

No. 03-14553

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT NILAND,
Plaintiff-Appellant,

v.

DELTA RECYCLING CORP.,
Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of Florida

BRIEF FOR THE SECRETARY OF LABOR
AS AMICUS CURIAE IN SUPPORT OF
DEFENDANT-APPELLEE DELTA RECYCLING CORP.
SUPPORTING AFFIRMANCE OF THE DISTRICT COURT

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No. 03-14553

Robert Niland v. Delta Recycling Corp.

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE SECRETARY OF LABOR	1
STATEMENT OF THE ISSUE	3
STATEMENT OF THE CASE	3
A. Course Of Proceedings And Statement Of The Facts	3
B. District Court Decision	8
SUMMARY OF THE ARGUMENT	11
ARGUMENT	13
THE DISTRICT COURT CORRECTLY HELD THAT THE SECRETARY SUPERVISED THE PAYMENT OF UNPAID OVERTIME COMPENSATION WITHIN THE MEANING OF SECTION 16(c) OF THE FLSA, AND THAT NILAND'S AGREEMENT TO ACCEPT SUCH PAYMENT THUS WAIVED HIS RIGHT TO BRING A PRIVATE ACTION UNDER SECTION 16(b) OF THE ACT	13
A. Statutory Language And Legislative History	13

B. The Secretary Supervised The Payment Of
Unpaid Overtime Compensation To Niland
Within The Meaning Of Section 16(c),
Thereby Effectuating A Waiver Of Niland's
Right To Bring A Section 16(b) Private
Action Upon His Acceptance And Receipt
Of The Back Wages 16

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

	PAGE
Cases:	
<u>Bonner v. City of Prichard,</u>	
661 F.2d 1206 (11th Cir. 1981)17
<u>Brooklyn Savings Bank v. O'Neil,</u>	
324 U.S. 697 (1945)14
<u>Bullington v. Fayette County School District,</u>	
246 Ga. App. 463, 540 S.E.2d 664	
(Ga. Ct. of App. 2000)22
<u>Cuevas v. Monroe Street City Club, Inc.,</u>	
752 F. Supp. 1405 (N.D. Ill. 1990)20
<u>Heckler v. Chaney,</u>	
470 U.S. 821 (1985)19
<u>Lynn's Food Stores, Inc. v. United States,</u>	
679 F.2d 1350 (11th Cir. 1982)10,16
<u>Rose v. Consolidated Electrical Distributors, Inc.,</u>	
816 F. Supp. 489 (N.D. Ill. 1993)21
<u>Sneed v. Sneed's Shipbuilding, Inc.,</u>	
545 F.2d 537 (5th Cir. 1977)Passim
<u>Walton v. United Consumers Club, Inc.,</u>	
786 F.2d 303 (7th Cir. 1986)18,22

Statutes and Regulations:

Fair Labor Standards Act of 1938,

as amended, 29 U.S.C. 201 et seq.

29 U.S.C. 20613

29 U.S.C. 20713

29 U.S.C. 216(b)Passim

29 U.S.C. 216(c)Passim

Code of Federal Regulations

29 C.F.R. 516.2(b)(2)10,21

Miscellaneous:

Federal Rules of Appellate Procedure

Rule 29(a)1

S. Rep. No. 81-640, (1949) reprinted in

1949 U.S.C.C.A.N. 2241, 224812,14,15

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor ("Secretary") submits this brief as amicus curiae pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure to present her views on an issue that will have a significant impact on the enforcement and administration of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 201, et seq. -- the scope of the Secretary's authority to supervise the payment of unpaid minimum wage and overtime compensation under section 16(c) of the Act, 29 U.S.C. 216(c). This issue is critical because this supervision is a prerequisite to an employee's waiver of his right to bring an

action for such compensation under section 16(b) of the FLSA, 29 U.S.C. 216(b).

