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Bracamontes et al. v. The Weyerhaeuser Company et al. Reply Brief of Appellant, 87-2456 (1987)

Marc Linder

United States Court of Appeals for the Fifth Circuit 1 (1987), 14 pages.

Comments
United States Court of Appeals for the Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2456

RUBEN BRACAMONTES, REYES PEREZ, and PABLO MARTINEZ,

and all others similarly situated,

Plaintiffs-Appellants

v.

THE WEYERHAEUSER COMPANY,

MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, ISABEL RODRIGUEZ,

individually and d/b/a SOUTH TEX REFORESTERS, and

JUAN SENDEJO,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

The Hon. Filemon Vela, Judge Presiding

REPLY BRIEF OF APPELLANT

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I. Introduction

Although Appellee-Weyerhaeuser's Brief does not engage Plaintiffs' central arguments, it does offer a number of disparate invalid counter-arguments, to which Plaintiffs will respond seriatim in their Reply Brief.

II. Coverage of Tree Planters under Other Protective Statutes is Consistent with Coverage under AWPA

Appellee repeatedly argues that the fact that forestry workers are protected by other statutes implies that they could not be the intended beneficiaries of coverage under the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA" or "MSPA"). Appellee's Brief at 10, 17-22, 49. To support this assertion, Appellee alleges that: "MSPA and its predecessor statutes were designed to protect migrant agricultural workers not protected by other labor relations statutes." Appellee's Br. at 22. For this allegation Appellee provides no substantiation whatsoever. It is also untrue.

Incontestably farmworkers protected by AWPA are also covered by the Fair Labor Standards Act ("FLSA"), the social security and unemployment provisions of the Internal Revenue Code (as well as by state minimum wage and unemployment compensation statutes), and state workers compensation statutes. Appellee, however, seeks to make the most of the fact that, whereas the National Labor Relations Act ("NLRA") excludes agricultural laborers,

forestry workers are covered under it.[1] Appellee therefore urges the Court to conclude that "Congress, which had knowledge of the DOL, IRS and NLRB's interpretation of the term 'agriculture,' elected to exclude forestry workers from coverage from MSPA." Appellee's Br. at 22.

What Appellee has passed over in silence is that Congress chose to confer the protection of the Farm Labor Contractor Registration Act ("FLCRA") and AWPA on a large group of workers who had been covered by the NLRA since 1940s. These are commercial packing shed workers, whom this Court held not to be agricultural workers. NLRB v. Edinburg Citrus Assoc., 147 F. 2d 353 (1945).[2] Yet this Court also held them protected under FLCRA after 1974. Almendarez v. Barrett-Fisher, Co., 762 F. 2d 1275 (5th Cir. 1985). And they have always been covered under AWPA. 29 U.S.C. §1802(10)(A)(ii).

With the emergence of this irrefragable counter-example, Appellee's counter-argument--that Congress could not have intended to confer multiple protections on tree planters--disintegrates.

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[1]Ironically, Appellee cites as authority for this proposition Weyerhaeuser Co. and Western States Regional Council No. III, Int'l. Woodworkers of America, AFL-CIO, 176 NLRB No. 128, 71 LRRM 1345 (1969), in which Weyerhaeuser took the position that its tree nursery employees were exempt from the NLRA as agricultural laborers.

[2]Scott Toothaker, the senior partner in the firm representing Weyerhaeuser in the instant case, represented the employer in that case.

III. No Relevant Agency Interpretation Exists of which Congress Could have been Aware or to which this Court Could Defer

At several points Appellee alludes to the necessity for this Court to defer to an alleged agency interpretation of FLCRA/AWPA excluding forestry workers of which Congress was also allegedly aware when it amended FLCRA in 1974 and enacted AWPA in 1983. Appellee's Br. at 24-26, 36, 38-39. Yet Appellee is unable to cite a single such interpretation issued by the U.S. Department of Labor ("DOL") under FLCRA or AWPA prior to the filing of this lawsuit.[3] Thus Appellee asserts: "Pursuant to its longstanding enforcement procedures, the Secretary of Labor has excluded forestry operations from the definition of agricultural employment under MSPA. Supra, at 15-16." Appellee's Br. at 39. At pp. 15-16, however, Appellee merely cites materials dealing with the Fair Labor Standards Act.

