IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 8, 2020

Lyle W. Cayce
Clerk

No. 19-20423
Summary Calendar

DEANA PERRY, Individually and On Behalf of All Others Similarly Situated,

Plaintiff - Appellant

v.

BERGHOFF INTERNATIONAL, INCORPORATED,

Defendant - Appellee

Appeal from the United States District Court
Southern District of Texas, Houston
USDC No. 4:18-CV-4552

Before STEWART, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:*

Deana Perry filed suit against BergHOFF International, Inc. ("BergHOFF") alleging violations of the Fair Labor Standards Act ("FLSA"). BergHOFF moved to dismiss Perry's suit under the doctrine of *forum non conveniens*. The district court granted BergHOFF's motion and dismissed Perry's suit. For the following reasons, we remand on a limited basis.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Factual & Procedural Background

BergHOFF is a Florida corporation that manufactures and distributes kitchen-related products. BergHOFF hires sales agents to help sell its products in various states. Each sales agent is required to enter into a contract with BergHOFF that contains a forum selection clause mandating that all legal disputes are to be filed in Pasco County, Florida. Perry worked as a sales agent for BergHOFF from April to October 2018.[1] As a sales agent, Perry's job duties involved setting up booths in different Sam's Clubs throughout the country and performing product demonstrations.

According to Perry, she and other sales agents were often paid less than minimum wage because their commissions were reduced for product returns and they were required to pay for their own supplies and job-related expenses such as hotel stays. Perry also alleges that she and other sales agents were denied meal and rest breaks, were required to attend unpaid mandatory meetings, and regularly worked over forty hours per week. On these and other similar grounds, Perry filed suit against BergHOFF alleging violations of the FLSA. Although her suit was never certified as a class action, she obtained the written consent of several other sales agents to join as plaintiffs.[2]

In response, BergHOFF moved to dismiss on grounds of *forum non conveniens* or alternatively, to transfer the suit to the U.S. District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1404(a). In its motion to dismiss, BergHOFF cited to the forum selection clause in Perry's contract that stated that "any dispute between [Perry] and [BergHOFF] arising under this Agreement shall be submitted [in] accordance with the laws of the State of Florida" and that "any litigation shall take place in New Port Richey, Pasco

[1] The record reflects that Perry signed her employment contract with BergHOFF on March 18, 2018.

[2] For ease of reference herein, only Perry's name will be used.

County, Florida." The district court granted BergHOFF's motion concluding that "venue of this lawsuit is required to be in the state courts of Pasco County, Florida." It dismissed the suit without prejudice "so that it might be re-filed in the appropriate state court in Pasco County, Florida, if Plaintiff chooses to do so." Perry filed this appeal.

II. Discussion

When a district court grants a *forum non conveniens* motion to dismiss on forum selection clause grounds, we review de novo its interpretation and assessment of the clause's enforceability. *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 766 (5th Cir. 2016). We review its balancing of the private and public interest factors for abuse of discretion. *Id*.

On appeal, Perry argues that the district court erred in dismissing her suit because her claims do not arise under her contract with BergHOFF, they arise under the FLSA. She further argues that, regardless of whether the forum selection clause was valid, the district court erred in dismissing her suit without "addressing and balancing the relevant principles and factors of the [*forum non conveniens*] doctrine."

In support of her argument that her claims do not arise under her contract with BergHOFF, but instead arise only under the FLSA, Perry cites to *Chebotnikov v. LimoLink, Incorporated*, a district court case out of Massachusetts. 150 F. Supp. 3d 128 (D. Mass. 2015). That case is not controlling here, but even it if was, it fails to support her argument. In *Chebotnikov*, the district court held that because the FLSA claims at issue were distinct from the plaintiff's employment contract, the forum selection clause contained therein did not apply. *Id*. at 131. In so holding, the district court noted that its determination was guided by an analysis of whether the plaintiff's FLSA claims were "dependent on any provision of the employment agreement." *Id*. (citing *Pacheco v. St. Luke's Emergency Assocs., P.C.*, 879 F.

Supp. 2d 136, 142 (D. Mass. 2012)). The district court concluded that they were not. *Id*. at 131–32.

Here, however, Perry's FLSA claims *are* dependent on numerous provisions of her employment contract. For example, her employment agreement states that: she is responsible for providing her own supplies and will not be reimbursed for them; she will not be reimbursed for any expenses incurred in performing her job duties (ex. transportation expenses); she must adhere to BergHOFF's control and directives in performing her job duties; and she will be paid on a "commission-only basis" for "completed sales." Perry's FLSA claims of being paid less than minimum wage and not being paid for overtime involve her allegations that BergHOFF failed to reimburse her for supplies and expenses, refused to allow her to take rest and meal breaks while performing her job duties, required her to attend unpaid meetings, and improperly docked her commission. Thus, it is clear that Perry's FLSA claims are dependent on provisions of her employment agreement. Consequently, she would not be entitled to relief under *Chebotnikov* if that case controlled here—which it does not. Moreover, Perry has failed to point to controlling Fifth Circuit precedent that supports her argument that the forum selection clause at issue here should not apply.

Perry's next argument is that the district court abused its discretion in failing to consider the relevant factors in granting BergHOFF's motion to dismiss. Although there is no general rule requiring district courts to provide written explanations for their orders, we have held that "[i]t is an abuse of discretion for a district court . . . where, in ruling on a motion to dismiss for [*forum non conveniens*], it fails to address and balance the relevant principles and factors of the doctrine[.]" *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015) (internal citation and quotation marks omitted). Given that we are presented with this precise scenario and because we are bound by our

precedent as set forth in *Lloyds*, a "limited remand is appropriate to allow the district court the opportunity to explain its reasons for dismissal." *See Sultana Entertainment, L.L.C. v. Gutierrez*, 740 F. App'x 81, 82 (5th Cir. 2018) (per curiam) (unpublished).

III. Conclusion

We REMAND with instructions that the district court enter its reasons for dismissal within thirty days of this order. After entry of such reasons, the case will be returned to this panel, which retains jurisdiction during the pendency of this limited remand.