No. 11680

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WEBSTER-BRINKLEY COMPANY, a corporation,
Appellant,

vs.

THOMAS R. BELFIELD, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

CHARLES H. HEIGHTON,
LEO W. STEWART,
Attorneys for Appellee.
1021 Northern Life Tower,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

No. 11680

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WEBSTER-BRINKLEY COMPANY, a corporation,
Appellant,

vs.

THOMAS R. BELFIELD, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

CHARLES H. HEIGHTON,
LEO W. STEWART,
Attorneys for Appellee.
1021 Northern Life Tower,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

CASES CITED

STATUTES

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

WEBSTER - BRINKLEY COMPANY, a corporation, *Appellant*, vs. THOMAS R. BELFIELD, *Appellee*.	No. 11680

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

I.

The appellant contends under its first assignment of error that the primary question of the case is one of classification of employment, hence a question of fact and not of law, whether Mr. Belfield was an executive or administrative official of the Webster-Brinkley Company.

As the trial judge found the facts and was in a far better position to observe the witnesses and appraise their testimony than the appellate court, it would seem pertinent to first consider the conclusion reached by the trial judge and then examine the facts as to whether his views are sustained. The Court's findings in part are as follows:

> "As to the Plaintiff Belfield, I have considered all that has been testified to and all that has been said by counsel on both sides. It seems to me, and the court finds, concludes and decides that Mr. Belfield, while occupying a nominal rank in advance of the other inspectors, did nothing, in reality, different from what they did except to sign some inspection reports or to permit his initials to be attached or affixed to certain inspection reports. Insofar as that was done, in this instance, it was a mere clerical performance." (Tr. 112)

Turning now to the facts, we find that the Webster-Brinkley Co. was engaged in furnishing Marine supplies, particularly windlasses, capstands, steering gears, and cargo winches on contract to the government. The most important contract during the period we are considering was the winch contract (Tr. 39).

Mr. Gregson, general manager, admitted that this all important contract was losing money and said "* * * the loss was quite sharp, and it was very upsetting, that is, the possible loss was quite sharp and upsetting" (Tr. 105). He stated that as general manager he had a choice to stop further loss between re-organizing the plant or reducing salaries, and promptly added, "we could not reduce salaries" (Tr. 105). Why? Because salaries were frozen. Mr. Gregson therefor never had but one choice, and that was reorganization of the plant, which he promptly set about to do.

The reorganization was effected by "promoting" employees to executive or administrative positions, thus actually reducing their salaries by eliminating

over-time pay. That this was the purpose and object of the reorganization becomes clear when we consider that Mr. Belfield was promoted in August, 1944, when he was working as high as 15½ hours a day and averaged 65 hours a week (Tr. 38). His wages for a 65-hour week would be $116.25. The rate of pay he was then receiving, $1.50 an hour, plus time and one-half for overtime, made his average income in excess of $450.00 per month. Mr. McCarthy, Efficiency Expert and Works Manager, corroborates the testimony of the General Manager by admitting that he definitely felt it was a promotion for Mr. Belfield to be called assistant chief inspector instead of inspector, even though his salary was reduced. His exact testimony is as follows:

> "Q. Do you mean that a man who had an income of $450.00 a month as wages and overtime and he is given $425.00 in salary, he is promoted—because he has a title? Is that correct?
>
> A. Well, to my way of thinking it is." (Tr. 96)

Needless to say that Mr. McCarthy "was a new hand at the bellows" but made an able assistant to the general manager in carrying out the "reorganization."

Now, what did they tell Mr. Belfield about the reorganization? He testified as follows:

> "Mr. Fogman 'who held title of Chief Inspector' told me that I wouldn't have to work over-time; that the job would be easier; that I could be home every night, and that I would get $2.00 and something an hour." (Tr. 39)

Why did this appeal to Mr. Belfield? He says:

> "At that time * * * I had been working long hours for over two years from January 1, 1943, to May, 1945. In all that time I missed very few days and in the last year had perfect attendance record, never having missed a day during the time we were making the winch job." (Tr. 39)

He was, however, not too well sold on the argument, so a further promise was made to come "inside" two or three months and he then could return "outside." But "This was later changed. They put me on a monthly salary anyway" (Tr. 38). This "promotion" of Belfield was not a voluntary act on his part, but the pre-emptory order of the corporation. Did the Company keep its promises to Belfield? Belfield answers as follows:

> "Q. What was the difference in your work in the plant after August to what it had been before?
>
> A. None. It was the same type of work outside of sitting there in the office for about an hour in the morning, or half hour to one hour. That started in August. The duties after November 15 were just the same as prior to that. I was asked by Mr. Fogman to work overtime after November 15 and I had to do so. At that time we were frozen in our jobs." (Tr. 39-40)

He stated that he protested to Mr. McCarthy and Mr. Fogman several times, and that he kept a record of his overtime, and turned in his over-time to Mr. Fogman's secretary, and he showed it to Mr. Fogman several times (Tr. 40). There is no evidence that he performed any different work except initialing the inspection records as any other ordinary inspector.