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[3]In further support of its claim that this Court should defer to the DOL's alleged interpretation of AWPA, Defendant-Weyerhaeuser alleges first that DOL "assisted in drafting MSPA," Appellee's Br. at 39, next that "the Bill which eventually became MSPA was prepared by the DOL," and finally that "Congress adopted the DOL's draft of MSPA." Appellee's Br. at 40. Appellee's authority for the first allegation is this Court's opinion in Almendarez v. Barrett-Fisher Co., 762 F. 2d at 1281 n.3. In point of fact, this Court was referring not to MSPA but to the 1974 amendments to FLCRA. Id. at 1282 n.3. The second claim is said to derive from H. Rep. 97-885, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Ad. News at 4550-51. But this committee report merely states that DOL "transmitted" the bill to Congress, not that it drafted the bill. In point of fact, the DOL was only one of many participants in the drafting of this "consensus bill." Appellee's Br. at 40.

This lapse reflects the root weakness in Appellee's counter-argument: its failure to meet Plaintiffs' central contention that the term "agriculture" cannot be viewed in pari materiâ in FLSA on the one hand and FLCRA/AWPA on the other precisely because, as remedial statutes, both:

> must . . . be construed broadly to fulfill their humanitarian purposes. In order to give effect to this canon of statutory construction, it is necessary to recognize the diametrically opposed functions that the term "agriculture" performs in FLSA and FICA on the one hand and in FLCRA/AWPA on the other. In FLSA and FICA "agriculture" operates to exclude workers from certain benefits (e.g., overtime) to which other workers are entitled. Since they are remedial statutes, this agricultural exclusion is construed narrowly in order to exclude as few workers as possible. In FLCRA/AWPA, on the other hand, "agriculture" operates to trigger coverage and protection. In this statutory setting, therefore, the term should be interpreted broadly in order to effectuate congressional intent.

Appellant's Br. at 10.

For this reason none of Appellee's references to FLSA as the touchstone for understanding the meaning of "agriculture" within FLCRA/AWPA can carry any authority whatsoever.

Similarly untenable is Appellee's related claim that it would be "logically inconsistent to suggest that longstanding DOL and IRC interpretations are valid and binding for the first 'two prongs', but somehow deserve no weight with regard to the 'third prong' of the 1974 FLCRA Amendment." Appellee's Br. at 26. For this Court has already expressly held that packing shed workers are covered under the third prong of the FLCRA definition of "agricultural employment" even though they are not covered under

the first two prongs. Almendarez v. Barrett-Fisher Co., 762 F. 2d at 1279.

IV. The Uncontradicted Expert Testimony Elicited by Appellee on Cross-Examination Below Characterizing Weyerhaeuser's Tree-Planting Operations as Tree Farms is Admissible on Appeal

Appellee denies that the "evidence, offered for the first time on appeal, that forests are 'tree farms' (App. Br., pp. 39-40), was ever offered before the Court below. (TR.2-91)." Appellee's Br. at 9. Appellee therefore urges its inadmissibility on the grounds that Appellee would be surprised by a decision of an issue on which it had no opportunity to introduce evidence. Appellee's Br. at 45-46.

What Appellee fails to call to the Court's attention is the fact that it was Appellee's counsel, Mr. Boe, who elicited testimony on tree farms below:

> Q. Are you aware that within the definition of agriculture, as it is contained within the Fair Labor Standards Act, that Forestry is included as agriculture only if it is done on a farm or by a farmer? Are you aware of that?
>
> A. I think I have heard that at one point. These properties are normally called tree farms. That is a widely recognized term, tree farm.

(Tr. 29:16-23.)

Because Appellee raised the issue itself below, it has no standing to urge the inadmissibility of this evidence on appeal.

V. Plaintiffs Did Not Waive their Argument in the Alternative that Tree Planting is Covered "Agricultural Employment" Because it Took Place on a Farm

Appellees assert that: "Plaintiffs repeatedly took the position before the District Court that they did not disagree nor [sic] contest Congress' intent and DOL interpretations excluding forestry from MSPA under the first two parts of the three-pronged definition of 'agricultural employment.'" Appellee's Br. at 5.

In point of fact, Plaintiffs did not take that position. Rather, the procedural history of this case was as follows. On the day before the scheduled hearing on Plaintiffs' Motion for Preliminary Injunction, Plaintiffs were served with Defendant Weyerhaeuser's Motion to Dismiss. In order to alert Judge Vela to the importance of hearing oral argument before ruling on that motion, Plaintiffs filed, inter alia, a Brief in Support of Plaintiffs' Response to Defendant Weyerhaeuser's Motion to Dismiss and Motion for Summary Judgment and in Support of Plaintiffs' Application for Preliminary Injunction. In an effort to focus the District Court's attention on a crucial aspect of the legislative history of the third prong of the definition of "agricultural employment" under FLCRA/AWPA that had not previously been presented in any other litigation, Plaintiffs, "assuming arguendo that Plaintiff-pine tree planters are not employed in agricultural employment within the meaning of the Fair Labor Standards Act . . . or §3121(g) of the Internal Revenue Code," urged that Congress had included tree planters within the third component of "agricultural employment" under

AWPA (R. 33). The flow of the give-and-take of argument at the hearing on March 25, 1987 in combination with the limited time that Judge Vela was able to make available to the litigants dictated Plaintiffs' decision once again to bracket the issue of coverage under the first two prongs of the definition in order to concentrate on the third prong, with which Judge Vela could not be presumed to be familiar since Plaintiffs' Brief in Support had been filed minutes before the hearing.

