

ORIGINAL

IN SUPREME COURT OF OHIO

John Haight, et al.,	:	Supreme Court Case No. 2014-1241
	:	
Plaintiffs,	:	Appeal from the Montgomery County
v.	:	Court of Appeals, 2 nd District
	:	
The Cheap Escape Company, et al.,	:	Appeal No. CA 25983
	:	
Defendants.	:	Trial No. 2012 CV 00946

PLAINTIFFS/APPELLEES' MEMORANDUM IN OPPOSITION OF JURISDICTION

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I. Statement of Appellees' Position Regarding Jurisdiction

Appellees ask the Court to decline jurisdiction over this case. The case, while implicating the Ohio Constitution, does not actually rest on a constitutional question. Further, the case presents issues that are of limited public or general interest. Additionally, Appellants did not raise their second proposition of law in either the trial court or the court of appeals and have therefore waived the issue.

II. Legal Question at Issue

Plaintiffs/Appellees are suing to recover unpaid minimum wages under Ohio's minimum wage amendment. There is no dispute that Defendants/Appellants employed Appellees and paid them less than minimum wage. The only question is whether the law obligated Appellants to pay minimum wage to Appellees. The answer to that question relies on whether Appellees are "employees" because only "employees" are entitled to minimum wage under Article II, Section 34a of the Ohio Constitution ("§34a"). Section 34a uses the Fair Labor Standards Act's meaning of "employee."¹ Consequently, whether Appellees are "employees" rests on interpreting the FLSA.

The FLSA defines "employee" in a single place - its Definitions section, 29 U.S.C. § 203. The definition of "employee" in 29 U.S.C. § 203(e) applies to the entire FLSA.²

There is no dispute that Appellees fit squarely in the meaning of "employee" found in §203. This necessarily means that Appellees are "employees," as the FLSA defines the term.

¹ "As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same meanings as under the federal Fair Labor Standards Act..." Ohio Const. Art. II, Sec. 34a.

² "As used in this chapter - * * * (e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer." (Emphasis added.) 29 U.S.C. § 203(e).

Appellants admitted exactly that in responding to Appellees' Request for Admission 43: "Defendants admit that Plaintiffs and other Outside Commission Salespeople were 'employees' within the meaning of that term as used in the Fair Labor Standards Act, but maintain that they were exempt employees."³

Appellants' admission should end the inquiry and may, in fact, moot this appeal.⁴ If Appellees are "employees" (exempt or otherwise) under the FLSA, they are necessarily covered by Ohio's minimum wage amendment; §34a adopts the FLSA's meaning of "employee" and explicitly rejects the application of any exemptions not found in the amendment.

In spite of this, Appellants argue that Appellees are not "employees." Appellants rely on §34a's implementing legislation, R.C. § 4111.14(B)(1) ("§B1"), which excludes from its definition of "employee" any "individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213..." Because Appellees are "outside salespeople," they are exempted by 29 U.S.C. § 213(a)(1) from the FLSA's minimum wage coverage and, thus, fall outside of §B1's definition of "employee."

There is no dispute in this case that if the meaning of "employee" under §34a is "any individual employed by an employer," (*i.e.*, the exact meaning used by the FLSA), then §B1 unconstitutionally conflicts with §34a. Appellants have taken the untenable position that the "meaning" of "employee" under the FLSA excludes exempt employees. In reviewing the FLSA, the court of appeals correctly rejected Appellants' argument:

³ RFA 43 states "Admit that Plaintiffs and other Sales Representatives were 'employees' within the meaning of that term, as used in the Fair Labor Standards Act."

⁴ Appellants made the admission after Appellees filed their motion for declaratory judgment that ultimately gave rise to this appeal.

The exemptions from minimum wage requirements set forth in 29 U.S.C. 213 do not alter the definition of “employee” set forth in 29 U.S.C. 203. * * * In other words, the exemptions remove certain categories of *employees* from the minimum wage requirements set forth in other parts of the Fair Labor Standards Act, but they do not remove persons in those categories from the definition of employee. (Emphasis sic.)

Haight v. Cheap Escape Co., 2014-Ohio-2447 ¶17 (2nd Dist.). Because Appellees are “employees” under the FLSA, they are “employees” under §34a and entitled to minimum wage. *Haight v. Cheap Escape Co.*, 2014-Ohio-2447 ¶23.

III. This case does not involve a substantial constitutional question because the case hinges on interpreting the FLSA, not the Ohio Constitution.

The court of appeals held §B1 to be unconstitutional because §B1’s definition of “employee” is narrower than the FLSA’s definition. *Haight v. Cheap Escape Co.*, 2014-Ohio-2447 ¶24. Whenever that a court holds a statute to be unconstitutional, a constitutional question is implicated. In certain cases, such as this one, the constitutional question is insubstantial because the dispositive question rests on something other than the constitution.

Here, §34a does not have its own definition of “employee.” Instead, §34a uses the FLSA’s meaning of the term. As a result, the question of §B1’s constitutionality can only be resolved by interpreting the FLSA. If the FLSA’s meaning of “employee” is “any individual employed by an employer,” then §B1 must be unconstitutional. This is not in dispute. If the FLSA’s meaning of “employee” is “any individual employed by an employer but not those employees exempted from coverage by 29 U.S.C. § 213,” then §B1 must be constitutional. This is also not in dispute.

Under these circumstances, the constitutional question is insubstantial. The substantial or dispositive question is one of federal law. Because this Court’s discretionary jurisdiction is not

based on federal law questions, even if those questions touch on constitutional issues, the Court should reject jurisdiction in this case.

IV. This case is not one of public or great general interest.

Appellants warn of a state-wide employment law apocalypse caused by the court of appeals' decision in this case. Appellants have overstated this case's importance to anyone outside of the litigants. In fact, the decision neither changed Ohio's minimum wage law nor is widely applicable on any practical level.

