



THE PASCHOS LAW UPDATE NEWSLETTER

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July, 2012

I. EMPLOYMENT LITIGATION**The Third Circuit Establishes a Four-Part Test To Determine Whether a Company Is a Joint Employer Under the Fair Labor Standards Act.**

In *re Enterprise Rent-A-Car Wage & Hour Empl. Practices Litig.*, ___ F.3d ___, 2012 U.S. App. LEXIS 13229 (3d Cir. Pa. June 28, 2012), involved a class action suit filed by assistant managers at Enterprise Rent-A-Car branches across the country who alleged that Enterprise failed to pay overtime wages in violation of the FLSA. The district court ruled that Enterprise Holdings, the owner of the rental car business, didn't qualify as a joint employer under the FLSA and granted its motion for summary judgment. The only issue on appeal was whether Enterprise Holdings, Inc., which is the sole stockholder of thirty-eight domestic subsidiaries, is a joint employer of the subsidiaries' assistant managers within the meaning of the Fair Labor Standards Act ("FLSA").

This was a case of first impression. The Third Circuit noted in its analysis that the definition of "employer" under the FLSA is "the broadest definition that has ever been included in any one act." According to the Third Circuit, although "control" is central in an analytical approach to determining whether an entity is an employer, it is not dispositive of the issue. In fact, the Court concluded, actual "control" over an employee by an entity may be irrelevant in determining whether there is an employer/employee relationship under the FLSA.

The Third Circuit established a four-part test to determine whether a company is a joint employer under the Fair Labor Standards Act. The Third Circuit emphasized that the following factors should be analyzed when ruling on whether an entity constitutes an employer under the FLSA:

1. Whether the alleged employer has authority to hire and fire employees;
2. Whether the alleged employer has authority regarding work rules and assignments, and sets conditions of employment such as rates of compensation, benefits provided, hours and work schedules;
3. Whether the alleged employer has day-to-day supervision over employees, including the authority to discipline employees; and
4. Whether the alleged employer controls employee records such as those relating to payroll, insurance, and tax records.

The Third Circuit noted that this list is not exhaustive, and cannot be "blindly applied" as the sole considerations necessary to determine joint employment. It further stated if a court concludes that other indicia of "significant control" are present to suggest that a given employer was a joint employer of an employee, that determination may be persuasive, when incorporated with the individual factors set forth.

Applying the above analysis, the Third Circuit held that Enterprise was not a joint employer under the FLSA

II. GENERAL LITIGATION**Attorney-Client Privilege Can Attach to Communication Between a Lawyer and a Third-Party Contractor**

In *re Flonase Antitrust Litig.*, 2012 U.S. Dist. LEXIS 91155 (E.D. Pa. July 2, 2012), direct and indirect purchasers of a steroid nasal spray containing the active ingredient fluticasone propionate ("FP"), along with a generic FP manufacturer, brought actions against Defendant SmithKline Beecham Corporation, doing business as GlaxoSmithKline PLC ("GSK"), the manufacturer of the branded version of FP ("Flonase"), alleging various violations arising from GSK's conduct delaying market entry of generic FP. The issue before the District Court was a dispute between direct purchasers and GSK concerning whether attorney-client privilege attaches to the communications involving GSK and independent consultant Swiftwater Group L.L.C. ("Swiftwater").

GSK and Swiftwater entered into a Master Consulting and Service Agreement ("Master Agreement"). Pursuant to the Master Agreement, Swiftwater played a role in the creation, development, and implementation of the Flonase brand maturation plan, which required Swiftwater not only to engage in administrative tasks and business strategy, but also to delve into the legal and regulatory issues associated with the brand maturation of Flonase.

Both parties agreed that the attorney-client privilege may attach to the Swiftwater Documents if Swiftwater operated as the "functional equivalent" of a GSK employee. Thus, the only issue was whether, as a matter of law, Swiftwater was the functional equivalent of a GSK employee. The District Court adopted a broad practical approach to determining whether Swiftwater is the functional equivalent of a GSK employee. The Court held that the prevailing test to be applied in order to determine if a non-employee is the functional equivalent of an employee hinges on simply analyzing whether that non-employee does "possess a significant relationship to the [client] and the [client]'s involvement in the transaction that is the subject of legal services."

The District Court provided that Swiftwater acted as an integrated member of the brand maturation team, which was comprised of full-time GSK employees. Swiftwater played a crucial role in the team, assisting in an administrative, managerial, and analytic capacity. Moreover, Swiftwater was intimately involved in the creation, development, and implementation of the Flonase brand maturation plan. As part of brand maturation strategy, Swiftwater assisted employees on three work streams, including the legal and regulatory work stream. This work touched on several legal and regulatory issues, such as GSK's assertion of intellectual property rights, interaction with the FDA, and application for and receipt of pediatric exclusivity for Flonase. Further, the Swiftwater documents, produced as a result of Swiftwater's collaboration with GSK employees, were at all times kept confidential and treated as if the attorney-client privilege applied.

As such, the District Court held that the evidence established that Swiftwater was the functional equivalent of a GSK employee. Therefore, the District Court held that, as a matter of law, communications involving Swiftwater and GSK's counsel may be entitled to the attorney-client privilege.

The "Most Significant Relationship" Test Controls Choice-Of-Law Issues In Tort Cases

In *Pitcock v. Kasowitz, Benson, Torres & Friedman, L.L.P.*, ___ A.3d ___, 2012 N.J. Super. LEXIS 107 (App. Div. 2012), Plaintiff was a partner in defendant's New York City, New York office and was terminated from his employment based on his alleged sexual harassment of female employees in that office. Plaintiff filed suit in New York, claiming that defendant had defamed him. In turn, defendant filed suit against plaintiff in New York alleging breach of contract and fiduciary duty. Those actions were consolidated and both were dismissed for different reasons. When plaintiff filed the underlying action, New York's one-year limitation period for filing an action for malicious prosecution or abuse of process had already expired. However, the action was not time-barred under New Jersey law, N.J.S.A. § 2A:14-1. The trial court concluded that under choice-of-law principles, the New York one-year limitation period applied to the action and dismissed the suit.

On appeal, plaintiff argued that the trial court erred in ruling that the maintainability of his cause of action should be determined by New York's one-year limitations period. The Appellate Division applied the "most significant relationship" test of section 142 of the

Second Restatement in determining the applicable statute of limitations. Applying section 142, the court concluded that allowing plaintiff to maintain this claim in New Jersey "would serve no substantial interest of the forum." The Appellate Division found that "although plaintiff was a New Jersey resident and part of his legal practice that the Firm allegedly damaged by filing its New York breach of contract action was conducted in New Jersey, the State's interest in protecting its residents from financial harm arising from their professional activities in another state does not by itself constitute what the comments to the revised section 142 characterize as an 'extreme and unusual circumstance[]' *Restatement, supra*, § 142 cmt. g, that could justify application of New Jersey's statute of limitations to a claim arising out of a multi-faceted dispute centered in New York."

The Appellate Division noted that the primary office of the Firm was in New York; plaintiff was a partner in that office; the sexual harassment occurred in New York; both plaintiff's defamation action and the Firm's breach of contract action upon which plaintiff's malicious use of process claim was based were filed in New York; and those actions arose out of the parties' business relationship in New York.

Therefore, the Appellate Division held this action was barred by the one-year limitations period upon actions for malicious use of process enacted in New York, which clearly had "a more significant relationship to the parties and the occurrence" than New Jersey.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.

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