Finally, since the parties agree that the single issue on appeal is whether tree planters come within the scope of the definition of "agricultural employment" for purposes of AWPA, the sub-argument concerning the three prongs of that definition is clearly subsumed under that main issue. Defendant-Weyerhaeuser's contention that sub-argument is "novel," Appellee's Br. at 4, "unique" and "unusual," Appellee's Br. at 6, does not withstand even superficial scrutiny, since this Court itself has noted the addition of the third element of the definition of "agricultural employment" in FLCRA in 1974. Almendarez v. Barrett-Fisher Co., 762 F. 2d at 1279.

VI. Defendant-Weyerhaeuser has Mischaracterized the Testimony of All of Plaintiffs' Expert Witnesses

Defendant-Weyerhaeuser has so distorted the testimony of each of Plaintiffs' three expert witnesses presented at the hearing on Plaintiffs' Motion for Preliminary Injunction as to make it unrecognizable. The pith of that testimony should therefore be summarized briefly.

Prof. Norman Richards, a Professor in Silviculture on the Faculty of Forestry at the State University of New York College of Environmental Science and Forestry at Syracuse (Tr. 9), has a B.S. in General Forestry, an M.S. in Soil and Agricultural Science, and a Ph.D. in Silviculture (Tr. 10). Dr. Richards, contrary to Appellee's claim, did not state that he "was there to offer his 'unofficial or unprofessional' opinion of agriculture and to dispute the way Congress defined agriculture. (TR.30-31)." Appellee's Br. at 7. What Prof. Richards in fact said was that as "a plant scientist," his "expertise in agriculture relates to only those parts of other crops that are involved in tree planting in silviculture." (Tr. 39.) He therefore disclaimed expertise in such aspects of agriculture as dairy farming and the raising of bees, poultry and fur bearing animals (Tr. 25-26). Nor did Dr. Richards arrogate to himself the authority to discuss the legal aspects of the statutory definition of "agriculture" (Tr. 30-31). Defendant-Weyerhaeuser also imputes to Prof. Richards another statement he in fact did not make--namely, that he "testified silviculture and agriculture were related, i.e. 'crops is crops'. (TR.11)." Appellee's Br. at 6. Neither at p. 11 nor anywhere else in the transcript did Prof. Richards say that "crops is crops." Prof. Richards' nuanced testimony, distilled from a quarter-century of professional and scholarly activity (Tr. 10-11), was related in detail in Appellants' Br. at 37-39, and need not be rehearsed here.

Stephen Myers, Pres. of the Southeastern Forestry Contractors Association and co-owner of a large tree hand-planting company (Tr. 43-44), who has planted over a million seedlings in the course of his career (Tr. 52) working for Weyerhaeuser and other timber companies in addition to having planted and harvested fruits and vegetables (Tr. 46), testified that:

1. Tree planting is unskilled work (Tr. 50-51) performed by crews who also shift back and forth among such crops as tomatoes, watermelon, blueberries, cranberries and apples (Tr. 58); and

2. It is a common practice for tree-planting contractors to undercount the number of hours their workers work and to fail to pay overtime compensation, unemployment or social security taxes (Tr. 55).

Jesus Moya, Pres. of the International Union of Agricultural Workers, testified to the following points:

1. Pine tree planters recruited in South Texas are part of one large pool of unskilled migrant and seasonal agricultural workers employed on row-crop farms and in packing sheds, and themselves do farm work most of the year (R. 16);

2. The How, When, Where of the labor recruitment or contractor system is identical for farm, agricultural processing and pine tree workers (R. 16-17); and

3. Pine tree workers and farm workers are subject to the same abuses and exploitation of the contractor system (e.g., non-payment of the minimum wage, unsafe means of transportation, false disclosures of the terms of employment, and deduction of social security taxes that are never paid to the government) (R. 17).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 1987, I mailed, by United States Postal Service, certified mail, return receipt requested, copies of the foregoing Brief of Appellant to the following counsel of record:

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