Section 17200 (the Unfair Competition Act or UCA) may adopt the substance of the Fair Labor Standards Act as a predicate to an unfair competition complaint without adopting the procedure for bringing FLSA claims directly under 29 U.S.C. 216(b), just like a federal district court with jurisdiction based upon diversity of citizenship applies state law on the merits but retains its own procedural rules, even if those rules are outcome determinative. An individual is owed overtime under the FLSA whether or not he “opts in”, although the individual cannot maintain an action under the FLSA itself unless he opts in. The “Opt In” requirement of the FLSA it is not a condition precedent to the basic substantive right to be paid overtime compensation for hours worked after 40 per week. Because Plaintiffs are not alleging a collective action under the FLSA, there is no bar to class certification under state law. *Acosta v. Scott Labor LLC*, 2006 U.S. Dist. LEXIS 153 (D. Ill. 2006). A rehearing is unnecessary to clarify this holding by the Court of Appeals.

II. THE COURT CLEARLY RULED THAT TO SUBSTAIN ITS BURDEN OF PROOF THAT A CHARGEBACK IS LAWFUL, THE EMPLOYER MUST SHOW THAT THE EMPLOYEE CLEARLY AGREED IN WRITING THAT THE PAYMENT WAS AN ADVANCE RATHER THAN WAGES, THE “AT RISK” PERIOD WAS VERY SHORT, THE MONEY WAS CLEARLY NOT EARNED, AND THERE WAS NO ECONOMIC BENEFIT CONFERRED TO THE EMPLOYER AS A RESULT OF THE LABOR OF THE EMPLOYEE

Despite Respondent’s parade of horribles, Appellant did not interpret the Court’s March 29, 2006 opinion as a grant of summary judgment in Appellant’s favor, and therefore there is no need for clarification in anticipation of Appellant making a motion for summary adjudication in the trial court after this Court’s remitter. It is clear that this Court held that Labor Code Section 221 is a bright line, prophylactic rule that prohibits an employer to take back monies previously paid to an employee unless the employer can prove it meets the exceptions articulated in *Steinhebel v. Los Angeles Times Communications*, (2005) 126 Cal.App.4th 696. Thus, the decision of the Court of Appeals would allow Respondent to prove at trial that 1) “--the employment agreement clearly identified the commission as an advance. . .” 2) the employees “expressly agree[d] to the chargeback policy in writing. . .” 3) the employer clearly stated that “the points were [not] earned at the time of the sale, but at some designated point in the future. . . and 4) that employer did not “retained the payment received for the portion of time during which the customer received the newspaper” but “retained nothing after the merchandise was returned.” If the Respondent cannot prove these four factors, the charge backs are unlawful.

This Court held as a matter of law that IBD cannot simply circumvent the statute by proving the employees agreed to chargebacks in general. Labor Code 219(a) prohibits such an agreement, and states, in relevant part that “no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied.” Respondent is seeking permission to prove a private agreement setting aside the provisions of Labor Code 221 and Labor Code Section 219 prohibits such an agreement. Therefore, proof of some generalized agreement to waive the provisions of Labor Code Section 221 should not be allowed.

The word “advanced” signifies that the money was a loan and not wages. Without the word advanced, these are wages. Labor Code 221 says nothing about “earned” or really deserved or any such concept of an accrual based payment of wages. Employees are treated as cash basis and money paid must belong to the employee “free and clear” or no employee could ever spend its paycheck for fear it would be required to make repayment at some future date. “It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.” The statute says paid, because employee wages are too important to the employee to be encumbered with esoteric notions of “earned” or “unearned”. Labor Code Section 204 covers the issue of when wages must be paid, but once paid, they cannot be taken back by the employer.

Without the word advance, the money paid must be wages and wages cannot be charged back. Labor Code 200(a) says "Wages" includes all amounts for labor performed by employees of every description . . . and Labor Code 200(b) says "Labor" includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment. To obtain this money, whatever it's called, the employee had to perform labor personally. Therefore, the money is wages. A Labor Code Section 221 says wages, whether earned or unearned, can not be taken back by the employer.

The legislation is simple, direct and absolute. The alternative is an administrative and economic nightmare. Every employer will simply claim wages are not earned unless the employer is satisfied with the work, and no employer will ever be satisfied after the employee terminates employment so no employee will ever receive their last paycheck contrary to Labor Code 203. And no employee can ever spend his or her pay check until the employer says the money is really earned, whatever the word earn means. Clearly, this will make impossible reliance on wages for payment of life's necessities. Under the employer's theory "what have you done for me lately" is the criteria for keeping money already paid. And while the Courts and the Labor Commissioner try to figure out whether money is really earned or is the employer just trying to take back money from employees who it now resents having paid initially, the employee's pay is being

held hostage in the employer's hands, an economically intolerable position for people who can least afford it and who have no bargaining power to withstand a long legal battle.

