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Wage Case Procedural Ruling Issued —

Collective Plaintiffs Allowed from 2013 Forward!

Dateline: January 25, 2019: In the anxiously awaited ruling on the R&R, the decision has been made. Details follow.

For those unfamiliar with this case (*Gamble et al. v. Minnesota State-Operated Services et al.*), the five named plaintiffs sought to recoup an unpaid portion of their wages as "patient-workers" in MSOP. That portion has been confiscated from late 2009 to the present by the joint state agencies (including MSOP) acting as their employers.

These confiscations have been made under supposed justifications varying over time (from reimbursement for "cost of care" to support for MSOP's vocational-education department). While the plaintiffs' claims of constitutional violations by this confiscation practice were dismissed early in the case, their principal claim, citing violation of the minimum wage statute as a part of the federal *Fair Labor Standards Act* has survived dismissal.

In a 5-page ruling issued on Wednesday, January 23, 2019, Chief District Judge John Tunheim upheld the Report and Recommendation (R&R) previously issued by Magistrate Judge Kathryn Menendez.

That R&R had chiefly recommended that MSOP inmates who had held patient-worker positions at anytime between August 12, 2013 and the present be provided formal notice of pendency of the wage case and be given the opportunity to join as "collective plaintiffs" in the case.

In federal labor law cases, a "collective action" has similarities to a "class action." However, the chief difference is that in a class action, mere identification of the class of plaintiffs is sufficient to include all who fall into that class as "class plaintiffs." On the other hand, in a "collective action," inclusion of someone as a "collective plaintiff" does not happen unless that person takes specific action to seek inclusion.

The way this happens is that, in the notice letter issued by plaintiffs' attorney at court direction, a reply mail form is included. Someone receiving such a letter who then promptly fills out the reply form and checks the choice to join as a collective plaintiff, and then mails that form back to that attorney will be granted such status as a collective plaintiff.

Thus, a good way to remember the difference is that, in a class action, in order not to be a class plaintiff, one has to opt out of the case by so stating specifically; whereas, in a labor "collective action," to be a collective plaintiff, one has to specifically take action to opt in to the case.

Hence, the next step is for the Defendants to provide the Attorney (Charlie Alden) for the Plaintiffs a list of every MSOP inmate who has worked in MSOP in any capacity at any time from August 12, 2013 on forward to the present. Using this list, Attorney Alden will prepare the letter for this mailing and the reply form it will enclose. Then he will mail that letter and reply form to every person on that list.

Each person receiving this mailing should then immediately fill out that short form, indicating that he wishes to be included in the case as a collective plaintiff. This form must be sent back within the period stated. Failure to do so will prevent one from being able to join the case.

Once this starts to happen, if you believe that you worked within that period, but you did not receive that letter and form, contact David Jannetta at MSOP-ML or David Gamble at MSOP-SP without delay. These two will pass your name on to Attorney Alden right away. He will ascertain whether there is any reason why you were omitted, or alternatively, if you were simply overlooked accidentally. In that case, you will receive that letter a little later. This will require you to act even faster to fill out that form and to return it to Attorney Alden.

As I have stated before, it will not be practical for any person getting this form to decline to join this case, and instead to move forward out on his own in a separate case. Labor law is complicated; even labor lawyers become such specialists through close study of all the details and technical pitfalls in this type of litigation. In short, it is not the kind of case you would ever want to represent yourself in.

A second disappointment awaiting those who choose not to join our case as collective plaintiffs will be the near certainty of not being able to find a labor lawyer willing to represent you in your separate claim for such back wages. This is because of the substantial amount of work that attorney would have to put into your case, just to gain your comparatively very small amount of back pay (as opposed to the huge collective verdict anticipated in our case). To pay for all that work, any lawyer taking your separate claim would have to charge you more in fees than the case could recoup as such damages. Effectively then, you would wind up with nothing.

In sum, take the smart choice: fill out that reply form and send it in, stating that you want to join our case.

Now a very important word to all who filled out such a "consent form" expressing that wish to join with us as plaintiffs back at the time we filed the case in 2016 or not long thereafter: Because we were not represented by any attorney back then, we were not initially allowed to proceed as a collective action at that time. This is a fairly obscure point of law that we should not be faulted for failing to discover.

Nonetheless, the result of this is that all of those "Consent Forms" failed to create a collective action. This means that, even though the case has now transformed into a collective action, the signature and submission of those earlier "Consent Forms" failed to bestow collective plaintiff status on any of the 241 signers of those earlier forms. Just like anyone else who did not sign one of those forms, all such earlier signers **must** sign and return the reply form enclosed with the letter from Attorney Alden that they will receive soon. Failure by **anyone** to do so will bar you from our suit forever! As regretful as this would make us, there would be nothing we could do to bring you into the case at that point.

There is some good news about those earlier Consent Forms, however. The fact that so many signed them and that they were submitted to the court adds equitable impact to the case, and especially, to our contention that the 'look-back period' for wage recovery should run at least as far back as 2013. In the eyes of the law, our argument is that, at least as to those who signed those forms, the fact that they did what they could to join our case then means that it would be inequitable not to deem those forms as planting the end-point of that look-back at that point in time (2016, when the case was filed), allowing 2013 to be its start-point (assuming that the "willfulness" element for that 3-year statutory limitations period is satisfied).

Now the bad news: Attorney Alden believes that this case could run well into 2021, perhaps even close to the end of that year, before reaching judgment. Hence, the bad news is that, whatever your share of that back-wage recovery, you should not look forward to receiving it before that time frame. Further, it is always possible that an appeal may be taken by Defendants assuming that they lose in the District Court. This would lengthen the waiting period out even longer.

Now the good news that goes along with the bad news: The back wages owed to you will continue to pile up during the pendency of this case. So for someone who worked a substantial number of hours per week each year from 2013 through 2021, such wages will have then piled up for 9 years. We previously calculated that a given collective plaintiff in that position could easily be looking at unpaid wages of about $3,000 to $4,000. If so, such a sample worker could be looking at a total recovery of up to $36,000. For this circumstance, this is a pretty impressive recovery.

Finally, there are no guarantees at all in court cases. While I think the law is on our side and hence, that our chances of winning in the end are very good, remember the outrageously unjust outcome in te first appeal in the *Karsjens* case ("*Karsjens* I"). Thus, there are no guarantees of success. If you pray, pray that the courts will adhere to our obvious rights under the FLSA statutes.

Lastly, a word to our readers elsewhere in the country: While we have confidence in our eventual victory in this case, it is far too early to argue its survival to date as forming any precedent upon which inmates of similar facilities elsewhere can rely yet. In fact, such attempts to cite our case could well backfire, perhaps even causing our judges to rethink their earlier decisions in our favor. So please simply bide the time for now and wait for the fat lady to sing, as it were. We will keep you posted. If we win in the end, we will then state clearly that our case stands as precedent for similar claims elsewhere. Thanks for your patience.

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