He exercised no discretion. He did not supervise, regulate or direct other employees (Tr. 40). He had no authority to hire or fire (Tr. 40), and his work was of the same nature 90 per cent of the time as that performed by non-exempt employees (Tr. 36). He had no authority to leave the plant without a slip signed by Fogman (Tr. 63). Belfield's ordinary day would be as follows: He would arrive around 7:00 o'clock, although most of the salaried men came in around 8:00 o'clock. He looked over the inspection reports that came into the office from the day before, sorted out the ones that were in question, chased some of them down for engineering or handed them into Mr. Fogman who would take care of them. He had no final say-so at all. When he arrived in the morning the rejected and o.k.'d reports were in the "box."

> "Q. Now, what independent, discretionary authority did you have over these reports, if any?
>
> A. None.
>
> Q. Did anybody else do the same thing that you did with regard to these reports?
>
> A. Yes. I merely separated the ones that were OK from the ones that were rejected. They eventually went to Mr. Fogman, the Chief Inspector. * * * This work probably took half an hour to one hour, and then I went out in the plant and worked with the rest of the inspectors in the assembly line in the shop." (Tr. 35)

Mr. Belfield was corroborated by other men who worked with him, namely, Robert S. Edmisten (Tr. 51), and Lloyd M. Burdge (Tr. 45-6). Those that disputed him in any manner were officers of the

company who had other duties and who never had occasion to be around where Mr. Belfield worked only a small percentage of their time. Mr. McCarthy was in the plant twice a day when he could (Tr. 89). Later he thought 25 per cent of his time (Tr. 99).

It is true that Warren D. Thacker, who is extensively quoted in appellant's brief, stated that he worked for about four months in the plant making up a manual for the use of inspectors. and sought considerable information from Mr. Belfield (Tr. 74). But his evidence is unconvincing. He makes frequent references to Mr. Belfield as "Tom," and that they were bosom friends (Tr. 82). Appellant's counsel states in his brief that from this fact the court can rely on his testimony as accurate. A reading of his testimony, however, would convince anyone that if Mr. Thacker was a friend of Mr. Belfield's, Mr. Belfield didn't have any friends. He could well join with his prayers the petition, "May God deliver me from my friends, I will take care of my enemies." Even Mr. Thacker admits that he never saw Mr. Belfield after five o'clock in the evening (Tr. 84), which would seem to be about the time Mr. Belfield was half through his day's work. He also admits there were days he spent one, two, three or sometimes five hours with Belfield (Tr. 84). But the fact remains that about the only time Mr. Thacker really saw Mr. Belfield was early in the morning when they walked about the plant (Tr. 83).

We turn now to what counsel says is "perhaps the most important piece of evidence showing that Bel-

field did have to exercise discretion and judgment," and is contained in defendant's Exhibit No. 11-A and plaintiff's Exhibit No. 6.

Exhibit No. 11-A was introduced in the testimony of Herbert R. Washington, Assistant Treasurer of the Company. Mr. Washington stated that he compiled the exhibit from a large number of original inspection records which were made by Mr. Belfield of rejected materials, and bore his initials. The original records from which the exhibit was compiled was contained in two filing cabinets in the court room open for the inspection of the court and appellee. These files purported to show that out of 1817 rejection reports the genuine initials of Mr. Belfield appeared on 599. Mr. Washington compiled this exhibit personally and was familiar with the whole matter (Tr. 71).

In clarifying the exhibit somewhat Mr. Washington made a very important statement, namely: that the record merely means that Mr. Belfield signed a typewritten report as assistant chief inspector, but it does not mean that he made the inspection or rechecked the inspection, but it only meant that the chief inspector had to countersign all the forms that showed rejections (Tr. 69).

