11TH CIRCUIT DOCKET NO: 07-15073-JJ

IN THE 11TH CIRCUIT COURT OF APPEALS

FELIX LOBO AND LIZA SUAREZ,

Appellant,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
BILLY CYPRESS,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

1. FELIX LOBO (Plaintiff/ Appellant)
2. LIZA SUAREZ (Plaintiff/ Appellant)
3. BILLY CYPRESS (Defendant/ Appellee)
4. DEXTER WAYNE LEHTINEN (Defendant's Counsel)
5. JUAN MANUEL VARGAS (Defendant's Counsel)
6. SONIA ESCOBIO O'DONNELL (Defendant's Counsel)
7. J.H. ZIDELL, ESQ. (Plaintiff's Counsel)

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STATEMENT REGARDING ORAL ARGUMENT

Felix Lobo and Liza Suarez, Appellants, request oral arguments. In light of the complex legal and factual issues extant herein, oral argument will benefit the Court.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291 because it involves the appeal of a final decision of a District Court.

STATEMENT OF THE ISSUE:

1. Whether the Fair Labor Standards Act (FLSA) 29 U.S.C. 201-216 creates a private right of action for non-Indians against Indian tribes who have failed to comply with its requirements?

INTRODUCTION

The Appellants Felix Lobo and Liza Suarez, were the Plaintiffs below. The Appellees, Miccosukee Tribe of Indians of Florida and Billy Cypress were the Defendants below. In this Brief, Felix Lobo and Liza Suarez will be referred to as Appellants and Miccosukee Tribe of Indians of Florida and Billy Cypress will be referred to as Appellees. The symbol [R__-__-__] will designate the volume, document number, and page number of documents in the record on appeal. There are no transcripts as this appeal concerns only the order granting motion to dismiss entered by the trial Judge which was decided before the jury trial. "App." Signifies appendix exhibit.

STATEMENT OF THE CASE

Appellant Felix Lobo was a non-Indian home health aide for the Defendants. Lobo worked for the Defendants from on or about approximately June 2004 through June 2005. Lobo worked an average of 72 hours per week at a rate of $11.00/hr. Lobo was never paid overtime wages for the overtime hours worked for Defendants. **[R, 1-8-AppA]**.

Appellant Suarez was a non-Indian private security guard who predominantly patrolled the Defendant's commercial casino for the most part and other parts of the reservation located in close proximity to the casino. Suarez worked for the defendants from the year 2000 until 11/07/06. Suarez worked an average of 50 hours per week for the Defendant's at an average hourly rate of $13.00/hr and was never paid overtime wages for the overtime work that she performed for the Defendants. **[R, 1-8-AppA]**.

The District Court ruled in favor of Defendant's motion to dismiss and found that Indian tribes have immunity from private lawsuits under the FLSA absent an express Congressional authorization to the contrary or an express waiver of immunity by the tribe. **[R, 1-12-AppC]**. This appeal follows.

STATEMENT OF THE FACTS

Appellant Felix Lobo was a home health aide for the Defendants. Lobo worked for the Defendants from on or about approximately June 2004 through June 2005. Lobo worked an average of 72 hours per week at a rate of $11.00/hr. Lobo was never paid overtime wages for the overtime hours worked for Defendants. **[R, 1-8-AppA]**.

Appellant Suarez was a private security guard who predominantly patrolled the Defendant's commercial casino for the most part and other parts of the reservation located in close proximity to the casino. Suarez worked for the defendants from the year 2000 until 11/07/06. Suarez worked an average of 50 hours per week for the Defendant's at an average hourly rate of $13.00/hr and was never paid overtime wages for the overtime work that she performed for the Defendants. **[R, 1-8-AppA]**.

The District Court ruled in favor of Defendant's motion to dismiss and found that Indian tribes have immunity from private lawsuits absent an express Congressional authorization to the contrary or an express waiver of immunity by the tribe. **[R, 1-12-AppC]**. This appeal follows.

SUMMARY OF THE ARGUMENT:

It has been well established that the Fair Labor Standards Act is a statute of general application. A general statute in terms of applying to all persons includes Indians and their property interests. A general statute is deemed to apply to Indian tribes unless (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. As will be demonstrated below, the FLSA does not touch exclusive rights of self-governance, nor does the application of the FLSA abrogate rights guaranteed by Indian treaties, nor is there any proof either by legislative history or by any other means that Congress intended the FLSA not to apply to Indian tribes. Therefore, the FLSA should apply to overtime wage claims brought by non-Indians against their employer Indian tribe.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS.

This is an overtime wage case brought under the Fair Labor Standards Act 29 USC 201-216 by both Plaintiff's to recover overtime wages for the work that they performed for the Defendants, Suarez as a private security guard and Lobo as a home health aide, both appellants are non-Indians.

29 U.S.C. § 207 (a) (1) states, " if an employer employs an employee for more than forty hours in any work week, the employer must compensate the employee for hours in excess of forty at the rate of at least one and one half times the employee's regular rate…"

In Rutherford Food Corp. v McComb, 331 U.S. 722, 727 (1947) the United Supreme Court found that the FLSA is a statute of general applicability. The United Supreme Court further found in Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) that such generally applicable statutes typically apply to Indian tribes. "A general statute in terms applying to all persons includes Indians and their property interests." Id. at 116.

In Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), the Eleventh Circuit stated:

"In section 3(e) of the FLSA, *Id.* § 203(e), Congress defined the term "employee" for the purpose of determining who would be covered by the act. It would be difficult to draft a more expansive definition. The term "employee" was defined to include "any individual employed by an employer." *Id.* § 203(e)(1). In subsequent paragraphs Congress set forth specific exceptions to this broad definition. Section 3(e)(2) governs which employees of public agencies are covered by the act. *Id.* § 203(e)(2). In section 3(e)(3) Congress provided a limited exception for the immediate family members of employers engaged in agriculture. *Id.* § 203(e)(3). Finally, section 3(e)(4) exempts from coverage a narrow group of state and local government workers. *Id.* § 203(e)(4). This definitional framework-a broad general definition followed by several specific exceptions-strongly suggests that Congress intended an all encompassing definition of the term "employee" that would include all workers not specifically excepted."

Furthermore, as stated in Patel, at 702, "the Court consistently has refused to exempt from coverage employees not within a specific exemption." As the United States Supreme Court has explained in Powell v. United States Cartridge Co., 339 U.S. 497 (1950), "Where exceptions were made, they were narrow and specific."

The Courts have further concluded that exemptions under the Fair Labor Standards Act are to be construed strictly and narrowly in favor of coverage of employees, affording maximum coverage to the employees due to the broad remedial purpose behind the Act. Nicholson v. World Business

Network, Inc., 105 F.3d 1361 (11th Cir. 1997) Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, (1960) Mitchell v. Kentucky Fin. Co., 359 U.S. 290, (1959).

In San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055 (NLRB 2004) the National Labor Relations Board stated:

"The Federal courts of appeals have applied widely the Tuscarora principle to a number of civil rights and employment-related statutes. See Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1129-1130 (11th Cir. 1999) (ADA); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA); Smart v. State Farm Ins. Co., 868 F.2d 929, 932 (7th Cir. 1989) (ERISA); Donovan v. Coeur d' Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985) (*Coeur d'Alene*) (OSHA). The rationale behind these decisions supports the proposition that because Congress intended the Act to have the broadest possible breadth permitted under the Constitution, the Act is a statute of general application. See Navajo Tribe v. NLRB, 288 F.2d 162, 164-165 (D.C. Cir. 1961); Sac & Fox, 307 NLRB at 243."

The United States Court of Appeals for the Seventh Circuit stated in Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 495 (7th Cir. 1993) that "We do not hold that employees of Indian agencies are exempt from the Fair Labor Standards Act."

Although, the Fair Labor Standards Act lists several exemptions such as exempting a narrow group of state and local government workers and does not mention any exemptions for employees of Indian tribes, we will continue

to proceed under the analysis laid out to us in Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) by the Ninth Circuit Court of Appeals when dealing with statutes of general application and its application to Indian tribes.

The Ninth Circuit stated “A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.” Id. at 1116.

The undersigned was unable to unearth any treaty relevant to the issue at hand, nor was the undersigned able to find and documentation supporting that Congress specifically expressed its intent that the Fair Labor Standards Act not apply to Indian tribes. Therefore the statute should be deemed to apply to Indian tribes unless touches "exclusive rights of self-governance in purely intramural matters.”

The Ninth Circuit explained the exclusive self-governance prong with the following statement, “We believe that the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes.” Id. at 1116. In our present case, the requirement to pay overtime wages to a private security guard or home health aide does not on any surface appear to interfere with exclusive rights of self-governance such tribal membership, inheritance rules or domestic relations. The Miccosukee Tribe of Indians of Florida Casino is a commercial enterprise open to both Indians and non-Indians from which the Indian tribe intends to profit. The casino does not relate to any governmental functions except possibly as a source of revenue. As the Ninth Circuit found in United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980) when referring to casinos “…such gambling is neither profoundly intramural (the casinos' clientele was largely non-Indian) nor essential to self-government.”

Therefore, applying the prong of "exclusive rights of self-governance in purely intramural matters” as a basis for exempting the Fair Labor Standards Act application to Indian tribes would fail.

CONCLUSION:

The Fair Labor Standards Act is a statute of general application and thus should be applied to Indian tribes unless (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. As demonstrated above, the FLSA does not touch exclusive rights of self-governance, nor does the application of the FLSA abrogate rights guaranteed by Indian treaties, nor is there any proof either by legislative history or by any other means that Congress intended the FLSA not to apply to Indian tribes. Had Congress intended the FLSA not to apply to Indian tribes, they would have listed Indian tribes as an exception to the FLSA, as they have done whenever they have intended an exception to apply.

Therefore, the District Courts order granting Defendants motion to dismiss should be reversed and this case should be allowed to proceed.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof has been furnished by U.S. Mail on this 10th day of December, 2007 To:

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CERTIFICATE OF COMPLIANCE

I hereby certify that 14 point Times New Roman font was used throughout this brief and that 2,577 words are extant herein.

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