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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4762

MCLAUGHLIN, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,

PLAINTIFF-APPELLANT

v.

SEAFOOD, INC. ET AL.,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

BRIEF OF AMICUS CURIAE

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On Behalf of

Jesus Barrera

CERTIFICATE OF INTERESTED PERSONS
PURSUANT TO LOCAL RULE 28.2.1

MCLAUGHLIN, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR
v. SEAFOOD, INC. ET AL.
(No. 87-4762)

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal, to wit:

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B. Defendants

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I. STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

ISSUE ON APPEAL

Whether backers, pickers, and peelers working at defendant-crabmeat and crawfish processing plant are defendant's employees or independent contractors for purposes of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219.

STATEMENT OF THE CASE

The issue presented in this appeal is whether backers, pickers and peelers working at defendant-crabmeat and crawfish processing plant were "employees" and hence protected by the FLSA. The court below concluded that they were independent contractors. This legal issue is of great importance to tens of thousands of migrant and seasonal farmworkers, whose status as employees under the FLSA could be jeopardized by the District Court's ruling, which would reinforce an already growing trend among agricultural employers to treat migrant and seasonal farmworkers as independent contractors in order to avoid the reach of numerous federal and state statutes designed to protect farmworkers.

This amicus brief will show the importance of this case to migrant and seasonal farmworkers by focusing on one aspect of the District Court's analysis of the judicially developed factors determining employee status.

ARGUMENT

Unskilled and capital-less day laborers and seasonal and casual workers are economically dependent on the succession of employers for whom they work and are therefore employees of each for the purposes of the Fair Labor Standards Act.

Although this case directly involves persons working as pickers, backers and peelers in a crabmeat and crawfish processing plant, this Court's decision will affect thousands of day laborers, seasonal workers and casually employed persons in numerous industries. Chief among these are migrant and seasonal farmworkers. In order to ensure that such workers continue to be protected under the FLSA and other remedial labor statutes, the decision of the District Court must be reversed. The District Court erred as a matter of law in applying the factors to be considered in determining whether an employment relationship obtained under the FLSA. In reaching its decision, the court below failed to incorporate the remedial goals of the FLSA.

The District Court found that the backers, peelers and pickers were free to work at competing seafood processing plants, and did in fact "commonly move from facility to facility," sometimes working in more than one plant in a single day, depending on piece rates and management relations. (R. 173.)

In its conclusions of law, the court below correctly stated that the remedial purposes of the FLSA require an expansive definition of the term "employee," which

"incorporates those persons 'who as a matter of economic reality are dependent upon the business to which they render service.'" (R. 175 [citing Bartels v. Birmingham, 332 U.S. 126, 130 (1947)].) The court below then rehearsed five of the six factors used by the courts since 1947 to determine employee status: 1. Opportunity for profit or loss; 2. Skill; 3. Capital 4. Control; and 5. Permanence. The District Court concluded that the workers' lack of opportunity for profit or loss and lack of skill spoke "against a finding of independent contractor status." (R. 176.) Although the court below conceded that the workers' capital investment was minimal (consisting of hairnet, apron, gloves and a rudimentary knife), it considered the factor not determinative because the work process was "not capital intensive." (R. 174, 177.) The District Court's holding that the workers were independent contractors rather than employees thus turned solely on the remaining two factors--namely, the findings that the defendant exercised virtually no control over the workers, and that the relationship was impermanent because the workers "worked for brief, intermittent periods." (R. 176.)

Although the court below did not expressly mention the workers' integration into the employer's business as the sixth factor of the test, it did remark that the status determination was made "particularly difficult" as a result of the inconsistency between the aforementioned integration

and independence. Resolution of these "countervailing factors" required in the court's view "an analysis directed at determining whether" the workers were "as a matter of economic reality dependent upon Seafood, Inc. for their livelihood." (R. 177.) The analysis offered by the court and culminating in a denial of any economic dependence, consisted, however, of only two brief and one-sided assertions: 1. that the workers "performed their services for multiple processors" (R. 177); and 2. that they constituted a "cohesive group" characterized by "mobility" and "the transient nature of a typical employment history." (R. 178.)