After the introduction of this testimony the court interrogated Mr. Belfield, who stated that in the mornings he would sign some of these reports, but it wasn't necessarily part of his daily work as he would be gone from time to time. The Court thereupon admitted Exhibit 11-A with the statement that he

thought it was proper to receive in evidence the summary of inspection reports to avoid the necessity of examining each inspection report separately (Tr. 70).

Later, during the trial, an examination was made of the original records and several of the original inspection reports were taken out of the filing cabinet at random and became plaintiff's Exhibit 6. From the testimony of Mr. Belfield and from plaintiff's Exhibit 6, it became clear that the original typewritten rejection records that contained the penciled initials purportedly of Thomas R. Belfield were forgeries, or at least were not made by him (Tr. 109-110). Belfield had examined other original inspection records besides those introduced in evidence as plaintiff's Exhibit 6, and found that they also contained forgeries of his initials. It was now clear to everyone that Exhibit 11-A had been compiled without any thought of whether Mr. Belfield's initials were genuine or not, and while his initials might have appeared 599 times on the original records, it by no means meant that he had personally signed that many reports. It did mean, however, that most anyone who desired could sign his initials to these rejection records, and did so. These facts rendered Exhibit 11-A worthless, and appellant never attempted to re-establish it.

It is a great surprise to appellee that appellant now designates Exhibit 11-A as "the most important evidence in the case," for if it is, then appellant just does not have any. The trial judge in his memorandum decision referring to this "important evidence" clearly indicates that he took into consideration all of the

original records as well as Exhibit No. 6, when he stated:

> "Those reports seemed to the court, as disclosed by the evidence, to have been in themselves something of routine which was done pursuant to established procedure. They were done, in a large percentage of the instances mentioned in the evidence, as a matter of routine by some clerical employee or typist, who had affixed the initials of Mr. Belfield. I believe, of those that were specifically mentioned and introduced in evidence, there was only one where the initials of Mr. Belfield were affixed by Mr. Belfield's own hand." (Tr. 113)

It would be needless extension of appellee's brief to discuss other matters under the first assignment of error, as the question of the classification of Mr. Belfield's employment is one of fact and rested in the sound discretion of the trial judge. We believe the evidence shows no abuse of that discretion and that there was ample evidence to support the decision.

II.

Under appellant's second assignment of error it maintains that there was no evidence to support the Court's finding of the overtime hours of Mr. Belfield. In its brief appellant sets out the testimony of Mr. Belfield, but not full enough to apprise the court as to the true facts. The testimony was as follows:

> "THE COURT: The total was what, as you stated just now?
>
> THE WITNESS: 591 hours.
>
> Q. What was your basic week, Mr. Belfield?

A. Well, while I was at $1.50 it was supposed to be 40 hours. We got paid for overtime over 40 hours. After we went on salary, I think it was supposed to be 44 hours.

Q. A 44-hour week?

A. Yes.

Q. This overtime is computed on that basis, is it?

A. Yes." (Tr. 55)

Mr. Burdge corroborates Belfield. He says:

"I was paid an hourly rate of $1.50 an hour. I got overtime after eight hours a day, regardless of the week." (Tr. 44)

Against this positive statement of Mr. Belfield and Mr. Burdge we do not find any official of that company that makes any positive statement at all. As appellant sets out in its brief (p. 40), Mr. Gerald S. McCarthy testified that all executives were hired to do a definite job irrespective of the time it took. That none was ever hired for a definite number of hours per week (Tr. 103).

On what evidence would the Court be able to make a finding, except on the evidence of Mr. Belfield and Mr. Burdge and exhibits showing Mr. Belfield's overtime pay? The appellant offered nothing and certainly should not now be heard to complain. The right to overtime pay is statutory being covered by Sec. 207, Fair Labor Standards Act, which is as follows:

"No employer shall * * * employ any of his employees * * * for a work week longer than 40 hours * * * unless such employee receives com-

> pensation for his employment in excess of the hours specified at a rate of not less than 1½ times the regular rate at which he was employed."

The duty of keeping the overtime of Mr. Belfield was that of the Webster-Brinkley Company as the obligation was statutory. The fact that it did not do so cannot defeat the right of Mr. Belfield to recover. As was stated by the Supreme Court of the United States in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 Sup. Ct. 1187:

> "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of Sec. 11(c). And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities, or non-activities, constitute work, the employer having received the benefits of such work, cannot object to the payment for such work on the most accurate basis possible under the circumstances."