The Secretary is responsible for administering and enforcing the FLSA. In fiscal year ("FY") 2003, the Wage and Hour Division of the Department of Labor ("Wage-Hour" or "the Division") successfully completed over 39,000 compliance actions overall and collected more than \$212 million in back wages for employees. Of that amount, Wage-Hour collected approximately \$182 million in back wages for employees in FLSA cases pursuant to the Secretary's authority to supervise the payment of back wages under section 16(c) of the Act.¹

Unless this Court affirms the district court's ruling that Robert Niland may not continue his action under section 16(b) of the FLSA after accepting payment of back wages under an agreement supervised by the Secretary under section 16(c), it will be significantly more difficult for the Secretary to obtain back wages for employees under section 16(c) of the FLSA; employers would have no assurance that a supervised settlement with the Department, accompanied by signed waivers from employees, would satisfy their liability, and they would thus be reluctant to reach any settlement. A reversal would undermine

¹ See 2003 Statistics Fact Sheet, "Wage and Hour Fiscal Year 2003 Enforcement Continues Record Climb," <http://www.dol.gov/esa/whd/statistics> (January 14, 2004).

the purpose of section 16(c) of the FLSA -- to encourage voluntary restitution by employers of unpaid minimum wage and overtime compensation. The consequent disincentive for employers to enter into settlement agreements would necessarily increase litigation.

STATEMENT OF THE ISSUE

Whether the Secretary supervised the payment of overtime compensation to Niland within the meaning of section 16(c) of the FLSA, 29 U.S.C. 216(c), such that Niland's subsequent acceptance of the check as payment in full, after being explicitly notified of the consequences of such acceptance, waived his right to bring a private action under section 16(b) of the Act, 29 U.S.C. 216(b).

STATEMENT OF THE CASE

A. Course Of Proceedings And Statement Of The Facts

1. Allied Waste Industries, Inc. acquired Delta Recycling Corporation ("Delta") on July 1, 2001, and contacted Wage-Hour after learning that Delta may have failed to pay overtime to individuals who were employed as tractor-trailer, front load, and roll-off drivers during the period of February 8, 2000 to February 8, 2002. (R43-2, R53-4, R54-3-4). Following negotiations, Wage-Hour entered into a Compliance Partnership Agreement with Delta on March 1, 2002. Id. Under the

agreement, Delta agreed to conduct a self-audit² and to pay back wages to employees who had not been properly compensated; Wage-Hour agreed to supervise Delta's payment of back wages to its employees. Id. An outside accounting firm, mutually agreeable to Delta and Wage-Hour, conducted the audit and Wage-Hour reviewed the computations. (R45-22, R53-4, R54-5).

Under the compliance agreement with Wage-Hour, Delta also agreed to use the Department of Labor's Form WH-58 ("Receipt For Payment Of Back Wages") waiver language in its own receipt forms.³ (R43-2, R53-5, R54-4-6). Wage-Hour also reviewed and approved the language used by Delta in a letter sent to its employees with the payment. (R45, R53-5). Additionally, Wage-

² Wage-Hour utilizes five different compliance actions in enforcing the FLSA: full investigations, limited investigations, self-audits, office audits, and conciliations. The Division conducted more than 850 self-audits, like the one in this case, in FY 2002. In a self-audit, the employer reviews its employment practices to identify violations of Wage-Hour enforced laws. After securing clearance from the investigator or Division supervisor, the employer computes and pays the back wages due and corrects its practices to ensure future compliance. Self-audits make up a small percentage of Wage-Hour compliance actions. They are limited to situations in which the employer has demonstrated its intention to come into compliance. Self-audits are not utilized when the employer has a history of violations, or where there are indications of willful noncompliance.

³ Form WH-58 contains a "Notice To Employee," which states that "[y]our acceptance of back wages due under the *Fair Labor Standards Act* means that you have given up any right you may have to bring suit for such back wages under Section 16(b) of that Act."

Hour approved the language printed on the back of the checks issued by Delta to its employees. Id. On May 23, 2002, Delta sent a letter with a receipt form and a check for back wages to approximately 100 employees, including Niland. (R15, R43, R53-5). The letter, the receipt, and the back of the check all contained language notifying Niland that acceptance of the check constituted a waiver of his right to file a complaint against Delta under section 16(b) of the FLSA.⁴ Id.

⁴ The Receipt For Payment of Back Wages included the following waiver:

Notice To Employee: Your acceptance of back wages due under the Fair Labor Standards Act means that you have given up any right that you may have to bring suit for back wages under Section 16(b) of that Act and any applicable state law. Section 16(b) provides that an employee may bring suit on his/her own behalf for unpaid minimum wages and/or overtime compensation and an equal amount as liquidated damages, plus attorney's fees and court costs. Generally, a two-year statute of limitations applies to the recovery of back wages. By accepting this payment, you acknowledge that the U.S. Department of Labor, Wage and Hour Division, has reviewed and supervised the payment of this amount and that this amount is in full payment of any overtime you may have worked up to and including February 8, 2002. Do not sign this Receipt unless you have actually received payment of the back wages due.