The court below was unable to cite a single case standing for the proposition that impermanence could be dispositive of the existence of an employment relationship. On the contrary, the U.S. Supreme Court has held that the fact that workers "did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act."[1] United States v. Silk, 331 U.S. 704, 718

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[1]Although the Act in question was the Social Security Act, the Supreme Court has held that Social Security Act jurisprudence is persuasive for interpreting the FLSA. Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947). The Social Security Act contained an exclusion for casual labor not in the course of the employer's trade or business. United States v. Silk, 331 U.S. 704, 718 n. 13 (1947). Since FLSA contains no such exclusion, but does include "'the broadest definition [of "employ"] that has ever been included in any one Act,'" United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (citing then Sen.

(1947).

The fundamental reason that the degree of permanence of a working relationship cannot be dispositive of employee status is that otherwise all seasonal workers, day laborers and casual workers would be presumptively converted into independent contractors. "Many seasonal businesses necessarily hire only seasonal employees, but that fact alone does not convert seasonal employees into seasonal independent contractors." Secretary of Labor v. Lauritzen, No. 86-2770, slip op. at 13 (7th Cir. Dec. 15, 1987). Similarly, "hamburger-turners at fast-food restaurants may drift from one job to the next yet be employees throughout." Id. at 21 (Easterbrook, J., concurring).

The reason that the permanence factor is not calculated to distinguish economic independence from economic dependence is that it serves to mask rather than illuminate what dependence means. To the essence of a capitalist economy belong both free enterprise and the free movement of labor. If the mere exercise of the latter freedom--as enshrined in the prohibition on involuntary servitude embodied in the Thirteenth Amendment--were per se an indicium of economic independence, then the category "employee" would be become hollowed out inasmuch as mobility characterizes both employees and entrepreneurs.

Black at 81 Cong. Rec. 7657 [1937]), a fortiori the Supreme Court's remarks would apply to FLSA.

Unskilled, capital-less, fungible laborers whose low wages ensure a life of perpetual vulnerability on the margin of social existence are no less dependent on an employer for the fact that they are formally free to work in quick succession for several employers under the same degrading conditions. The appropriate guide to understanding why precisely such workers must be protected by the FLSA is contained in the Act itself. It declares congressional policy to be "to correct and as rapidly as practicable to eliminate . . . labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. Judge Easterbrook's recent eloquent explanation of why migrant farmworkers must be protected by the FLSA applies with equal validity to the non-English speaking Vietnamese workers of the instant case:

> The migrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend. This does not belittle their skills. . . . But those to whom the FLSA applies must include workers who possess only dedication, honesty, and good health. So the baby-sitter is an "employee" even though working but a few hours a week . . . .
>
> There are hard cases under the approach I have limned, but this is not one of them. Migrant farm hands are "employees" under the FLSA--without regard to the crop and the contract in each case. We can, and should, do away with ambulatory balancing in cases of this sort.

Secretary of Labor v. Lauritzen, slip op. at 29.

If the Fifth Circuit were to let stand the precedent

that mere impermanence of employment constitutes an indicium of independent contracting, it would encourage thousands of agricultural employers to deny that their seasonal and migrant farmworkers are their employees. If such a reclassification into the category of the self-employed were successful, tens of thousands of impoverished farmworkers would be deprived of their protections and benefits under the FLSA, the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872, Social Security, Unemployment and Workers Compensation as well as under a host of other federal and state statutes.

V. CONCLUSION

For all the foregoing reasons Amicus Curiae urges the Court to:

1. Reverse the District Court's conclusion of law that the backers, pickers and peelers were independent contractors;

2. Rule that they were Defendants' employees within the meaning of the FLSA; and

3. Remand the case to the District Court for further proceedings consistent with this ruling.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this 7 th day of March, 1988, I mailed by U.S.P.S., certified mail, return receipt requested, copies of the foregoing Brief of Amicus Curiae to the following counsel of record:

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