This view followed in other cases, namely:

Lawley v. South (C.C.A.) 140 F.(2d) 439;

Joseph v. Ray (C.C.A.) 139 F.(2d) 409.

Appellant complains that Mr. Belfield, while telling the defendant's officials that he worked overtime and complained bitterly of the long hours, never actually demanded payment, and therefore should be denied payment. The burden, however, was not upon Mr. Belfield to make such demand as the right to overtime could not be waived by him. The rule against estoppel

or waiver by failure to demand pay being well stated in the cases of

Dize v. Maddrix, 65 U.S. 895, 324 U.S. 697

and

Rigopoulos v. Kervan, 140 F.(2d) 506.

III.

Appellant contends under this assignment of error that Mr. Belfield's overtime rests upon very frail testimony and asks the Court to examine certain pages of the transcript. We join in that request.

We are certain that the evidence discloses that Mr. Belfield kept a daily written record of his overtime. He requested the company to keep a record of his overtime, and insisted upon Mr. Fogman's secretary keeping a record of it (Tr. 40).

He had with him in court a statement compiled from his original records showing very minutely the amount of overtime. His failure to testify in the first instance the number of hours of overtime was not due to a lack of knowledge, but the confusion in his mind as to whether he should be permitted to testify or not. When he was recalled to the stand he explained it as follows:

"Q. What was the confusion in your mind?

A. Well, I thought I couldn't answer that question on that over-time — the total amount of overtime that I had. I didn't think I could answer that the same as it was on the paper.

Q. From the ruling the court has made and from what was said?

A. That is right." (Tr. 54-55)

This confusion was natural for a man of Mr. Belfield's temperament and education. The court observing him was aware of it for in his memorandum decision he states:

> "I carefully observed Mr. Belfield's demeanor on the stand, his manner of testifying, and all of the other measuring sticks by which triers of the fact may properly determine the credibility of a witness, and I would never be impressed that Mr. Belfield is a man of such a nature or disposition—even if he had sufficient ability, in fact—to put in a position of discretion and important supervision." (Tr. 113-114)

The primary and statutory duty of keeping Mr. Belfield's overtime rested upon the appellant, and what Mr. Belfield supplied in the absence of any other rocrd, was amply sufficient to support the findings of the court.

The Supreme Court in *Anderson v. Mt. Clemens Pottery Co., supra,* passed upon this very question and resolved it in favor of the appellee.

IV.

Appellant contends that specification of error under this title depends upon the finding of the court on its preceding specification of error.

We believe that sufficient argument has already been devoted to this subject, and, further, that the matter of overtime is statutory and based upon 40-hour week.

Sec. 207, Fair Labor Standards Act.

V.

The specification of error under this head depends upon the previous one, as it only has to do with doubling the amount found. We believe it is sufficiently answered.

VI.

Under this head the appellant discusses the Portal-to-Portal Bill of 1947, and requests this Court to take judicial notice of it. Appellant bases this request for the reason and on the ground that it must now be clear to this court that the employer did exercise the "highest degree" of good faith; that Mr. Belfield's duties were certainly such as afforded reasonable grounds for the belief that he was an administrator; that they relied solely on the Stabilization Unit, and that Mr. Belfield was in no wise damaged since he made no request for overtime for more than eleven months after his employment ceased.

We do not believe that the observations of appellant are correct or are substantiated by the record. They did not in good faith advance Mr. Belfield to an executive or administrative position, but in bad faith, in order to make a profit at a time when the company was losing money, took a good working man who was earning a large salary by overtime work, a faithful employee who never missed a day's work, and "promoted" him by giving him a title, but actually reduced his pay. This was all done without the consent of Mr. Belfield as was stated on cross-examination by Mr. Washington:

"I did not say that the application made to the

> Wages & Hours people was brought to the attention of Mr. Belfield." (Tr. 73)

In truth and in fact the promotion was made without the knowledge or consent of Mr. Belfield. The promotion was accomplished on the fictitious and fraudulent promises of Mr. Fogman and Mr. McCarthy that he "wouldn't work overtime," "that the job would be easier," "that he would be home every night," "that he would get over $2.00 an hour" (Tr. 39), and "to come inside for a little while and then he could go outside" (Tr. 38).