The letter to the employee stated, in part:

Your acceptance of this check means that you have given up any right you may have to bring suit for back wages under Section 16(b) of the Fair Labor Standards Act and any applicable state law. By accepting this check you also understand and agree that the U.S. Department of Labor, Wage and Hour Division, has reviewed and supervised the payment of this amount and

Niland did not cash the check, but signed the receipt on September 27, 2002 and returned it to Delta. (R53-5, R43-2). Subsequently, Niland asked Delta to reissue the check (which had expired). Id. Delta reissued the check and on October 25, 2002, Niland endorsed and cashed the check, in the amount of \$526.12. Id.

2. In April of 2003, Wage-Hour conducted a full investigation of Delta to determine whether compliance had been achieved as a result of the self-audit. (R53-6). The investigation included a review of payroll records and employee interviews. No violations were found as a result of the investigation. Id.

3. On April 3, 2003, Niland filed a complaint against Delta to recover unpaid overtime compensation and liquidated damages under section 16(b) of the FLSA, 29 U.S.C. 216(b). (R1). Delta filed a Motion to Dismiss, arguing that Niland had waived his right to file an action under section 16(b) when he endorsed and cashed a check, and signed a receipt, both of which

that by accepting this payment you agree that this amount is in full payment of any overtime you may have been entitled to receive up to and including February 8, 2002.

The back of the check also contained a waiver of the right to bring an action for back wages under the FLSA. It stated, in part: "I agree that by accepting this payment I have received full payment for any unpaid wages as reviewed by the U.S. Department of Labor."

contained language waiving his right to sue Delta for unpaid overtime compensation. (R15). On July 7, 2003, the district court entered summary judgment for Niland, ruling that Niland could proceed with his section 16(b) lawsuit against the employer. (R43). The court concluded that the Secretary had failed to supervise Delta's self-audit and the payment of back wages to a degree "sufficient" under section 16(c) of the FLSA to permit a waiver of Niland's right to bring an action under section 16(b) of the Act. (R43).

On July 21, 2003, Delta filed a Motion for Reconsideration; Niland filed a Response asking the court to deny the motion. (R45, R50). On August 5, 2003, the Secretary of Labor filed an amicus curiae brief in support of Delta, arguing that Wage-Hour had supervised the payment of back wages within the meaning of section 16(c) of the FLSA. (R53).

On August 7, 2003, the district court reconsidered its prior decision and granted Delta's motion for summary judgment. (R54). In an unpublished order, the court vacated its earlier ruling and held that Niland's section 16(b) back wage claim was barred by section 16(c) of the FLSA. Id. Final judgment was entered on August 7, 2003. (R55). On September 3, 2003, Niland filed a timely notice of appeal to this Court. (R59).

C. District Court Decision

1. In its decision on reconsideration, the district court observed that neither this Court, nor any other appellate court, has addressed the level of supervision required by section 16(c) of the FLSA. With regard to the "sufficiency" of the Department's supervision, the court stated:

The question is not what type of supervision took place but whether it occurred at all. The position taken by the Department of Labor as well as the affidavit of Mr. [Alfred H.] Perry [Wage-Hour Regional Director] both demonstrate that the Department engaged in some level of supervision and, more importantly, that it determined this supervision to be sufficient to satisfy the requirement of § 216(c). The Court does not find it proper, as Plaintiff suggests, to now delve into that determination and question whether it agrees with the Department. Once the Department has concluded that it not only agreed to supervise the payment of back wages but also that it did in fact conduct such supervision pursuant to § 216(c), the question of whether the waiver was valid and bars further litigation by Plaintiff is answered conclusively.

(R54-7 n.4).⁵

Accordingly, the district court concluded that the Department of Labor "did supervise the determination and payment of back wages" owed to Niland and other employees, and that Niland accepted such back wages. (R54-5). The court specifically found that in the instant case, Alfred Perry, the Regional Director of Wage-Hour, "negotiated and entered into the

⁵ The Secretary here cites to the district court's slip opinion, reported at 2003 WL 21939781.

