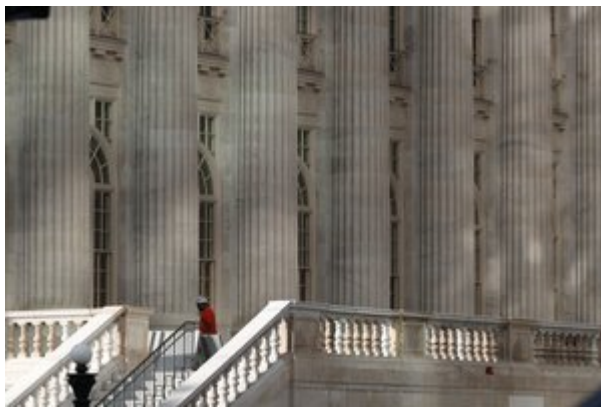


10th Circ. Compels Arbitration In OT, Joint Employer Case

By **Daniela Porat**

Law360 (December 1, 2021, 4:06 PM EST) -- A pipeline inspector cannot sidestep arbitration to resolve unpaid overtime claims by bringing a collective action against the energy company that subcontracted his direct employer with whom he signed an arbitration agreement, the Tenth Circuit ruled, reversing a lower court decision.



The Tenth Circuit's decision turned on the fact that the pipeline inspector's employment and the resulting claims were intertwined with both his direct employer and the energy company that subcontracted it. (AP Photo/David Zalubowski)

Applying the "substantially interdependent and concerted misconduct" approach to equitable estoppel, the appellate judges determined that inspector Robert Ferrell's Fair Labor Standards Act suit against energy company SemGroup Corp. could not be fairly adjudicated without involving subcontractor Cypress Environmental Management-TIR LLC that paid the worker's wages.

"By bringing FLSA claims against SemGroup, Ferrell is trying to use his contract with Cypress to his advantage when it suits him and disavow it when it does not," U.S. Circuit Judge Bobby R. Baldock wrote in Tuesday's opinion. "Ferrell's attempt to avoid the arbitration provision he agreed to in his contract with Cypress through artful pleading is the epitome of a party 'playing fast and loose with the courts.'"

The decision turned on the fact that Ferrell's employment and the resulting claims were intertwined with both companies.

Ferrell did work for SemGroup through his employment with Cypress, and consequently any FLSA violations potentially committed by SemGroup are interdependent and linked to Cypress, the opinion said. As a result, Ferrell's employment contract with Cypress, which includes an arbitration clause, applies to SemGroup, even though the company is a nonsignatory.

"After all, Ferrell would not have performed work for SemGroup, much less had any grounds for asserting FLSA claims against it, were it not for his employment agreement with Cypress," Judge Baldock wrote.

The opinion relied on the **Tenth Circuit's decision** in **Reeves et al. v. Enterprise Products Partners** , which similarly compelled arbitration in a collective action brought by two welding inspectors

even though the defendant company wasn't part of the arbitration agreement the workers signed with their respective staffing agencies.

Reeves raised the possibility that joint employers could use the decision to further block courtroom fights, **attorneys previously told Law360**.

But this case, more so than Reeves, "is precisely the type of lawsuit that 'concerted misconduct estoppel' was designed to address" because Cypress became a party to the suit after successfully intervening on the grounds of a potential joint employment relationship with SemGroup, the opinion said.

"We conclude the appropriate course of action is to require Ferrell to honor the contract he agreed to," Judge Baldock wrote.

Ferrell filed a collective action against SemGroup in November 2019 after having worked as a chief pipeline inspector through Cypress from June 2016 to June 2017.

SemGroup enlisted Quantas Pipeline Services for pipeline inspection and that company then subcontracted with Cypress.

Attorneys for SemGroup, Cypress and Ferrell did not immediately respond to requests for comment on Wednesday.

SemGroup is represented by Annette Idalski of Seyfarth Shaw LLP.

Cypress is represented by Rachel Cowen of McDermott Will & Emery LLP.

Ferrell is represented by Richard J. Burch of Bruckner Burch PLLC.

The case is Ferrell v. SemGroup Corp., et al., case number 20-5092, in the U.S. Court of Appeals for the Tenth Circuit.

--Editing by Vincent Sherry.