The Court needs look no further than Google to see that there is no public or great general interest in this case. A Google search performed on August 4, 2014 for "Haight v. Cheap Escape" turned up no press coverage of this case. The only search results of note were a short Facebook post, a short LinkedIn post, and two blog entries, all of which were from lawyers.⁵ The obvious implication is that the decision is of very limited public or general interest. If this case was the harbinger of an employment law apocalypse, one would expect significant news coverage and numerous amicus briefs urging this Court to hear the case. Neither has happened.

The reason for this lack of interest is the same reason that there are no other court decisions addressing the meaning of "employee" under §B1. The situation giving rise to this case is very rare. For the issue in this case to come up, an unusual combination of factors must be present.

First, an employee must be exempt from the FLSA's minimum wage requirements under 29 U.S.C. § 213. Second, the employee cannot fall under any of the common exemptions (*i.e.*

⁵ Specifically, the search turned up a short Facebook post from Elfvin & Besser, a LinkedIn post from Bugbee & Conkle that links to a two-sentence blurb on the firm's website, a blog post from Neil Klingshirn (who filed an amicus brief in this case on behalf of the Ohio Employment Lawyer's Association), and a blog post from Priscilla Hapner.

executive, administrative, and professional employees) because those employees must be paid a salary higher than minimum wage anyway.⁶ Third, an employer has to have disregarded the requirements of §34a and decided to pay less than minimum wage. Fourth, the employee has to accept working at a job where he or she is, in fact, paid less than minimum wage despite other, generally available employment opportunities that pay minimum wage. For obvious reasons, this combination of facts does not come up often.

Appellants warn of a deluge of collective action lawsuits resulting from upholding the court of appeals' decision. This warning has no basis. If the circumstances giving rise to this case were common, then a flood of cases would have already happened because the minimum wage amendment has been in effect since 2007. The flood has not occurred because, as discussed above, the circumstances of this case are rare.

Appellants also warn that Ohio's minimum wage law is now in a state of confusion. This too is inaccurate. Section 34a was and still is the law. The court of appeals' decision did not substantively change Ohio's minimum wage law. Instead, the court held only that §34a means what it says it means - "employee" has the same meaning as under the FLSA.⁷ The law remains as it was since the §34a's adoption. Incidentally, this fact strongly favors retroactive application of the court of appeals' decision.

⁶ In order to be an executive, administrative, or professional employee, the employee must be paid a salary of at least \$455 per week. *See* 29 C.F.R. 541.100 (executive employees), 29 C.F.R. 541.200 (administrative employees), 29 C.F.R. 541.300 (professional employees), and 29 C.F.R. 541.400 (computer employees).

⁷ As a legal matter, the court of appeals' finding that §B1 is unconstitutional *cannot* change Ohio's law because an unconstitutional law is a nullity. "A decision overruling a former statute as being unconstitutional is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law." *Roberts v. Treasurer*, 147 Ohio App. 3d 403, 2001-Ohio-8867, 770 N.E.2d 1085, ¶20 (10th Dist.).

Further, §34a is self-executing and a complete law by itself. “The amendment did not require any action by the Ohio General Assembly to implement its protections.” *Haight v. Cheap Escape Co.*, 2014-Ohio-2447 ¶2. Thus, Ohioans are still protected by the minimum wage law that they originally approved. Even if Ohioans had to rely on the implementing legislation for protection, R.C. 4111.14(B) still stands and defines “employee” in exactly the same way as §34a. This leaves no gaps of coverage, even in the implementing law.

This case is certainly important to the litigants, but its application is narrow and not of public or great general interest. Accordingly, the Court should decline jurisdiction over this case. The Court can always take up the issue at another time if public interest manifests or Ohio courts reach conflicting decisions.

V. Appellants’ second proposition of law was not raised in the court below, does not present a substantial constitutional question, and is not a matter of public or great general interest.

Appellants’ second proposition of law requests a “Get Out of Jail Free” card by asking the Court to apply the court of appeals’ decision prospectively. Appellants claim that allowing them to get away with paying their workers less than minimum wage *for years* would be an “equitable” result. *See* Appellants’ memo, pp. 13-15. This is an anathema to the remedial goals of wage and hour laws, including §34a. The Court should not exercise jurisdiction to entertain this argument.

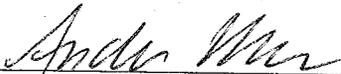
First, Appellants did not raise this issue in either the trial court or the court of appeals. It has therefore been waived and should not be considered by this Court. *See State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St. 3d

122, 2004-Ohio-6363, 818 N.E.2d 688, ¶10.⁸ Second, the issue does not present a substantial constitutional question. Deciding whether to apply another court's decision prospectively is generally an equitable consideration that does not rely on considering a part of the constitution. Third, the issue is not one of public or great general interest. This is discussed above with respect to the case as a whole and applies here as well. For those reasons, the Court should decline to hear Appellants' second proposition of law.

VI. Conclusion

The court of appeals summed up the issue in this case: "[T]he Fair Labor Standards Act defines 'employee' as 'any individual employed by an employer.' Therefore, the Ohio Constitution provisions cover any individual employed by an employer." *Haight v. Cheap Escape Co.*, 2014-Ohio-2447 ¶23. Because the substantial question in this case is one of federal law and the case is not of public or great general interest, Appellees urge the Court to decline to exercise jurisdiction over this case.

Respectfully submitted,



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⁸ "Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 2004-Ohio-6363 ¶10.

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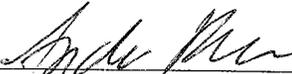
The undersigned hereby certifies that on the 5th day of August, 2014, a copy of the foregoing was served upon the following and by regular mail.

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