Compliance Partnership Agreement" with Delta and "[m]ost significantly, . . . engaged in the negotiation, review, and approval of formulas and assumptions to be used by an independent accounting firm to calculate back wages under [his] supervision." (R54-4) (internal quotation marks omitted). The district court determined that Perry also "spent time in negotiation of what data would be considered in those calculations." Id. (internal quotation marks omitted). In addition, the court determined that "Perry reviewed the correspondence from, and reviewed and approved the report of the accounting firm." (R54-5) (internal quotation marks omitted). The district court stated, "Not only did the Department enter into an agreement with Defendant to supervise the payment of wages, but the Department also negotiated the manner in which the calculation of back wages would be performed and who would perform the calculation." Id.

2. Additionally, the district court concluded that the Department "negotiated the waiver language that would be included with payments to employees," and authorized Delta's use of waiver language on the back of the employees' checks. (R54-4-5, 6). The court concluded that "given the permissibility of

alternate receipt forms [see 29 C.F.R. 516.2(b)(2)],⁶ the legal effect of the use of waiver language on the back of [Niland's] check was no different than if a [Wage-Hour] Form WH-58 had been sent with the payment." (R54-6). Therefore, the district court concluded that "[t]here is no question that the waiver language used by Defendant was authorized by the Department." Id.

3. Thus, the district court determined that the Department fulfilled its responsibility under section 16(c) "to protect employees from independent and unsupervised negotiation and settlement with employers" by supervising the payment of unpaid overtime compensation owed to Delta's employees. (R54-5) (citing Lynn's Food Stores v. United States, 679 F.2d 1350, 1352 (11th Cir. 1982)). In this regard, the district court observed that the Department's role is to supervise the payment of back wages under section 16(c), not to perform the calculations and make the payments itself. "To rule that the Department's actions were insufficient would improperly alter that requirement." (R54-5-6).

⁶ The applicable regulation states that the receipt form for a back wage payment may be "provided by or authorized by the Wage and Hour Division." 29 C.F.R. 516.2(b)(2) (emphasis added).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the district court based on the plain language of section 16(c), 29 U.S.C. 216(c). The statute authorizes the Secretary "to supervise the payment of unpaid minimum wages or the unpaid overtime compensation" that an employer owes to its employees and provides that "the agreement of any employee to accept such payment shall, upon payment in full, constitute a waiver by such employee" of the right to bring a private action under section 16(b), 29 U.S.C. 216(b).

In this case, the Secretary, through the Wage-Hour Administrator, supervised Delta's self-audit and payment of unpaid overtime compensation -- by negotiating and entering into the Compliance Partnership Agreement with Delta, and by negotiating, reviewing, and approving the methodology of the independent accounting firm (which was itself approved by Wage-Hour) in calculating the back wages. The district court correctly concluded that the issue is not the "sufficiency" of such supervision but, rather, whether such supervision in fact occurred. Niland agreed to and did accept payment in full when he signed a receipt form and cashed a check after having been made aware (by waiver language approved by Wage-Hour) of the consequences of doing so.

The Secretary's position is also supported by the legislative history of section 16(c), which explains Congress's purpose in amending the statute. As noted in the Senate Report, the waiver provision in section 16(c) was "essential to the equitable enforcement of the provisions of the [A]ct," S. Rep. 81-640, reprinted in 1949 U.S.C.C.A.N. 2241, 2249, in that it allows employers to make voluntary restitution (which had been on the decline) without then being subject to a private action for back wages and liquidated damages. In other words, Congress intended to encourage voluntary restitution by employers by giving the Secretary the authority to settle cases with finality.

The leading case in this Circuit holds that the necessary elements for a waiver in an FLSA case are the Secretary's supervision of the amount due, the employee's agreement to accept it, and payment in full. See Sneed v. Sneed's Shipbuilding, Inc., 545 F.2d 537 (5th Cir. 1977). Each of the elements of a valid waiver is present in this case. Therefore, this Court should affirm the district court's conclusion that Niland has waived his section 16(b) right to bring a private action.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE SECRETARY SUPERVISED THE PAYMENT OF UNPAID OVERTIME COMPENSATION WITHIN THE MEANING OF SECTION 16(c) OF THE FLSA, AND THAT NILAND'S AGREEMENT TO ACCEPT SUCH PAYMENT THUS WAIVED HIS RIGHT TO BRING A PRIVATE ACTION UNDER SECTION 16(b) OF THE ACT.

