"Public Interest" Led, Judge-Made Law: The Case of the Tree Planters

*By Elizabeth K. Dorminey**

In a concerted and well-funded litigation effort, a *soi-disant* public interest law firm is conducting a campaign against America's reforestation industry. It managed to persuade a court to rewrite a section of the Fair Labor Standards Act concerning the obligation of an employer to reimburse nonimmigrant agricultural guest workers for certain expenses related to their accepting seasonal employment in the U.S. and is seeking, through litigation, to expand that holding to cover guest workers hired pursuant to other visa programs. That they are doing so at the expense of an entire industry, not to mention their clients' livelihood, seems beside the point. Their goal, plainly, is to use the courts to rewrite the law to their liking. And they are making great progress.

In *Arriaga v. Florida Pacific Farms*,[1] the Eleventh Circuit applied the Fair Labor Standards Act ("FLSA"),[2] to hold that an employer of legal foreign agricultural guest workers engaged pursuant to the H-2A visa program[3] must reimburse those workers for the entire cost of their inbound transportation and visa processing costs to the U.S. within their first week's pay. The rules for the H-2A visa program require reimbursement of the worker's inbound transportation costs after the contract is half-complete, and payment for outbound costs at the end of the contract.[4]

The visa program also provides that employers are subject to other State and Federal laws, such as the FLSA, regarding their workers, absent an explicit conflict.[5] The FLSA requires, *inter alia*, that employers must provide workers' weekly wages "in cash or in facilities," "free and clear" of improper deductions, at a rate no lower than the minimum wage rate ($5.15 per hour since 1997).[6] The only statutory exception to this requirement allows an employer to count as wages the reasonable cost "of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."[7]

In *Arriaga* the Eleventh Circuit accepted the plaintiffs' argument[8] that the visa processing and transportation costs —costs incurred by the workers before they arrive for their first day of work—were "primarily for the benefit of the employer." As such, these costs could not be counted against wages as "facilities" under the FLSA, and thus were due to be reimbursed to the employees. This was thematically consistent with the H-2A regulations, which required reimbursement of inbound expenses after an employee completes one-half of the contract. However, the Eleventh Circuit went a step further, and ruled that because the FLSA requires more prompt reimbursement than the H-2A regulations, the employer must reimburse the workers for their inbound expenses (which the court reasoned were *de facto* improper deductions from their first week's pay, because incurred in advance of the work start date) in their first paycheck.[9] "If the FLSA mandates that employers reimburse certain expenses at an earlier time than the H-2A regulations, requiring employers to do so would satisfy both statutes."[10]

Before the district court, the employer had contended that this could result in the reimbursement of inbound transportation costs to a worker who works only one day, an argument that the district court had found persuasive. However, the Eleventh Circuit, reversing the district court, held that:

> This [wa]s not a legal argument but instead a policy-based argument that cannot guide our construction of these statutes . . . The fact that this risk exists is not an excuse for failure to comply with the FLSA; employers must reimburse employees for the cost of uniforms promptly, even though there is some risk that the employees may quit soon thereafter.[11]

This was a pious sentiment indeed for a court that had just accelerated a reimbursement requirement far beyond what a reasonable employer might expect from naively reading the H-2A regulations.

Central to the court's ruling in *Arriaga* was a reversal of longstanding FLSA decisions and regulations concerning transportation. In ruling that such costs were "primarily for the benefit of the employer," the Eleventh Circuit effectively reversed a long line of cases that had held, in the domestic context, that transportation, like meals and lodging, was primarily for the employee's benefit.[12] It is significant that the Eleventh Circuit resorted to the dictionary, and not the FLSA's regulations and case law, in reaching this conclusion.[13] Thus distancing its rationale from the H-2A regulations and tying it more closely to the FLSA, the Eleventh Circuit opened the door for other courts to bootstrap this holding into a requirement for reimbursement of transportation expenses for workers *other than* H-2A workers. This is exactly what is going on in the tree planter cases.