Based on the above, the Court clearly intended that unless IBD can meet the narrow exceptions of *Steinhebel*, supra, its chargeback policy is illegal per se.

III. THE COURT CLEARLY RULED THAT IBD'S COMPENSATION SYSTEM OF RANDOMLY ASSIGNING POINTS FOR VARIOUS TASKS DOES NOT CONSTITUTE A COMMISSION

The Court clearly ruled, as a matter of law, that IBD's compensation plan does not constitute "commissions". IBD cannot now resurrect its argument that more than 50% of an employee's compensation was derived from "commissions" because such compensation was as a result of "sales." Unfortunately for IBD, that "ship has sailed." This Court has ruled that the sales themselves were **not** "commissions" because the points received by the telemarketers for such sales (when converted to dollars) were not based on a percent of the price of the product sold. As the Court stated on Page 11 of its opinion, "...**none** of the compensation constituted commission." (Emphasis added.)

In reaching its decision that the payments to the telemarketers are not commissions, the Court followed the California Supreme Court decision of *Ramirez v. Yosemite Water Co.*, (1999) 20 Cal 4th 785, 803-804, cited in this Court's opinion, on page 9 thereof, wherein the Supreme Court held that in order for a

compensation plan to be a commission it had to meet the following two requirements:

1. That the employees are involved in selling a service or product; and
2. That the amount of compensation is a percent of the price of the product or service (emphasis added).

In applying the holding of *Ramirez*, supra to this case, the Court, after reviewing how points were earned, stated as follows on P. 10 of its decision: “The point values were not tied to the price of the subscription sold”. (Emphasis added.) The Court then further rejected Respondents argument that the compensation may be a “commission” if based on “value” (not tied to price) by reiterating that the Supreme Court interpreted the statute to mean that the amount of compensation “must be a percent of the price of the product or service” and that “value” is too vague a standard.

The Court then delivers the coup de grace to Respondents’ position. On Page 11 of its decision, the Court holds as follows:

“We agree with Respondents that if the facts are undisputed, then the legal conclusion is a question of law. Applying de novo review, we find that the point system did not constitute commission payments.” (Emphasis added.)

Thus, it does not matter if IBD can present evidence that more than 50% of the telemarketers compensation came from direct sales of the newspaper, because this Court has held as a matter of law that IBD’s “point system” (including the points earned from sales of newspapers) was not a commission. Based on the

above, no rehearing is necessary on this issue as the Court has clearly conveyed its decision.


CONCLUSION

For the reasons stated herein, the petition for rehearing should be denied. Notwithstanding the same, if this Court believes that any portion of its decision is in need of further clarification, then Appellants have no objection to this Court issuing a modification consistent with this Court's original decision.

Dated: April 17, 2006.


Respectfully submitted,

ERIC M. EPSTEIN

By: 
Eric M. Epstein, Esq.
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 14(c)(1) of the California Rules of Court because it contains 2,292 words, excluding the parts of the brief exempted by Rule 14(c)(3). This brief complies with the typeface requirements of Rule 14(b)(2)-(4) because it has been prepared in a proportionally spaced font using Microsoft Word XP in 13 point Times New Roman type.


Eric M. Epstein

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1901 Avenue of the Stars, Suite 1100, Los Angeles, California 90067. On April 18, 2006, I served the foregoing document described as **APPELLANT'S ANSWER TO PETITION FOR REHEARING** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope addressed as stated on the attached Service List.


BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

BY FACSIMILE: I transmitted to the interested parties by facsimile, pursuant to California Rules of Court, Rule 2006. The facsimile number(s) I used are noted with the address of each party. The facsimile machine I used complied with California Rules of Court, Rule 2004, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached hereto.

BY PERSONAL SERVICE: I caused such document(s) to be delivered by an employee of United Express Messenger, Inc. which said delivery was confirmed by United Express Messenger, Inc.

BY OVERNIGHT DELIVERY: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and placed said envelope for collection and overnight delivery at a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 18, 2006 at Los Angeles, California.



Linda Collins

SERVICE LIST

Silver & Freedman, APLC
2029 Century Park East, 19th Floor
Los Angeles, CA 90067-3005
Attn: Belle C. Mason, Esq.

Attorney for Respondent

Law Offices of Marjorie G. Fuller
110 East Wilshire Avenue, Suite 501
Fullerton, CA 92832

Attorney for Respondent

Attorney General
300 S. Spring Street
Suite 1702
Los Angeles, CA 90013

Pursuant to B&P Code 17200

Office of the District Attorney
320 West Temple Street, Room 540
Los Angeles, CA 90012

Pursuant to B&P Code 17200

Los Angeles Superior Court
Clerk, Department 46
111 North Hill Street
Los Angeles, CA 90012

LASC Case No. BC269313

Office of the Clerk
California Supreme Court
300 S. Spring Street
Second Floor
Los Angeles, CA 90013-1233

(4 copies)