A. Statutory Language And Legislative History

1. The FLSA provides, in relevant part:

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

29 U.S.C. 216(c).⁷ The plain language of the statute empowers the Secretary to supervise the payment of unpaid wages as part of the enforcement authority committed to her discretion by Congress. Under section 16(c), all that is required for a waiver of an employee's right to bring a private action under section 16(b) is the Secretary's supervision of the payment, the employee's agreement to accept the payment, and payment in full.

2. The legislative history is instructive. In 1945, the Supreme Court held that it was against public policy for an

⁷ Section 16(b) allows for an action to recover unpaid minimum wage and overtime wages, and an equal amount in liquidated damages, "against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. 216(b).

employee to waive his or her right to liquidated damages, as well as to unpaid minimum wage and overtime compensation, under the FLSA. See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) (a signed release does not waive an employee's right to liquidated damages). In 1949, Congress amended the FLSA to provide the Secretary with enhanced authority to obtain back wages for employees by adding section 16(c), which states that an employee's agreement to accept the payment of unpaid minimum wage and overtime compensation supervised by the Secretary, upon payment in full, waives the employee's right to bring a private action under section 16(b).

Prior to 1949, Wage-Hour had followed a policy "in cases which it did not believe justified litigation, of requesting employers to make voluntary restitution to employees affected [by] unpaid minimum wages or overtime compensation due under the [A]ct." S. Rep. 81-640, reprinted in 1949 U.S.C.C.A.N. 2241, 2248. Instances of voluntary restitution by employers, however, had declined during the three years preceding the 1949 FLSA amendments. In explaining the reasons for the decline, the Senate Committee on Labor and Public Welfare recognized that it was difficult, if not impossible, for the Department to collect back wages short of litigation, unless employers knew that the payment to an employee under a settlement with the Department of

Labor would satisfy its liability. As stated in the Committee report:

Undoubtedly one of the most important of these [reasons for the decline of voluntary restitution] is the fact that an employer who pays back wages which he withheld in violation of the [A]ct has no assurance that he will not be sued for an equivalent amount plus attorney's fees under the provisions of section 16(b) of the [A]ct. One of the principal effects of the committee proposal will be to assure employers who pay back wages in full under the supervision of the Wage and Hour Division that they need not worry about the possibility of suits for liquidated damages and attorney's fees.

S. Rep. 81-640, reprinted in 1949 U.S.C.C.A.N. 2241, 2249. The Senate Committee agreed with the Report of the House Committee on Education and Labor that the amendment "is essential to the equitable enforcement of the provisions of the [A]ct and that it should be welcomed by fair-minded employers who wish to make restitution for perhaps unwitting violations of the [A]ct by encouraging them to do so in such a manner to insure that their liability will be limited to the amount of wages due." Id.

3. Thus, the purpose of the amendment was to provide the Secretary with the necessary tools to resolve cases, short of litigation, for the recovery of back wages. The essential tool the legislation provided was the leverage to assure employers that the payment of back wages, when supervised by the Secretary and agreed to by the employee, would settle the matter.

B. The Secretary Supervised The Payment Of Unpaid Overtime Compensation To Niland Within The Meaning Of Section 16(c), Thereby Effectuating A Waiver Of Niland's Right To Bring A Section 16(b) Private Action Upon His Acceptance And Receipt Of The Back Wages.

1. In the more than 50 years since the 1949 amendment, the courts have given force to the statutory language and the legislative history by confining their analysis to two questions: (1) did the Secretary utilize her authority to supervise the payment of unpaid compensation; and (2) did the employee agree to accept the payment. The courts will not approve a settlement in an FLSA case unless it is supervised by the Department of Labor under section 16(c) or sanctioned by judicial process as part of a settlement agreement in litigation. See Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352-53 (11th Cir. 1982). In Lynn's Food Stores, this Court disapproved a private settlement of an FLSA claim where the Secretary of Labor did not negotiate the settlement or supervise back wage payments, and where the agreement was not entered as a stipulated judgment in a suit brought against Lynn's by the employees. Id. at 1353.