In the tree planter cases, the Southern Poverty Law Center ("SPLC")[14] seeks to expand *Arriaga* to require reimbursement of transportation expenses incurred by H-2B (non-agricultural)[15] foreign guest workers in their first week's pay as well, notwithstanding the fact that the H-2B visa program, unlike the H-2A, imposes on employers *no* duty to reimburse transportation costs. SPLC has sued four tree planting companies in nearly identical lawsuits seeking class action status under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA),[16] and collective, representative actions under the FLSA.[17] The four

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companies sued represent more than half of the reforestation industry in the United States. SPLC asks to represent every individual who has planted trees in the U.S. for one of these four defendant companies during the past six years.

Large paper companies rely on contractors to replant their land after timber is harvested. This is physically demanding, seasonal labor that U.S. citizens who have other employment options generally refuse. Contractors therefore utilize the H-2B visa program to procure short-term visas for foreign workers, mostly from Central America, who are willing to do the work. Contractors must comply with the rules for procuring visas, the Migrant and Agricultural Worker Protection Act ("AWPA"), and the FLSA, all of which prescribe requirements and conditions for the recruitment, employment, and pay of these workers.

These regulations prescribe, *inter alia*, that the workers receive not less than the "prevailing wage" determined by the Department of Labor (DOL) for that work, generally in the range of $6.50-8.50 per hour, that working conditions and pay must be disclosed in advance; and that overtime must be paid (forestry does not qualify for the FLSA's agricultural worker overtime exemption). Most workers are paid on a piece-rate basis, and if their piece-rate earnings do not meet or exceed the prevailing wage rate, their hourly pay is supplemented to that level. The planting season lasts from approximately December to March. During that period the tree planters can earn substantially more than what twelve months of steady labor in their home communities would give them.

In *Arriaga* the Eleventh Circuit concluded that, for purposes of the FLSA, that transportation and visa processing expenses primarily benefit the employer.[18] The court's reasoning is questionable. The Wage & Hour regulation on this issue states:

> (a) "Other facilities," as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term . . . transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.[19]

Apparently ignoring this language, the Eleventh Circuit in *Arriaga* held that:

> Transportation charges are an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States; these are costs which arise out of the employment of H-2A workers. When a grower seeks employees and hires from its locale, transportation costs that go beyond basic commuting are not necessarily going to arise from the employment relationship.

Thus the court appears to conclude that transportation costs are primarily for the benefit of the employee when incurred by domestic workers, but primarily for the benefit of the employer in the case of foreign guest workers. This is a novel reading of the FLSA, to say the least.

In most domestic cases under the FLSA transportation costs are considered primarily to benefit the employee, and are routinely included in the definition of "facilities," along with meals and lodging, for which the FLSA allows costs to be counted towards an employee's wages. The FLSA allows employers to treat some expenses as wages, if they are primarily for the benefit of the employee and not the employer. An uncontroversial example would be taxes: tax withholding amounts can be deducted from an employee's earnings even if they cause the employee's pay to drop below minimum wage because they primarily benefit the employee—the taxes are applied to the employee's tax bill, not the employer's.[20] On the other hand, expenses that are primarily for the benefit of the employer, such as the cost of employer-required uniforms, cannot be deducted from an employee's earnings if it would cause those earnings to drop below minimum wage.[21] Transportation costs are sometimes deductible and sometimes not deductible: it depends on whether they are determined to be primarily for the benefit of the employer (in which case they are not deductible), or the employee (in which case deductions may be made).[22]

In the tree planter cases, SPLC argues that the employers must reimburse their H-2B workers for the costs of recruitment, visa processing, and transportation on the theory that these expenses were incurred "primarily for the benefit of the employer," under the FLSA, which arguably makes them chargeable to the employer, not the employee. However, there is a serious question whether these costs—which the *Arriaga* court concluded were "primarily for the benefit of the employer" at least in part because their reimbursement was required by the H-2A regulations—should be considered the same way in the context of the H-2B visa, which does not mention transportation costs at all. This is boot-strapping at its best.

