On The Move

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# 2351 SEPTA Operators Win Back Pay and Liquidated Damages in Settlement Agreement

On August 24, 2015, the Steering Committee representing 2,351 SEPTA operators reached a Settlement Agreement in the Fair Labor Standards Act ("FLSA") lawsuit filed against SEPTA in June 2011. The settlement provides for the payment of $8,661,447 to 2,351 operators who joined the collective action. The settlement agreement won the approval of a federal district court, following the Court's review of the entire case. The settlement checks are expected go out sometime in mid or late October. They are being processed by a third party, Heffler Claims Group.

The Court's approval of the agreement covered the (1) settlement amount, (2) the method used to calculate each plaintiff's award, (3) the fees and expenses to Kaufman, Coren & Ress (the "Firm") and the award to the Steering Committee members for their work on behalf of plaintiffs. The Court found the attorneys' fees fair, reasonable, and appropriate under the applicable legal standard, in light of the *contingent risk* undertaken by the Firm, the large number of plaintiffs, and the results achieved in the face of relevant factual disputes and SEPTA's significant legal defenses.

The case against SEPTA claimed that the Authority failed to fully pay its bus and trolley operators for time spent working at the start of their daily runs, during which time the operators were required to perform certain reporting tasks and pre-trip vehicle inspections. In a similar case filed in 2006, the same morning-run claims were *withdrawn*, because the attorneys in that case believed that SEPTA had an insurmountable defense– namely that the FLSA claims were subject to grievance and arbitration procedures under the various collective bargaining agreements.

Despite SEPTA's arbitration defense, the Firm decided to represent the plaintiffs on a "contingent fee" basis, thereby fully assuming the risk that it would not receive *any* fees or reimbursement for its expenses in the event that SEPTA prevailed. Each plaintiff who joined the suit agreed that the Firm would receive 33% of the total settlement fund, if the case settled.

The concerns about SEPTA's arbitration defense proved correct. By an Order and Opinion dated September 28, 2012, the District Court *granted SEPTA's Motion to Dismiss the Complaint*, ruling that the operators' FLSA claims were subject to the labor agreements' grievance and arbitration procedures. The Firm appealed, and the Third Circuit Court of Appeals vacated the District Court's dismissal and returned the case for further action.

While the Third Circuit sent the case back to the District Court, many factual and legal questions remained unresolved, including the following:

- SEPTA challenged whether each plaintiff, in fact, reported to the depot in advance of his/her scheduled report time, and, if so, how much in advance. SEPTA argued that the time it took to do the CDL inspection took less time than plaintiffs claimed and that many operators were not doing the inspection as required. SEPTA produced over 500 damaging videos recordings as evidence of this claim. As a result, 238 plaintiffs withdrew from the case.

- The parties disagreed as to the statute of limitations to be applied. The FLSA provides for a two-year statute of limitations unless plaintiffs can show that the employer acted willfully. While Plaintiffs argued that SEPTA was liable for a third year look-back, SEPTA argued that its failure to pay was not willful.

- The parties disagreed as to the applicability of liquidated damages. The FLSA provides liquidated damages in the form of compensatory *double damages* unless the employer can show that it acted in good faith. Plaintiffs argued that SEPTA was liable for liquidated damages. SEPTA argued otherwise and that it need not pay double damages. In the Settlement Agreement, plaintiffs prevailed on the three year look-back and on the question of double damages.

- The parties also disputed whether the case should be certified as a collective action, since SEPTA contended that individual issues predominated, based on the differences in the time it took to perform the required reporting and inspection tasks. Had SEPTA prevailed on this issue, the case would have had to proceed on the basis of 2,351 *separate lawsuits!*

- Moreover, SEPTA argued that the ten minute report time allowance afforded plaintiffs sufficient time to perform their reporting and inspection tasks.

In deciding whether to approve a contingent fee agreement, courts consider many factors, including: (1) the size of the fund created and the number of beneficiaries; (2) the skill and efficiency of the attorneys; (3) the complexity and duration of the litigation; (4) the risk that the case could be lost; (5) the amount of time counsel devoted to the case; and, (6) the awards in similar cases. In this case, the Court found that these factors favored approval of the fee agreement signed by plaintiffs, taking into consideration the results achieved, the difficulties faced, and, the speed and efficiency of the recovery---without a long and complex trial. As for the results, the $13.1 million settlement surpassed every public sector FLSA settlement in the country this year.

The 2006 FLSA case, where 1,250 swing-run operators raised the same FLSA claims relating to work performed prior to their second-half, settled for $1.9 million, over the objections of lead plaintiff, Allison Cooper. Plaintiffs received $1.2 million of the settlement fund. In other words, the settlement in this case was about *four times as great* per plaintiff for the same claims!

Finally, the Court found that the Steering Committee, Brian Pollitt, Will Vera and Vicki Dupree, played an invaluable role in the outcome of the case; missing time from work, responding to numerous questions from plaintiffs during four years of litigation, providing counsel with critical factual information and participating in settlement negotiations. As a result, the Court approved a $15,000 award to each Steering Committee member, a common practice in FLSA cases.