The Fifth Circuit has concluded that the Secretary's determination of the amount due, the employee's agreement to accept it, and payment in full are the necessary elements for the waiver of a section 16(b) claim under section 16(c) of the FLSA. See Sneed v. Sneed's Shipbuilding, Inc., 545 F.2d 537

(5th Cir. 1977).⁸ In Sneed, the employee signed a waiver form provided to him by a Wage-Hour compliance specialist, and took a check for the payment of back wages; he later returned the check to his employer and brought a private action after consulting with an attorney. Id. at 538. The district court had ruled that the employee's waiver was void for lack of consideration. In reversing the district court's decision, the Fifth Circuit ruled that the appropriate question was not whether there was consideration, but whether there was a waiver within the meaning of section 16(c) of the FLSA. "For there to be a valid waiver section 216(c) simply requires (a) that the employee agree to accept the payment which the Secretary determines to be due and (b) that there be 'payment in full.'" Id. at 539. The Fifth Circuit held that the employee waived his right to sue when he signed the waiver and took the employer's check. Id. at 539-40.

2. All of the elements for a valid waiver are present in this case. The Department of Labor, through the Wage-Hour Division, supervised Delta's self-audit and the payment of back wages as authorized by section 16(c). The district court correctly refused to consider the "adequacy" or "sufficiency" of the Department's supervision, stating that "[t]he question is

⁸ In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

not what type of supervision took place but whether it occurred at all. . . . Once the Department has concluded that it not only agreed to supervise the payment of back wages but also that it did in fact conduct such supervision pursuant to § 216(c), the question of whether the waiver was valid and bars further litigation by [Niland] is answered conclusively." (R54-7 n.4).

As the Seventh Circuit stated in Walton v. United Consumers Club, Inc., 786 F.3d 303, 306-07 (7th Cir. 1986):

The Department's decision [as to the appropriateness of the settlement] is the kind of supervision that § 16(c) contemplates. The idea is that federal supervision replaces private bargaining, and that the right to receive full statutory wages and overtime is not to be extinguished without the assent of both employee and Secretary. If the Secretary withholds assent, he declines to send out the form soliciting agreement. Unless we were to hold that a compromise between United and its employees is enough to bar other litigation, we must let the Secretary decide when employees are entitled to sign an 'agreement' under § 16(c).⁹

Thus, courts are reluctant to interfere with the Secretary's authority to supervise the payment of unpaid compensation under section 16(c) of the FLSA.¹⁰

⁹ In Walton, Wage-Hour decided not to send release forms to employees, thus withholding its assent to, and supervision of, the settlement. The Seventh Circuit stated that "United could have negotiated for a settlement under which the Department would have solicited such agreements, but either United did not ask or the Department did not assent." Walton, 786 F.2d at 306-07.

¹⁰ There is further support for the district court's reluctance to delve into the "sufficiency" of the Secretary's supervision of the payment of unpaid overtime compensation. The Supreme

That the Secretary exercised supervision over the self-audit and the payment of overtime compensation in this case in accordance with section 16(c) is clear. The Wage-Hour Regional Director negotiated and entered into the Compliance Partnership agreement with Delta. The Regional Director negotiated, reviewed, and approved the formulas, assumptions, and data to be utilized by the independent accounting firm in calculating back wages; that accounting firm was approved by the Regional

Court, in Heckler v. Chaney, 470 U.S. 821, 831 (1985), emphasized its long-standing position that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." The Supreme Court stated:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Chaney, 470 U.S. at 831-32. Similarly, the Secretary's explicit statutory authority to supervise the payment of unpaid minimum wages or unpaid overtime compensation under section 16(c) of the FLSA (i.e., her discretionary authority to take action short of prosecution by means of entering into a settlement agreement with the employer) should, as a general matter, not be second-guessed by the courts.

Director, as was its final report. As the district court concluded, "Not only did the Department enter into an agreement with Defendant to supervise the payment of wages, but the Department also negotiated the manner in which the calculation of back wages would be performed and who would perform that calculation." (R54-5). The Wage-Hour Regional Director also negotiated the waiver language that was used when payment was made to the employees. Thus, "the conclusion is inescapable that the Department of Labor did supervise the determination and payment of back wages owed employees such as [Niland]." Id. Therefore, the district court correctly concluded that the Secretary supervised the payment of overtime compensation to the employees, including Niland, in accordance with section 16(c) of the FLSA.¹¹

3. Under the Department's supervision pursuant to section 16(c), Niland agreed to accept the payment of unpaid overtime compensation, waiving his right to file a private action. Niland's waiver was effected when he signed a receipt form