There also is the larger question whether transportation costs can properly be regarded as "primarily for the benefit of the employer." A well-reasoned analysis concluding that the benefit of such expenses is at least mutual to both employer and employee appears in *Alvarado v. R& W Farms*.[23] In that decision, which was overruled by *Arriaga*, the H-2A worker plaintiffs sought reimbursement for travel expenses from their home villages to the employer's farm. The *Alvarado* court analyzed the question of who benefits from travel in considerable depth:

> Arguing that the travel primarily benefits the employer, Plaintiffs also point out that the employer "badly needed the Plaintiffs to travel" to fill a labor shortage, and that Plaintiffs would have no desire to travel over 1000 miles from their homes absent the offer of employment. The Court acknowledges these to be logical premises, but also notes that the Plaintiffs apparently were

> so in need of employment that they voluntarily traveled such extended distances to obtain work. Essentially, Plaintiffs' logic runs both directions; it appears that Defendants needed Plaintiffs no more than Plaintiffs needed Defendants. The travel benefited the workers at least as much as it benefited the employer.[FN]5
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> [FN5: The Court also notes that to adopt Plaintiffs' reasoning would require employers to reimburse travel costs such as these at the very moment work commenced to avoid violating the FLSA. The FLSA balances the protection of the employee with that of the employer. In this case, the employer must have some guarantee that the worker whose travel costs have been paid will remain at Defendants' farm and perform labor under the terms of the contract. Delaying reimbursement until half of the contract has been performed provides exactly that protection.]
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> Since the Court concludes that the travel expenses do not principally benefit the employer, the expenses should not be factored into an analysis of the workers' wages. If the travel expenses are not subtracted from the wages earned, it is undisputed that the plaintiffs were paid in excess of minimum wage at all times during their employment with defendants. It is also undisputed that the Defendant adhered to the H-2A regulations regarding travel expenses. As a result, this Court finds that Defendants were not in violation of the FLSA by waiting until half of the contract period elapsed prior to reimbursing the workers' expenses for travel to Hillsborough County.[24]

Arriaga's judge-made change in the law raises a host of practical problems. Although the *Arriaga* court gave a passing nod to the policy argument behind the two-stage reimbursement schedule in the H2-A visa, acknowledging the risk that a worker who recoups his entire travel expense in his first paycheck might not stick around for the second. However, the court fastidiously stated that policy arguments were beyond its competence as a court of law. Nonetheless, the H-2A rules reflected a legitimate and genuine concern that foreign workers brought to the U.S. might be tempted to walk away from the employer who procured their visas and seek greener (if illegal) pastures elsewhere, departing after the first fat paycheck is received.

Arriaga also makes it considerably more expensive for employers to recruit labor in countries such as Guatemala and Honduras, from which transportation is considerably more expensive than it is from Mexico. Plaintiffs' counsel argue that the solution is simply for the paper companies to pay more for tree planting to cover the contractors' higher costs, but this argument does not hold up in the marketplace. If *Arriaga* prevails, visa-holding foreign guest workers already cost the price of transportation more than their unavailable domestic counterparts. Still higher costs for legal foreign workers will mainly encourage activity in the black market, where employers flout all laws and disappear rather than defend when sued. Although the four tree planting companies sued in these actions represent the majority of the reforestation contractors in the U.S., all are essentially mom-and-pop businesses. As such, they are hard-pressed to bear the cost of defense, not to mention potential liability for statutory damages that, given the size of the putative class of plaintiffs would be many times greater than their annual profits.

SPLC is litigating these cases very aggressively (the mere mention of *Alvarado* in a brief gave rise to a motion for contempt in one case, and motions for contempt and sanctions and to compel discovery fly thick and fast) and seems intent on changing the law in other ways through the courts. SPLC recently won a default judgment in Florida, *Avila-Gonzalez v. Barajas*, which appears to hold that an employer may not make otherwise legitimate deductions for "facilities" that primarily benefit the employee (e.g., meals and housing) from an H-2A worker's pay if those deductions cause the worker's hourly wage to fall below the prevailing wage, rather than the minimum wage.[25] This is another dramatic, judge-made expansion of the FLSA and yet another instance of clever boot-strapping by litigators to persuade a judge to expand the FLSA from the bench. SPLC already has cited *Barajas* in briefs in other cases in an apparent effort to broaden its application.

