Third District Court of Appeal

State of Florida, July Term, A.D. 2010

Opinion filed October 6, 2010.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-3332
Lower Tribunal No. 07-26996

Alexander A. Alvarado,
Appellant,

vs.

Bayshore Grove Management, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Lester Langer, Judge.

Lawrence J. McGuiness and Juliana Gonzalez, for appellant.

Damian & Valori and Russell Landy, for appellee.

Before COPE and SALTER, JJ., and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

The plaintiff Alvarado was employed as a maintenance person in a commercial office building operated by the appellee, Bayshore Grove Management, LLC. After he was discharged allegedly for excessive tardiness and absenteeism, he brought this two count action under the Federal Labor Standards Act, 29 U.S.C. § 201 ("FLSA"), for unpaid overtime (Count I) and for unlawful discharge under the anti-retaliatory provision of the act based on the claim that Bayshore had fired him because he had made verbal complaints about his compensation (Count II). The trial court entered summary judgment on both counts for Bayshore. Alvarado appeals but we affirm for the following reasons.

I.

The overtime claim is not cognizable as a matter of law because neither Alvarado nor the employer is subject to the act:

> 1. There is no "individual coverage" for Alvarado inasmuch as he was not, as 29 USC § 206(a) requires, "engaged in commerce or in the production of goods for commerce" within the meaning of the statute. See Lenca v. Laran Enters., Inc., 388 F. Supp. 782, 784-85 (N.D. Ill. 1974) (collecting cases finding "residential or commercial janitor's work does not substantially affect interstate commerce" for purposes of FLSA coverage); see also Thorne v. All Restoration Servs., Inc., 448 F.3d 1264 (11th Cir. 2006) (same as to mold and water restoration

worker); Jimenez v. S. Parking, Inc., 2008 WL 4279618, 1 (S.D. Fla. Sept. 16, 2008) (same as to car wash employee).

2. The alternative basis asserted for coverage under the act likewise does not apply because the employer Bayshore is not an "enterprise engaged in commerce or in the production of goods for commerce." 29 USC §207(a). This is so because, contrary to 29 USC §203(s)(1),[1] its "annual gross volume of sales made or business done" was, at most, $461,605.00, less than the $500,000 required. See Padilla v. Manlapaz, 643 F. Supp. 2d 298 (E.D.N.Y. 2009); Cordero v. Red Grouper, Inc., 2008 WL 1781158, 1 (M.D. Fla. April 17, 2008); Casanova v. Morales, 2007 WL 4874773, 1 (S.D. Fla. Aug. 3, 2007).

II.

Although the ground was not relied upon below, we invoke the "tipsy coachman" modernized as the "drunken cabbie" rule, see Tubbs v. State, 897 So. 2d 520, 523 (Fla. 3d DCA 2005), to hold that the anti-retaliation claim, 29 USC

[1] 29 U.S.C.A. Section 203, states in part:

> **(s)(1)** "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that--
>
> . . . .
>
> **(ii)** is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 . . .

§215(a)(3), which provides protection against discharge on account of the employee having "filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter," does not protect purely verbal complaints such as those allegedly made by the plaintiff. See Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 838-40 (7th Cir. 2009). As Kasten persuasively holds, the very meaning of the word "filed" requires that the aggrieved employee at least submit something in writing. That did not occur here.[2]

Affirmed.

[2] This holding makes it unnecessary to consider whether the retaliation may also be foreclosed for other reasons including (a) the basis of the ruling below, which was that any such action must be based on conduct which is itself covered by the FLSA, which, as we have seen, is not true in this case. See Lamont v. Frank Soup Bowl, Inc., 2001 WL 521815, 6 (S.D.N.Y. May 16, 2001); but see Wirtz v. Ross Packaging Co., 367 F.2d 549, 550 (5th Cir. 1966); and (b) that the act does not cover even written complaints when they are made only to the employer rather than to a separate regulatory or other entity. See Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000); but see Kasten, 570 F.3d at 837-38.