¹¹ In Cuevas v. Monroe Street City Club, Inc., 752 F. Supp. 1405, 1415-16 (N.D. Ill. 1990), an employee accepted a check for back wages and signed a release form. The court concluded that there was supervision where Department of Labor personnel met with the independent accounting firm hired by the company to perform a self-audit and with employer representatives concerning the audit, received correspondence regarding the audit and the amount paid to employees, and reviewed questions from the accounting firm.

waiving his right to file an FLSA claim upon payment, and when he explicitly agreed to accept the employer's check by cashing it. The receipt form was based on Wage-Hour's Form WH-58 -- "Receipt For Payment Of Back Wages" -- and, as noted above, was reviewed and approved by the Wage-Hour Division.¹² The waiver language was similar to that utilized by the employer in Sneed, which the Fifth Circuit found adequate. The back of the check contained waiver language that was approved by the Department indicating that the check was for "payment in full." Finally, the letter accompanying the check contained waiver language approved by the Wage and Hour Division. Like the employee in Sneed, Niland has thus waived his right to sue under section 16(b) of the FLSA.

4. Niland contends that he did not receive all of the overtime compensation that he was due. Appellant's brief at pp. 10-11. However, as the Seventh Circuit emphasized in Walton, 786 F.2d at 305, the FLSA "is concerned with settlements, and a settlement is a compromise -- the employee surrenders his opportunity to get 100 cents on the dollar, in exchange for a smaller payment with certainty." See also Rose v. Consolidated Electrical Distributors, Inc., 816 F. Supp. 489, 490 (N.D. Ill.

¹² As also noted above, the regulation at 29 C.F.R. 516.2(b)(2) allows for the receipt form for back wages paid by the employer to be "provided by or authorized by the Wage and Hour Division." (Emphasis added.) In the instant case, it was authorized by Wage-Hour.

1993) (employees have choice of taking the money immediately or pursuing additional damages). As the Seventh Circuit recognized explicitly in Walton, "[s]ection 16(c) requires 'payment in full' of the agreed amount, not of the underlying claim." 786 F.2d at 305. See also Bullington v. Fayette County School District, 246 Ga. App. 463, 465, 540 S.E. 2d 664, 666 (Ga. Ct. of App. 2000) ("The crucial element for waiver is a demonstration that the settlement [in a case arising under the FLSA], although not payment in full, was supervised by and approved by the Department of Labor."). If Niland did not want to accept the employer's check, he did not have to do so. Similarly, Niland was not required to sign a waiver of his right to bring a private action against Delta. Having done so, however, Niland cannot now avail himself of section 16(b) to sue his employer under the FLSA.

5. A ruling permitting an employee like Niland to proceed with a section 16(b) action would be contrary to the plain language of, the congressional purpose behind, and the case law under section 16(c). It would have a chilling effect on the Secretary's ability to settle cases short of litigation. As the Fifth Circuit has recognized, "The addition of the waiver provision [of section 16(c)] was intended to . . . create an incentive for employers voluntarily to accept settlements supervised by the Wage and Hour Division." Sneed, 545 F.2d at

539. Moreover, the employee is not left unprotected because the employee waiver provides an inherent check on the Secretary's authority to supervise the payment of unpaid compensation. Thus, an employee does not waive his right under section 16(c) to bring a section 16(b) action unless he or she agrees to do so after being fully informed of the consequences. Here, Niland was provided adequate notice, signed a waiver of his rights, and received the supervised payment in full upon his cashing of the check.

6. In sum, the district court correctly determined that the necessary elements for the waiver of a claim -- the Secretary's supervision of the payment, the employee's agreement to accept such payment, and the actual receipt of overtime compensation -- are present here. The Court should, therefore, affirm the district court's decision granting summary judgment to Delta.

CONCLUSION

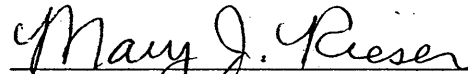
For the foregoing reasons, the Secretary respectfully requests that the decision of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c) (5) and 32(a) (7) (C), I certify that this brief has been prepared using the following monospaced typeface -- Microsoft Word, Courier New, 12 point. Exclusive of the table of contents, table of authorities, certificate of interested persons, and any addenda, this brief contains 5602 words.

01/22/2004
DATE

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for the Secretary of Labor As Amicus Curiae has been sent via regular mail on this 22d day of January 2004 to the following:

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