A further example is *Morante-Navarro v. T&Y Pine Straw, Inc.*,[26] another victory against a non-participating opponent, which applied *Arriaga* to hold that fees paid to labor recruiters could not be counted as "facilities" and credited against minimum wage under the FLSA. And in *De Luna-Guerrera v. North Carolina Growers Ass'n, Inc.*,[27] the same team of lawyers attempted to persuade a District Court in the Fourth Circuit to follow *Arriaga* and hold not only that H-2A workers must be reimbursed transportation costs in their first paycheck, but that the employers' failure to do so was a willful violation of the FLSA, subjecting them to a three-year period of liability instead of the usual two-year period that applies to non-willful violations. Although the argument was unsuccessful, the damages awarded included two years' back pay, doubled for liquidated damages, plus attorneys' fees.

So, what does all this mean? First, these cases serve as a reminder that despite efforts to ensure that only judges who will apply existing law, not forge new laws from the bench, are appointed, the latter are already well-represented (frequently, with life tenure) in the federal and the state judiciaries, and an astute lawyer with an agenda will often seek them out when they can choose venue. Judicial activism is not dead. In some courts, it is just waiting to happen.[28]

Second, the public interest bar is not to be underestimated. Aggressive litigation, often in tandem with profit-oriented plaintiffs' firms, has yielded substantial monetary awards that organizations like the SPLC, which does not benefit from federal funding and its restrictions on damages, are perfectly free to collect. Unlike most laws, the FLSA specifically allows for the award of "reasonable attorneys' fees," which are substantial and make FLSA collective action lawsuits particularly attractive to entrepreneurial plaintiffs' attorneys. With fat war-chests, seasoned professionals, assisted by idealistic and motivated

graduates from top law schools, they have the means to bring about the legal changes they seek. They can afford to distribute slick, comic-book style brochures (in Spanish) to recruit suitable clients, and to pay their expenses, even procure visas for depositions.

Defendants, on the other hand, often are hard-pressed to maintain the cost of defense, and the ruinous prospect of liability often forces them into a pragmatic settlement and capitulation even where good legal defenses exist. It is noteworthy that in both *Barajas* and *T&Y Pine Straw* the lawyers representing the workers argued their way to victory against empty chairs. Those defendant employers may have simply lacked the resources to continue to fight.

Third, these cases exemplify the urge to achieve through litigation ends that more properly should be sought through legislation. It is not likely, given the current overheated political environment, that legislation designed to expand entitlements to foreign guest workers would be successful in Congress. For those who advocate such changes, litigation provides an avenue to achieve real change. Ultimately, the judiciary is our last line of defense against those who would subvert the constitutional processes by which laws are supposed to be made, but one cannot always count on judges to do the right thing.

There is no neat conclusion: the tale of the tree planters is still unfolding.

Footnotes

[1] 305 F.3d 1228 (11th Cir. 2002).

[2] 29 U.S.C. § § 201-219.

[3] *See* Pub.L. No. 99-603, 100 Stat. 3359, Immigration Reform and Control Act of 1986 ("IRCA"), codified as amended in scattered sections of 8 U.S.C. Agricultural employers are permitted to hire nonimmigrant aliens as workers under the H-2A program if they first obtain from DOL certification that (1) there are insufficient domestic workers who are willing, able, and qualified to perform the work at the time and place needed; and (2) the employment of aliens will not adversely affect the wages and working conditions of domestic workers. *See id*. 8 U.S.C. §§ 1184(c)(1), 1188(a)(1). In addition to searching for domestic workers before gaining DOL certification, agricultural employers must hire any qualified domestic worker who seeks employment, under the terms of the work contract, during the first fifty percent of the work contract period. *See id*. § 1188(c)(3)(B)(i). An H-2A worker may be displaced in this situation and the agricultural employer is then relieved from its obligations to that worker under the work contract. *See id.* § 1188(c)(3)(B)(vi). An employer seeking the services of H-2A workers must compensate them at a rate not less than the federal minimum wage, the prevailing wage rate in the area, or the "adverse effect wage rate," whichever is highest. *See* 20 C.F.R. § 655.102(b)(9).

[4] The H-2A visa rules require an employer to pay an H-2A worker for inbound transportation and subsistence costs, if the worker completes 50 percent of the contract work period, unless the employer has previously done so. *See* 20 C.F.R. § 655.102(b)(5)(I). If the worker completes the contract work period, the employer is generally responsible for the payment of outbound transportation and subsistence costs. *See id.* § 655.102(b)(5)(ii).

[5] 29 C.F.R. § 655.103(b).

