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NJ Justices Say Agency Decisions Don't Back Up OT Defense

By **Bill Wichert**

Law360 (January 13, 2021, 4:56 PM EST) -- The New Jersey Supreme Court on Wednesday said that Cream-O-Land Dairy could not escape a proposed class action by relying on determinations from lower-level employees of the state's labor department about its purported exemption from an overtime pay requirement, saying such decisions must come from agency leaders.

The justices agreed with a state appellate ruling that the business could not assert that "good-faith defense" based on the staffers' conclusions, finding that the underlying statute requires those types of findings from the commissioner of the state's Department of Labor and Workforce Development or the director of the Division of Wage and Hour Compliance.

"We concur with the Appellate Division that none of the decisions identified by defendant satisfy the requirements of the good-faith defense under the plain language of [state statute] N.J.S.A. 34:11-56a25.2," Justice Anne M. Patterson wrote in the unanimous opinion.

But the Supreme Court also acknowledged the "dilemma" facing employers such as Cream-O-Land, which prevailed in overtime disputes before the subordinate employees for over the course of a decade without those matters being reviewed further.

The court suggested that the agency develop a procedure for an employer to seek "an opinion letter or other ruling" from the commissioner or the director with respect to an exemption from the overtime requirements of the state's Wage and Hour Law.

"Such a procedure would assist employers who intend in good faith to comply with their obligations under the WHL, clarify the employer's obligations under the WHL, and avoid unnecessary litigation," Justice Patterson said.

Plaintiff Elmer Branch has claimed that Cream-O-Land violated the WHL by not paying him and other truck drivers 1 1/2 times their regular hourly wage for hours worked beyond 40 hours in a workweek, according to the opinion.

The business has said it is exempt from that requirement as a "trucking industry employer," and thus, it only had to provide overtime compensation at a rate of 1 1/2 times the minimum wage, the opinion said.

In asserting the good-faith defense before a trial court, Cream-O-Land cited the three lower-level determinations that qualified it for that exemption: a handwritten decision from a department hearing and review officer, an email from a senior investigator and an email from the section chief of the Division of Wage and Hour Compliance, the opinion said.

The trial court found that the company could assert the defense and tossed the suit, but an appellate panel in June 2019 **reversed** that decision.

On Cream-O-Land's **challenge to that ruling**, the Supreme Court found that the three determinations fell short of the two bases for a good-faith defense under state statute N.J.S.A. 34:11-56a25.2.

Under the first prong, an employer may assert the defense if "he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation by the Commissioner ... or the Director," the court said.

The second prong enables the employer to assert the defense if "he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on ... any administrative practice or enforcement policy of such department or bureau with respect to the class of employers to which he belonged," according to the court.

The 2007 decision from the hearing and review officer did not comprise a "written administrative regulation, order, ruling, approval or interpretation" by the commissioner or the director, and thus did not meet the first prong, the court said.

"Moreover, defendant's 2007 WHL matter did not give rise to a Department or Division 'administrative practice or enforcement policy' regarding the 'class of employers' to which defendant belonged and thus fails to satisfy the second prong of N.J.S.A. 34:11-56a25.2," the court said.

The 2014 and 2017 emails from the senior investigator and the section chief, respectively, similarly fell short.

"Neither decision was issued by the Commissioner or the Director; neither constituted an administrative practice or enforcement policy addressing the class of employers to which defendant belonged," the court said.

The justices remanded the matter to the trial court for a decision on whether Cream-O-Land qualified as a trucking industry employer entitled to the overtime exemption.

Branch attorney Ravi Sattiraju of Sattiraju & Tharney LLP told Law360 on Wednesday that "the plain language of the [good-faith defense] statute ... governed here and the court recognized that."

"We look forward to litigating the case now," Sattiraju added.

Counsel for Cream-O-Land did not immediately respond to a request for comment Wednesday.

Branch is represented by Ravi Sattiraju and Steven B. Gladis of Sattiraju & Tharney LLP.

Cream-O-Land is represented by David R. Kott and Adam N. Saravay of McCarter & English LLP, and Mark E. Tabakman of Fox Rothschild LLP.

Amicus curiae the New Jersey Civil Justice Institute and the National Federation of Independent Business are represented by Jeffrey S. Jacobson of Faegre Drinker Biddle & Reath LLP.

Amicus curiae the New Jersey Business and Industry Association and the Commerce and Industry Association of New Jersey are represented by Thomas A. Linthorst of Morgan Lewis & Bockius LLP.

Amicus curiae the New Jersey Office of the Attorney General is represented in-house by Caroline Jones.

Amicus curiae the New Jersey Association for Justice is represented by Michael A. Galpern of Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins PC.

The case is Elmer Branch v. Cream-O-Land Dairy, case number 083379, in the New Jersey Supreme Court.

--Editing by Steven Edelstone.