

The Perils of Employer Do-it Yourself-Representation

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A recent case decided by the US Court of Appeals for the 11th Circuit points out the dangers of an employer trying to “go it alone” in attempting to settle a Fair Labor Standards Act (“wage-hour”) case.

The Eleventh Circuit, which hears appeals from federal courts in Alabama, Florida, and Georgia rejected a settlement reached by an employee and an employer without their attorneys in *Nall v. Mal-Motels, Inc. and Mohammad Malik*. (11th Cir. Case No. 12-13528, Decided July 29, 2013) The Court noted: “[The parties] attempted to settle the litigation without the advice and assistance of attorneys, which only led to the involvement of more attorneys and more litigation.”

The plaintiff, Candace Nall worked as a front desk clerk and night auditor at a motel. She used a time clock to keep track of her hours worked for the first four months of her employer. The employer later told her to stop using the time clock, and that he would pay her a “salary” of \$8.75 per hour. Ms. Nall was not a salaried employee since she was paid on an hourly basis only for the hours she actually reported. Nall verbally reported her actual time worked to Mr. Malik who kept no accurate written record of the time she actually worked

After she quit her job, Nall sued the employer for failing to pay her properly under the FLSA. In her suit she claimed that she “periodically” worked more than 40 hours per week and that the employer failed to pay her overtime for those hours after 40 hours, in violation of the FLSA. She used the Motel’s guest, and estimated Nall that the employer owed her at least \$3,780 in unpaid overtime. Since the FLSA provides that an employer who is found willfully to have violated the FLSA must pay the employee not only the full amount of the underpayment, but also the same amount again as “liquidated damages,” the Motel employer’s total potential liability was at least \$7,560 (not including interest and the employee’s attorneys’ fees, if any).

Nall's attorney filed an FLSA lawsuit on her behalf against the owner individually and the motel company. Without the assistance of an attorney, Mr. Malik filed an answer *pro se* (for himself). He also filed an Answer for the motel corporation. Since a corporation cannot represent itself without an attorney, the trial court entered a default against the motel company. The company then had to hire an attorney to file a Motion to set aside the default judgment.

Mr. Malik still had not learned the perils of representing one's self, and in May 2010, he called Ms. Nall to discuss settling her lawsuit. Ms. Nall agreed to meet Mr. Malik at the motel without an attorney because Mr. Malik told her not to bring one. At the meeting Mr. Malik told Nall that she was "ruining his business" and that it would be better for him if she would settle the case. He presented her with two documents to sign: a dismissal of her suit "with prejudice" and a letter to her attorney telling him that she had settled her case. He offered her a check for \$1,000 plus an additional \$1,000-\$2,000 in cash if she agreed to sign the two documents and to dismiss her lawsuit. The offer thus did not include any liquidated damages and it may not have covered the full amount of the back pay that the employer owed Ms. Nall. Other than the dismissal and the letter, there was no written agreement that set forth the terms of the settlement.

Nall later claimed that she felt she was being pressured, but explained that she agreed to sign the two documents because she trusted the owner and because she "was homeless at the time and needed money." Less than a week after the dismissal document was filed, the district court judge issued an order rejecting the settlement because Nall's attorney had not been involved in the settlement, and declaring that the suit was still pending.

Subsequently, the defendants, now represented by an attorney, filed a motion to enforce the parties' "deal." The magistrate who heard the motion concluded that the agreement reached between Malik and Nall was a "fair and reasonable resolution of a bona fide dispute under the FLSA." He recommended that the district court approve the settlement. The district court overruled Nall's objection to the settlement and adopted the magistrate's recommendation, dismissing the complaint.

Ms. Nall appealed to the 11th Circuit seeking to overturn the district court's decision. The appeals court reversed the district court. It found that the lower court had erred in approving the deal because it was not a "stipulated judgment" as required in the 11th Circuit case of *Lynn's Food Stores v. United States*, 679 F.2d 1350 (11th Cir. 1982).

In *Lynn's Food Stores*, the dispute was between employees and their current employer. The Eleventh Circuit held that there were only two ways to settle an FLSA claim: (1) under the supervision of the U.S. Department of Labor; or (2) pursuant to a "stipulated judgment" entered by the court after a proposed settlement is presented by both parties. The rationale behind the rule is to prevent employers from taking undue advantage of their superior bargaining power. Even though Ms. Nall was not still an employee of Mr. Malik's who could be intimidated or subjected to undue pressure to settle a claim because of the ongoing employment relationship, the Court of Appeals held that the *Lynn* rationale still applied. In Nall's case the "settlement did not provide for liquidated damages and perhaps not even for the full amount of back pay that was owed. The Court stated that to allow the employer to escape liquidated damages by simply giving the employee the wages to which she was entitled in the first place (or in some cases less than that) would "undermine the deterrent effect if the statutory provisions."

Since the settlement in the *Nall* case was not reached under the supervision of the US Department of Labor, the only way it could be considered to be binding would be by meeting the second *Lynn* alternative ground for enforcing a settlement: by showing that it was a "stipulated judgment." However, the fatal flaw was that Nall herself opposed the settlement. As the 11th Circuit noted, "it takes two (or more) to stipulate, and a judgment to which one side objects is not a stipulated one. . . .When a plaintiff's attorney asks the district court to reject a settlement agreement that was reached without the attorney's knowledge or participation, whatever else the judgment approving the agreement may be, it is not a 'stipulated judgment' within the meaning of *Lynn's Food*." Thus, by excluding Ms. Nall's attorney from the settlement negotiations, the employer precluded the settlement from becoming effective or enforceable, and, after paying all the attorneys fees to enforce the settlement and to respond to the appeal, the

employer faces being required to go back and defend the case in full litigation.

The moral for employers: Don't try to settle a case on your own without your own attorney, or without an employee's attorney. This ultimately can result in far more costly litigation costs. The person who represents himself in litigation has a fool for a client.