[6] 29 U.S.C. § 206(a)(1); 29 C.F.R. §§ 531.35, 776.4.

[7] 29 U.S.C. § 203(m).

[8] The plaintiffs in *Arriaga* were represented by Thomas Julian Page, A. Stephen Hut, Jr., and Robin A. Lenhart, of Wilmer, Cutler & Pickering in Washington, DC; Edward Tuddenham of Austin, TX; and Gregory S. Schell of the Migrant Farmworker Justice Project, Lake Worth, FL.

[9] "When employment statutes overlap, we are to apply the higher requirement unless the regulations are mutually exclusive." *Arriaga*, 305 F.3d at 1235, (citing Powell v. U.S. Cartridge Co., 339 U.S. 497, 519, (1950).

[10] *Id.* at 1235-36.

[11] *Arriaga*, 305 F.3d at 1236, n.8, (citing Marshall v. Root's Rest., Inc., 667 F.2d 559, 560 (6th Cir.1982)).

[12] *See* 29 C.F.R. § 531.32(a) (emphasis added): "'Other facilities,' as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee**;** *transportation furnished employees between their homes and work* where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment."

[13] "We hold that this transportation cost is 'an incident of and necessary to the employment' of H-2A workers. Dictionary definitions of 'incident' and 'necessary' bear this out. Incident is defined as 'dependent on, subordinate to, arising out of, or otherwise connected with' something else. Black's Law Dictionary 765 (7th ed.1999); *see also* Black's Law Dictionary 762 (6th ed.1990) ('Used as a noun, ["incident"] denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the "principal."'). 'Necessary' means 'of an inevitable nature: inescapable.' Merriam-Webster's Collegiate Dictionary 776 (10 ed.1995). Transportation charges are an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States; these are costs which arise out of the employment of H-2A workers. When a grower seeks employees and hires from its locale, transportation costs that go beyond basic commuting are not necessarily going to arise from the employment relationship. Employers resort to the H-2A program because they are unable to employ local workers who would not require such transportation costs; transportation will be needed, and not of the daily commuting type, whenever employing H-2A workers." *Arriaga*, 305 F.3d at 1241.

[14] Information about the SPLC and these cases on SPLC website, at www.splcenter.org.

[15] For reasons lost in the mists of history, forestry work is not considered agricultural work within the meaning of the FLSA, and forestry workers must have H2-B visas rather than H2-A visas.

[16] 29 U.S.C. §1801-1871.

[17] The four cases are *Escolastico de Leon-Granados v. Eller & Sons Trees, Inc.*, No. 1:05-CV-1473-CC (N.D. Ga., Atlanta Division): *Federico Salinas-Rodriguez v. Alpha Services, LLC*, No. 3:05-CV-

440-WHB-AGN (S.D. Miss., Jackson Division): *Hugo Martin Recinos Recinos v. Express Forestry LLC*, No. 05-1355 (E.D. La., New Orleans Division): and *Jose Rosiles-Perez v. Superior Forestry Services, Inc*., No. 1:06-CV-00006 (M.D. Tenn., Columbia Div.)

[18] *Arriaga*, 305 F.3d at 1237.

[19] 29 C.F.R. § 531.32.

[20] *See* 29 C.F.R. §531.38.

[21] *See*, *e.g.*, Marshall v. Root's Restaurant, 667 F.2d 559 (6th Cir. 1982).

[22] *See* 29 C.F.R. §531.32.

[23] 2001 WL 34103833 (M.D. Fla. 2001) (not published in F. Supp.).

[24] *Alvarado*, 2001 WL 34103833 at *4-*5.

[25] 2006 WL 643297 (M.D. Fla., March 2, 2006) (Covington, J.).

[26] 350 F.3d 1163, 1166 (11th Cir. 2003).

[27] 370 F. Supp. 2d 386 (E.D.N.C. 2005).

[28] On August 16, 2006 the Southern Poverty Law Center filed a lawsuit against the Decatur Hotels in New Orleans, making nearly identical claims of violations of the FLSA (including the *Arriaga* claim) on behalf of Central and South American H-2B workers who were recruited to work in New Orleans hotels after Hurricane Katrina. *See* Castellanos-Contreras v. Decatur Hotels LLC, No. 2:06-4340 (E.D. La.).