When these worthless promises were later contemptuously disregarded Belfield was held on his job as a virtual slave for, as he says:

> "At that time we were frozen in our jobs." (Tr. 40)

This odious conduct finally became so burdensome that even the stark reality of unemployment could no longer keep Mr. Belfield on the job, and he sent his written resignation to the company which is admitted by Mr. McCarthy (Tr. 97). Belfield further testified:

> "I protested to everybody I seen there, toward the last * * *." (Tr. 63)

He was finally permitted to transfer if he went to Western Gear, who, strange as it may seem, had the same president, Mr. Bannan, as the Webster-Brinkley Co. (Tr. 63). Is this the conduct of an executive or a slave?

As an example of the double talk indulged in by the Company in behalf of Mr. Belfield we only have to

turn to the testimony of Mr. McCarthy regarding this so-called "promotion." Mr. McCarthy testified:

"Q. You told him what his salary would be?

A. That is correct.

Q. And he was happy to take it, was he?

A. Yes, I believe he was.

Q. Did he say he was?

A. He didn't express himself as being unhappy." (Tr. 97-98)

It would be hard to find an oracle from Ancient Dehli better phrased than this. Mr. Belfield flatly denied that he ever talked to Mr. McCarthy about a salary until after he had been placed on one (Tr. 107). When we consider that Mr. Washington corroborates Mr. Belfield when he stated that the application to the Wages and Hours people was never brought to the attention of Mr. Belfield, is it any wonder that the Court believed the testimony of Mr. Belfield and not the officials of the Webster-Brinkley Company?

From the fact that all of this testimony went into the record prior to the enactment by Congress of the Portal-to-Portal Act of 1947, approved May 14, 1947, when the good faith of the company was not an issue, it must now be apparent that if it had been, this record could have been grealy extended on this particular issue. The mere application to the Stabilization Unit to advance or promote an employee can easily be done in bad faith, as well as good faith, as fictitious duties and responsibility may be claimed in the application but later never put into practice. We must resolve that the application for Belfield was made in

bad faith by the Webster-Brinkley Co., since the application was made without his knowledge or consent. It was not a bona fide promotion because his duties were not changed, only increased, but his salary was decreased.

The Webster-Brinkley Co. received the benefits of Mr. Belfield's services and have become unjustly enriched thereby. It comes with poor grace on their part to now try to pay off Mr. Belfield with a title and conversation, simply because he made no specific demand for overtime pay until eleven months after his employment ceased, although during his employment he made constant complaint. A workingman cannot be deprived of his rights simply because he does not know what they are.

Appellant stoutly maintains that the granting of overtime to Mr. Belfield is a great injustice to the employer, since Mr. Belfield had become entitled to a "guaranteed" monthly salary and anything more would be a windfall. The amount of the judgment, $4249.76, includes one-half the amount as a penalty. The remaining one-half was payment for 591 hours of overtime pay which the company wrongfully withheld from Mr. Belfield. The magic of this argument seems to be in the word "guarantee." But whom did it guarantee, Mr. Belfield, or the appellant? Mr. Belfield had never earned less than the amount they were offering as salary and frequently earned far more. The "guaranteed" salary only guaranteed the Webster-Brinkley Co. that it would not have to pay overtime to Mr. Belfield, that is, unless this Court compels

them to do so. The Wage and Hour Act was to circumvent the making of profits from extra burdens being wrongfully placed upon labor.

We know that there are still those who out of greed for gain do not shame to oppress the workingman, for the lust is so powerful that it deranges their sense of justice and they fall an easy prey to low desires, and finally hold that all means are good which enable them to increase their profits. War contracts have always been a source of easy returns. Any corporation quickly formed and quickly dissolved, with its divided responsibility and limited liability, with no heart and no conscience, and with its memory only a filing cabinet, can always be made a suitable instrumentality for man's exploitation. History is replete with the examples of the abominable abuses practiced under the corporate structure where divided responsibility hardens men against the sting of conscience and leaves them only the unquenchable thirst, "to show a profit." To liken such an organization to a single employer with a few workingmen, who has from a lifetime of unremitting toil amassed a modest fortune, and ask the same measure of justice in its own behalf, is an insult to intelligence. The law is the only curb to such avarice and needs above all to be fearlessly and with unwearing zeal enforced. It would be a grave injustice to let the 1947 Portal-to-Portal Act relieve the appellant from an obligation rightfully imposed, or send the case back to the District Court for further trial, for to do so would only wear down the appellee with endless and fruitless litigation.

We believe the proper disposition of this case is to affirm the judgment.

Respectfully submitted,

CHARLES H. HEIGHTON,
LEO W. STEWART,
Attorneys for Appellee.